

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA
CONSTITUTIONAL PETITION NO. 13 OF 2019

BETWEEN

DR. KAMBA SAMUEL BALEKE

MR. LUTAAYA SONKO GERALD

MR MUGANDA FAISAL ::::::::::::::::::::::::::::::::::: PETITIONERS

AND

THE ELECTORAL COMMISSION

THE ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::RESPONDENTS

CORAM:

HON. Justice Richard Buteera, DCJ

HON. Justice Kenneth Kakuru, JCC

HON. Justice Catherine Bamugemereire, JCC

HON. Justice Christopher Madrama, JCC

HON. Justice Irene Mulyagonja, JCC

Judgment of Catherine Bamugemereire, JCC

The Petitioners bring this Constitutional Petition under Article 137(3) of the Constitution of the Republic of Uganda. They allege that the Electoral Commission of Uganda (hereinafter referred to as EC) failed in its constitutional obligation to review the division of Uganda into constituencies after the publication of the results of the population census of the inhabitants within the boundaries of Uganda as reported in the population census of 2002 and of 2014 respectively. The petitioners

equally questioned the 7th, 8th and 9th Parliaments of Uganda in their creation of new Districts and Counties by way of a resolution. They sought a declaration that the retention of one woman representative in Parliament for every District in Uganda was in contravention of Article 1, 5, 8A, 21, 38, 60, 61, 63 and 78 of the Constitution of Uganda.

The Petitioners assert that the current composition of the Parliament of Uganda was born out of vote discrimination and voter debasement where the majority of Members of Parliament are elected by a minority of the population and hence inconsistent with and in contravention of Articles 1, 8A, 21, 38, 61, 62, 63 and 78 of the Constitution.

- 12 The Petitioners case is that the current composition of Parliament is specified under Article 78 (1) to include among others, a directly elected Member of Parliament representing each Constituency and a directly elected woman Member of Parliament representing each District. At the time of promulgation of the 1995 Constitution, Uganda was divided into 212 Constituencies and 39 Districts. Both the Constituencies and Districts were/are separately but sequentially coded. A list of the current Districts and Constituencies with their respective codes is annexed. According to the Petitioners, the framers of the 1995 Constitution were alive to the fact that population changes both in number and distribution were likely to skew the representation and result into a debasement of votes in certain areas if constituency demarcation was not periodically reviewed. They further asserted that failure to review the number of constituencies to reflect the density of the population infringed on and the affected

people's right to equality before the law in the political sphere and also affected the quality of their vote.

They noted that under Article 63 in the twelve months following the publication of the results of the census of inhabitants of Uganda the EC is
6 under compulsion to review the division of Uganda into Constituencies and ensure that the population of each Constituency is as nearly as possible equal to the population quota (the population of Uganda divided by the total number of Constituencies).

Similarly, under Article 78(2), Parliament is compelled to review the representation by women Members of Parliament starting in 2005 and
12 every 5 years thereafter for the purposes of retaining, increasing or abolishing such representation and any other matter incidental to it. The petitioners allege that over the last 25 years the EC has twice abrogated its Constitutional obligation with regard to the review of the division of Uganda into Constituencies and Parliament has on each occasion rubber stamped the status quo when reviewing the representation by women
18 Members of Parliament.

In answer to the Petition the Respondents rejoined that the Parliament approved Counties and Districts and that therefore the contested Constituencies/ Counties were a creature of both the Representative District Councils and Parliament; with the Legislature exercising its approval mandate. They further argued that the EC's mandate of
24 demarcation and/ or re-demarcation of Constituencies only arises when the Parliament has prescribed the number of Constituencies.

It was the Respondent's case that the Petition was premised on misconceptions of the provisions of the Constitution and therefore that the Petitioners were not entitled to the remedies sought.

In their grounds, the Petitioners allege that;

- 6 1. The failure of the Electoral Commission of Uganda [herein after referred to as EC] to review the division of Uganda into Constituencies after the publication of the results of the census of the population of inhabitants of Uganda of 2002 and 2014 was in contravention of Articles 61 and 63 of the Constitution.
- 12 2. The resolution of the 7th, 8th and 9th Parliament of Uganda to create new Districts and Counties by way of a resolution and to retain one woman representative in Parliament for every District in Uganda contravenes Articles 1,5,8A, 21, 38, 60, 61,63 and 78 of the Constitution.
- 18 3. The resolutions of the 7th, 8th and 9th Parliament to create new Constituencies without the EC having carried out a review of the division of Uganda into Constituencies was inconsistent with and in contravention of Articles 1, 8A, 21, 38,63 and 61 of the Constitution.

The Petitioners seek a declaration that;

- a. The omission by the Independent EC to review the division of Uganda into Constituencies after the publication of the results of the 2002 census of the population of the inhabitants of Uganda was unconstitutional.
- 24 b. The omission by the independent EC to review the division of Uganda into Constituencies after the publication of the results of the 2014 census of the population of the inhabitants of Uganda was unconstitutional.

- c. The resolutions by the 7th, 8th, 9th and 10th Parliaments of Uganda to retain one-woman representative for every District were unconstitutional.
- d. The resolutions by the 7th, 8th, 9th and 10th Parliament to create new Counties/Constituencies without the EC having reviewed the demarcation of Uganda into Constituencies was unconstitutional and the Constituencies created were illegal and unconstitutional.
- e. As a consequence of the above omissions the composition of, and the 8th, 9th, 10th and 11th Parliament of Uganda were/are unconstitutional.
- f. That Districts created by way of a resolution of Parliament are unconstitutional.
- g. The holders of the office of Chairperson, Deputy Chairperson, Secretary and Members of the Electoral Commission from 2002 were/are incompetent.

18 Representation

At the hearing of this Petition, the Petitioners, Dr. Kamba Samuel Baleke. Mr. Lutaaya Sonko Gerald who are advocates opted to represent themselves. On the other hand, Learned Counsel, Mr. Lugolobi Hamidu appeared for the 1st Respondent, while Mr. Wanyama Kudooli/ Principal State Attorney appeared for 2nd Respondent. Both counsel opted to proceed by way of written submissions and conferencing notes. They were granted a few minutes to highlight their positions.

I note that apart from setting out clear unambiguous grounds of the Petition, counsel on both side also drew issues from the said grounds. This being a Constitutional Petition I thought it was rather arduous and windy to proceed by way of issues where the grounds were clearly scoped.

What made it more troublesome in this case was that the some information not found in the grounds of the Petition was slotted into the issues. For instance, the Petitioners prayed that the EC Chairperson is found to have committed treason. The only time a person can be found to have committed treason is after due process; meaning that investigations are done, he is criminally charged and following a criminal trial he is found guilty of committing the offence of treason. Not to mention that treason is a capital offence carrying a death penalty. Counsel cannot therefore, afford to be flippant, casual and trivial in his pleadings regarding such a heinous offence. I will therefore determine the legal arguments as set out by Counsel in this Petition based on the grounds of the Petition and not the issues.

Legal Arguments

Whether the failure of the Electoral commission to review the demarcation of Uganda into Constituencies after the publication of the results of the 2002 and 2014 census of the inhabitants of Uganda was an abrogation that violated articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62 and 63 of the Constitution and was therefore unconstitutional.

It was the case for the Petitioners that the EC was obligated to review the division of Uganda into Constituencies and re-demarcate the Constituencies Uganda within a year from the time the Bureau of Statistics conducted census of the inhabitants of Uganda in 2002 and 2014 and published the results pursuant to Article 63 (5), of the Constitution.

The EC did not do so. The Petitioners argued that as a result, this abrogated the Constitution. The Petitioners observed the population of the various Constituencies is nowhere near the population quota (population divided by the number of Constituencies) as required by Article 63(3), with some Constituencies having a population as little as 1/20 of others.

The Petitioners further submitted that by implication in parliamentary elections, the votes of voters in such small constituencies weigh 20 times more than the votes of voters in other Constituencies. Counsel concluded that if the votes of smaller counties are weighed against the votes of overpopulated but under-represented constituencies, amounts to disparate or unequal and therefore unfair treatment of the voters and tantamount to voter suppression of the electorate in the Constituencies with larger populations, a situation which counsel argue, is forbidden by under Articles 24 and 44 of the Constitution.

The Petitioners contended that this was a form of voter discrimination which is proscribed by Article 43 and added that this amounts to what he termed as, '*Apartheid Noir*', comparing it to the systematic oppression of black people by other black people. The resultant debasement of votes in highly populated Constituencies infringed on the rights of the voters in those Constituencies to vote, enshrined in Article 59. This led to failure by the discriminated voters to participate in the affairs of Government which is a constitutional right under Article 38 of the Constitution (1995).

It was the submission of Counsel for the Petitioner that the debasement of the vote in Constituencies with high populations renders the parliamentary elections a nullity since they no longer conform to the basic principles of democracy and that this violates Articles 1, 3 and 8A.

6 The Petitioners sought refuge and persuasion in **Baker et al v Carr 369 US, 186** in which the US Supreme Court made a significant demand when it found that the US legislature had not reapportioned congressional Districts for 60 years despite the state Constitution of the State of Tennessee requiring such reapportionment every 10 years. The question was whether the state legislature's failure to re-apportion
12 congressional Districts violated the equal protection clause of the Constitution and presented a justiciable cause for which remedies could be sought in the Court and the Appellants being registered voters had standing to maintain suit. It was held that drawing lines around state electoral districts can be reviewed by courts because the political question doctrine does not apply.

18 Similarly, the Petitioners relied on the case of **Reynolds v Sims US 1964 533** where the United States Supreme Court considered a complaint about the mal-apportionment of the Alabama state legislature which deprived voters in largely populated Counties of rights under the equal protection clause. Weighting votes differently according to where citizens happen to reside is discriminatory. The court held that the right of suffrage is denied
24 by debasement or dilution of a citizen's vote. This case advocated that State senate districts must have roughly equal populations based on the

principle of "one person, one vote". That a claim for debasement of the right to vote through mal-apportionment presented a justiciable cause under the equal protection clause. The Court emphasized that legislators represent people not areas and weighing votes differently according to where citizens happen to reside was discriminatory. The Court further found that under the equal protection clause, seats in the legislature must be apportioned substantially on a population basis and the legislative districts must as nearly as practical be of equal population and failure to do so renders the apportionment constitutionally invalid.

The Petitioners invited this court to adopt the reasoning of the United States Supreme Court and find the current division of Uganda into Constituencies as well as their demarcation unconstitutional.

The Case for the Respondents.

Counsel for the 1st Respondent submitted that it is inconceivable for the EC to carry out a review of the Constituencies envisaged under Article 63(5) and (6) of the 1995 Constitution unless the prescription of Constituencies envisioned under Article 63(1) of the Constitution is made by Parliament. It was the contention for the respondent that Article 63(1) of the Constitution has to be read together with Article 294 which recognizes the number of Constituencies Uganda is divided into and indicates the Parliament may prescribe otherwise.

Counsel for the Respondent pointed out that as a matter of history, there are two major Statutes to consider on the question of the number of

Constituencies into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005. This is primarily the Parliamentary Elections (Interim Provisions) Statute, Statute 4 of 1996 which under Section 13 provided that; -

6 *Subject to Article 263 and 264 of the Constitution, for the purpose of this Article 63, Uganda shall be divided into two hundred and fourteen Constituencies for the election of members of Parliament.....”*

In light of the foregoing, Learned Counsel argued that the Article expressly provided that Uganda shall be divide into 214 Constituencies for election of Members of Parliament; accordingly, Uganda is deemed to
12 have remained divided into 214 constituencies until the 9th day of August, 2016, when Parliament by a resolution under Article 63 of the Constitution prescribed 296 Constituencies.

Counsel relied on **Eddie Kwizera v Attorney General & Electoral Commission, Constitutional Petition No. 20 of 2018** where this court challenged the practice of Parliament where by resolution it prescribes
18 Constituencies.

The Respondents maintained that the Parliament was exclusively vested with the authority to prescribe Constituencies. They argued that for the population quota to work efficiently the government took into account means of communication, geographical features, density of population, area and boundaries of districts

Clause (7) of Article 63, provides that; -

“For purposes of this Article, ‘Population Quota’ means the number obtained by dividing the number of inhabitants of Uganda by the number of Constituencies into which Uganda is to be divide under this Article.”

Counsel for the Respondent reasoned that before the Parliament prescribes the number of constituencies under Article 63, there had to be in place the prescription of constituencies by the Parliament.

Whether the resolutions by Parliament to maintain one woman Member of Parliament for each district violated articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61,62 ,63 and 78 of the constitution and was therefore unconstitutional.

Article 78 (2) of the Constitution provides for Parliament to review the representation in Parliament by women MPs every five years starting in 2005. It was Counsel for the Petitioner’s submission that during the reviews, Parliament has always maintained the status quo of one woman MP for each district. The Petitioners contended the effect of this resolution without following constitutional obligations makes it unconstitutional to have women members of parliament.

Whether the creation of Counties by Parliament contravenes Articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62, 63, 177 and 179 of the Constitution and is therefore unconstitutional.

The Case for the Petitioners.

6 Counsel for the Petitioners submitted that the Constitution did not envisage the formation of new counties by either Parliament or the District Council. His contention was that in purporting to pass resolutions on its floor, the Parliament was usurping the powers of the local government to create new counties. Counsel relied on Article 176(1) which provides that the District is the highest unit of Local Government
12 in Uganda. The Petitioners argued that Article 207 specified the lower Local Government units whose boundaries the District Local Government could alter or which could be created as new lower Local Governments by a District Council and these units exclude counties.

The Petitioners alleged that whenever the Executive felt there was need to increase the number of Constituencies, instead of entreating Parliament
18 to propose the rise in the number of constituencies as provided under Articles 63(1) and allowing the EC demarcate those constituencies as provided under Articles 63(2) - 63(7), the executive instead brings a motion in Parliament to create new counties which Parliament always approved. Counsel noted that Article 63 (2) provided that each county should have at least one Member of Parliament, the EC treated these
24 counties automatically as new constituencies in effect rendering the EC exercise of its mandate under Article 63 (5) moot.

Counsel for the Petitioners invited this court to rule that any action that renders any article of the Constitution moot is null and void because it negates the supremacy of the Constitution provided for under Article 1(2).

Counsel reasoned that the Parliament is partisan and if left to demarcate
6 constituencies, the party with the majority is bound to engage in
gerrymandering. It was Counsel's submission that in their wisdom the
framers of our Constitution bestowed the role of demarcating
Constituencies on to the EC which is independent. He noted however,
that by indirectly usurping the role of demarcating constituencies from
the EC, the Parliament used the opportunity to not only engage in acts
12 of gerrymandering but also debased the voters in a number of
Constituencies by creating counties with extremely small populations
that were automatically treated as constituencies and which the majority
party was more likely to win. The debasement of votes of voters in
counties with large population infringed on their right to vote guaranteed
under Article 59 as well as their right to equality in the political sphere
18 guaranteed under Article 21.

The Case for the Respondent.

Counsel for the 2nd Respondent submitted that under the Local
Government Act, Cap 243 the Counties are administrative units whose
creation is a Constitutional mandate for Parliament under Article 176 of
the Constitution. That by creating them, the Parliament was not ultra
24 vires.

Counsel relied on **Eddie Kwizera v Attorney General and another, Constitutional Petition No. 20 of 2018** where this court found that:

It can be deduced that the county is composed of sub counties. Parliament has authority under article 176 (1) of the Constitution at its discretion to prescribe such local governments and administrative units as it deems fit by law. It therefore follows that the counties are prescribed by Parliament under... article 176 of the Constitution or are created under a law prescribed by Parliament by the district councils as local government units which must have at least one member of Parliament according to the direction to the second respondent under article 63 (2) of the Constitution.

12 Relying on **Kwizera Supra** Counsel submitted that Parliament had the authority to stipulate local government and the creation of Counties was within the mandate of Parliament.

Whether Districts created by Parliament without amending the Constitution and/or following the laid down procedures in the Constitution violate Articles 1, 2, 3, 5, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62, 63, 177, 179 and 260 of the Constitution and are therefore unconstitutional.

The Case for the Petitioners.

The Petitioners submitted that at the time of promulgation of the 1995 Constitution there were 39 Districts which were code numbered 001 to 039. Parliament has since then created new Districts in batches up to 146.

24 It was the contention of Counsel for the Petitioner that the process,

purpose and effect of creating Districts 40-145 were/are unconstitutional rendering these Districts null and void when considered in light of Article 5(2) which prescribes the districts in Uganda as only those in the first schedule to the Constitution.

- 6 With regard to the process, the Petitioners argued that Article 260 specifies Articles whose amendment requires ratification by the District Local Councils. In the year 2000, there was an increase in the number of Districts from 39 to 69 without ratification by the District Councils. In year 2005 vide Constitutional Amendment Act (No 2) of 2005 the Districts were increased to 75 these were ratified by the District Local Councils, however
12 the 30 District Local Councils that had not been ratified by the original 39 DLCs took part in the ratification thus invalidating the whole exercise.

Since 2005, an additional 70 Districts have been created by Parliament without amending the Constitution and without being ratified by the DLCs. The Petitioners contended that other than the original 39 Districts, the rest are null and void.

- 18 The Petitioners contended that Article 179 permitted Parliament to create new Districts with the approval of a majority of all MPs. However, this was to be done in accordance with the Constitution, particularly Article 5(2). That Constitutional provisions support rather than destroy each other and the process of creating new Districts had to be in accordance with both Article 5(2) and Article 179. That since Article 5(2) was ignored,
24 the Districts created are null and void.

Whether the holders of the office of chairperson, vice chairperson, secretary and members of the electoral Commission from 2003 to date were/are incompetent, abrogated the constitution and should be referred to the High Court to answer the charge of treason.

- 6 The Petitioners were totally opposed to the fact that Hon. Justice Simon Byabakama, the current Chairperson of the EC, was also a Justice of the Court of Appeal/Constitutional Court before his appointment. Counsel found it odd that upon his appointment, the Justice never relinquished his prior position as a Justice of the Court of Appeal/ Constitutional Court and proudly continues to refer to himself as Justice Byabakama.
- 12 It was the Petitioner's contention that Article 60(5) requires public officers to relinquish their positions as public officers upon being appointed to the commission. Articles 175 and 257 (2) defines a public officer to include a Justice of Appeal thus Justice Simon Mugenyi Byabakama did not competently occupy the position of Chairperson of Electoral Commission.

The Case for the Respondents

- 18 It was submitted for the Respondent that Hon Justice Byabakama Mugenyi Simon compiled with article 60 (5) of the Constitution by relinquishing his position in the office of Justice of the Court of Appeal as required by law at all material times on appointment as Chairperson Electoral Commission and has since then ceased performing the functions of a Justice of the Court of Appeal.

The gist of the Respondents case was that provisions that relate to the Electoral Commission, Public Service Commission and Education Service Commission do not require relinquishing office or vacation of office as opposed to provisions relating to Health Service Commission and Uganda Land Commission that requires relinquishment of office. That the provisions that regulate the appointment of Electoral Commission, Public Service Commission and Education Service Commission members, require one to relinquish his /her position in the office.

By 'relinquishing the position in that office' it is envisaged that he will not sit to hear appeals at the Court of Appeal, not that he will resign or vacate the office of Justice of Appeal. 'Position in office' relates more to posting, rather than the office itself. Resignations are generally provided for under Article 252 of the Constitution.

Counsel argued that while the provisions relating to resignations specially require the occupant to resign office, the wording used with regard to the Electoral Commission is different, in the sense that they require one to relinquish his/her position in that office. To relinquish position in office cannot be equated to resignation or vacation of office, if that is what the framers wanted, they would have stated so. Vacation of office, for example, is provided for under Article 114 of the Constitution.

Counsel reasoned that the framers of the Constitution were very clear as to what they wanted and chose to give different provisions to different offices. Relinquishing his or her position in that office is not the same thing as resignation, as long as the member of the Electoral Commission

is not hearing cases and is not posted to a Court, he has relinquished his position in that office.

The position of a Judge is a special mandate which does not bar the holder of the title from appointment in another capacity subject to
6 relinquishment of his or her judicial functions as provided for under the law. It follows, therefore, that, as long as the appointment of a judge in another capacity is not expressly and specifically barred by any specific legislation, there is no bar to designating and appointing a Judge in another capacity. The Constitution treats the position, office, title and/ or appointment of a Judge as a special appointment, office or job capable of
12 appointment in other capacities.

Counsel cited Article 51 (3) of the Constitution which provides that the Chairperson of the Uganda Human Rights Commission shall be a Judge of the High Court or a person qualified to hold that office.

In conclusion, counsel prayed that this Court finds no merit in the complaints against the Respondents and be pleased to dismiss the Petition
18 with costs.

Consideration of the Petition

I have carefully considered the Petition, the answer to the petition, the submissions of both Counsel and related attachments as set out above.

Preliminary Matters

- 6 Before I delve into the grounds of this petition I will start by providing the broad context within which the framed grounds should be interpreted. First is that the Constitution of Uganda 1995 here-in-after referred to as the Constitution is the main document from which other laws derive their legitimacy. Hence 'the Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged.
- 12 And further that any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency.

Secondly, the Constitution provides the canvas upon which the whole fabric of state is mapped. In many ways it is the basic infrastructure. In **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** which was widely cited in **Male Mabirizi and Others v AG Constitutional**

18 **Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018** the proposition is that a 'written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people

24 themselves.'

The Constitution is therefore the main contract between the people of Uganda and those who govern them. All other socio-political or economic undertakings between people and the State stem from this main document. A presumption exists that government has legal authority to act unless a limitation appears within the Constitution or other law. This means that different governmental structures may exert dominance in particular areas, thus limiting and checking governmental authority, safeguarding individual freedoms, and creating a political equilibrium. The constitution should always impose legal controls on Parliament, the Executive and Judiciary

The rule of harmony; the Constitution must be read in its entirety as an integral whole. No provision of the Constitution should to be construed to oust or rescind the other but rather that each article enhances, gives meaning and augments the other. The rule of harmony requires that each provision should afford exhaustiveness and completeness to the others. The Constitution ensures that the government does not own the state it simply manages the state, under the authority of higher laws, on behalf of its citizens.

Jurisdiction

In all matters that are brought before this court, sitting as a Constitutional Court, the onus is on the petitioner to prove first, that there is a constitutional issue worthy of interpretation and secondly, to prove those issues on the balance of probabilities. The set up and jurisdiction of this court is provided under Article 137 (1) of the Constitution with the effect

of restricting the jurisdiction of the Constitutional Court to only determination of questions as to interpretation of the Constitution where there is a cause of action. In **Fox Ayelowo Odoi v The National Resistance Movement Party and the Attorney General Constitutional**
6 **Petition No. 0037 of 2015** this court recapitulated **Attorney General v Major General David Tinyefunza** in which Wambuzi CJ had this to say,

*"In my view jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart
12 from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."*

In **Fox Odoi 2015 (supra)** this court held that a constitutional question
18 arises when there is an issue, legal or otherwise, requiring an interpretation of the Constitution for the resolution of the cause out of which that issue arises from.

This Petition questions the constitutionality of the actions of the Parliament when it usurps the powers of the EC by demarcating Constituencies, a mandate which the Petitioners insist is granted to the
24 EC by the Constitution. This Petition equally questions the EC for failing in its duty when it narrowly construes its obligations under Article 61

and Art. 63. It is my humble view that by questioning the acts and /or omissions of Parliament in line with Article 61 and 63 of the Constitution of Uganda, which acts could have the effect of causing a constitutional breach, the Petitioner does indeed raise an issue for interpretation of the Constitution. Consequently, by questioning the interpretation of the above said articles of the Constitution, this petition does raise a constitutional question.

Whether the failure of the EC to review the demarcation of Uganda into Constituencies after the publication of the results of the 2002 and 2014 census of the inhabitants of Uganda was an abrogation that violated articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62 and 63 of the Constitution and was therefore unconstitutional.

The Petitioners faulted the EC for failing to demarcate the country into Constituencies following the publication of the 2002 and 2014 population census results. Counsel for the Respondents contended that the EC was dependent on the Parliament prescribing the Constituencies in accordance with Article 63(1) of the Constitution. In reply, the Petitioners averred that the reviewing of the demarcation of Constituencies is due within 12 months after the publication of the results of the census of the inhabitants of Uganda. It was their contention that review ought to take place whether or not Parliament has prescribed new Constituencies. Their argument was that the review of the Constituencies is not related to Article 63 (1) of the Constitution. In order to have a meaningful discussion of this ground, it is important and proper to look again at what the constitution provides under Article 63 of the Constitution of Uganda 1995.

63. Constituencies.

(1) Subject to clauses (2) and (3) of this article, Uganda shall be divided into as many constituencies for the purpose of election of members of Parliament as Parliament may prescribe; and each constituency shall be represented by one member of Parliament.

(2) When demarcating constituencies for the purposes of clause (1) of this article, the Electoral Commission shall ensure that each county, as approved by Parliament, has at least one member of Parliament; except that no constituency shall fall within more than one county.

(3) Subject to clause (2) of this article, the boundary of a constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota.

(4) For the purposes of clause (3) of this article, the number of inhabitants of a constituency may be greater or less than the population quota in order to take account of means of communication, geographical features, density of population, area and boundaries of districts.

(5) Subject to clause (1) of this article, the commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result redemarcate the constituencies.

(6) Where the boundary of a constituency established under this article is altered as a result of a review, the alteration shall come into effect upon the next dissolution of Parliament.

(7) For the purposes of this article, "population quota" means the number obtained by dividing the number of inhabitants of Uganda by the number of constituencies into which Uganda is to be divided under this article.

Article 63 of the Constitution of Uganda which Constitution, as earlier noted, is the supreme law of Uganda provides a framework for the creation and review of constituencies and the article creates centres of responsibility. In 63(1) the Parliament of Uganda is obligated to **prescribe constituencies for the purposes of election of members of Parliament.** In order to gain an understanding of this part of the Constitution it is important to remind ourselves that each chapter or article of the constitution bolsters the other and that the constitution must be read as an integral whole.

As we delve into the discussion of Article 63(1) it is important to note that it cannot be interpreted in isolation. It ought to be read together with Article 61(3).

61. Functions of the Electoral Commission.

The Electoral Commission shall have the following functions—

- 1. (a) to ensure that regular, free and fair elections are held;**
- 2. (b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;**
- 3. (c) to demarcate constituencies in accordance with the provisions of this Constitution;**

The role of the EC is crystallised under Article 61. The role of the EC is provided for by Article 61 of the Constitution. The specific role to demarcate Constituencies of the Country is provided for by Article 61(1) (c)

61. Functions of the Electoral Commission

(1) The Electoral Commission shall have the following functions—

(c) to demarcate constituencies in accordance with the provisions of this Constitution;

Article 63 (5) of the Constitution of the Constitution provides that:

Subject to clause (1) of this article, the commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result re-demarcate the constituencies.

Article 294 provides that:

Until Parliament prescribes the constituencies under article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005.

In **Constitutional Petition No. 18 of 2019, Eddie Kwizera v Attorney General and Another**, this court highlighted a precise history of the statutes that provided for the number of Constituencies prior to the 2005 Constitutional Amendment that introduced Article 294 of the Constitution. Whereas this ground of the petition does not relate

necessary to the number or creation of constituencies, Kwizera provides good background reading in understanding how the powers between the Parliament and the EC work. Here is an excerpt from the case

6 *As a matter of history, there are two major statutes to consider on the question of the number of constituencies into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005. This is primarily the Parliamentary Elections (Interim Provisions) Statute, Statute 4 of 1996 which under section 13 provided that:*

12 *13.(1) Subject to article 263 and 264 of the Constitution, for the purposes of article 10 63 of the Constitution, Uganda shall be divided into two hundred and fourteen constituencies for the election of members of Parliament as specified in the First Schedule to this Statute; and each constituency shall be represented by one member of Parliament.*

18 *The second provision can be traced to the Electoral Commission Act, 1997, Act 2 of 1997. Section 11 thereof provided inter alia that subject to article 63 of The Constitution, Uganda shall be divided into such number of constituencies as Parliament may, by resolution prescribe and the constituencies as prescribed by Parliament shall be demarcated by the Commission under that article. Secondly, the number of constituencies prescribed shall be*
24 *published in the Gazette .*

Last but not least, the 214 constituencies of Uganda are reproduced in the Revised Edition of the laws of Uganda 2000 and is cited as the Parliamentary Elections (Interim Provisions) Act Cap. 141.

30 *In it, it is written by the Law Revision Commission that the Parliamentary Elections (Interim Provisions) Act was repealed by Parliamentary Elections Act, Act 8/2001. However, the Parliamentary Elections Act saved the First Schedule to the Parliamentary Elections (Interim Provisions) Act until Parliament prescribes new constituencies under Article 63 of the Constitution. In other words, the First Schedule would remain valid and specifies the number of constituencies into which Uganda is divided until*

Parliament prescribes any new number of constituencies under article 63 of the Constitution. Section 100 of the Parliamentary Elections Act, Act 8/2001 provides that:

100. (1) *The Parliamentary Elections (Interim Provisions) Statute, 1996 is the repealed.*

(2) *Notwithstanding the repeal effected by this section, until constituencies are prescribed by Parliament and demarcated by the Commission under article 63 of the Constitution, Uganda shall, in accordance with section 11 of the Electoral Commission Act, 1997, be divided into the constituencies set out in the First Schedule to the Parliamentary Elections (Interim Provisions) Statute, 1996.*

The primary duty of the EC which is in line with Article 2 of the Constitution is to hold regular, free and fair elections by planning, organising and conducting them. However, before a free and fair election can be held, the EC is duty bound to demarcate constituencies in accordance with Art.63 and Article 264 of the Constitution. The other periodically specific role the EC has is to review the demarcation of constituencies within a year after the decennial population census. These roles of the EC which are in plain English are clear and unambiguous. The operative word 'prescribe' ought to be understood in light of Art. 63(2) which grants to EC power to demarcate and delimit constituencies. Let me unpack what it means for the Parliament to 'prescribe'. At the risk of sounding repetitive I would like to emphasise that the essence of article 63 (1) and 63 (5) is that Parliament prescribes what the number of constituencies should be in terms of locality and numbers. This number remains constant until the next general election. If any changes happen midterm, this Court clarified in Eddie Kwizera that any changes to the number of constituencies takes effect at the next general elections.

The general role of the EC therefore, is to demarcate the constituencies that have been prescribed by Parliament. It is the duty of the Parliament to stipulate, specify, recommend, declare or to order that a certain number of constituencies be formed. Upon declaring the constituencies, the EC
6 would then carry out its duty to ensure that it demarcates an appropriate or equal population ratio or quota for each constituency. This ought to be the relationship between the Parliament and the EC.

The EC is obligated to delineate and delimit the individual constituencies. In this context, the role of the EC includes the review of the demarcations and not the number of constituencies. This means that it tries to ensure
12 that the demarcations conform to the Constitution. The elements of the conformity are that each county as approved by parliament shall have at least one member of parliament and no constituency when demarcated shall fall within more than one county.

The Specific Role of the EC under Article 63(5)

The specific and singular role of the EC under Article 63(5)) requires that
18 the notion of delimitation is observed. The Constitution specifies that within twelve months of a population census, the EC is obligated to review the existing constituencies. In reviewing constituencies the boundary of the constituency should ensure that the number of inhabitants in the constituency is as nearly as possible equal to the population quota. The essence of delimitation is to ensure that the

population of all constituencies shall, so far as practicable, be the same throughout the country.

A population quota would be arrived at when and if the total population of the Uganda can be divided by the total number of constituencies. This way an average is arrived at and used to obtain the optimum average per constituency. The national average becomes the guiding factor for delimiting the constituencies in such a manner that each constituency, so far as practicable, is close to the population quota. This is what a population quota is about and this is what Article 63(5) of the Constitution of Uganda aims to achieve. In many ways this latter article of the constitution is a self-executing directive which does not need to be aided by an enacted law to supplement or bring life to its provision. This article makes the EC and no other body, the sole executing agency. Most importantly, the EC has the duty to review the division of Uganda into constituencies within 12 months after the publication of the results of a census of the population of Uganda. The outcome of that review is not a division of Uganda into more Constituencies but a delimitation of the constituencies to conform to the elements stated above.

What does it mean for the EC to Demarcate Constituencies

Before I attempt to answer that question it is necessary to understand what a constituency means. A constituency has several meanings depending on its attributes. In this context a constituency refers to the spatial or geographical area with voters, which is demarcated to elect a

representative. In a broader sense a constituency could also refer to a political group with homogenous ideas. In designing the 1995 Constitution, the makers had in mind a Constitution that not only embodies ideas but which designs the infrastructure of the state. The
6 Constitution as the single most important document embodies in its nature a design and purpose. Most importantly it must inherently embody the will of the people as stipulated under Article 1.

1. Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

12 (2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) ...

18 (4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

In view of Article 1 of the Constitution, it would be a great disservice to the people of Uganda when the institutions which are meant to be the vanguard of the Constitution and who have a duty to uphold democracy do not put in place processes and procedures that enable the people to
24 exercise their sovereignty and their will and to choose how they should be governed in a free and fair manner. If indeed the Constitution is the *Grund Norm* from which all democratic principles emanate, then it should be fully executed without exception. I will adopt the reasoning in **Male Mabirizi and Others v AG** in which Owini Dollo DCJ, as he then was;

referenced **Crabbe,1994 at p.129, *Understanding Statutes*** which describes the Constitution as the fundamental law which

1. *"contains the principles upon which the government is established;*
2. *regulates the powers of the various authorities it establishes;*
- 6 3. *directs the persons or authorities who shall or may exercise certain powers;*
4. *determines the manner in which the powers it confers are to be confined or exercised; and*
5. *specifies the limits to which powers are confined in order to protect individual rights and prevent the abusive exercise of arbitrary power."*

12 In **Centre for Rights Education and Awareness & Anor v The Speaker of the National Assembly, Kenya High Court of Kenya at Nairobi, Milimani Law Courts Constitutional & Human Rights Division, Petition No. 371 of 2016** the Supreme Court of Kenya re-stated the principle that the power of the people is superior to both the Constitution and the Legislature; and that where the will of the Legislature is adverse to that of the people as is declared in the Constitution, the judge must give effect to the latter rather than the former. To the effect that court decisions ought to be regulated by fundamental laws and not by the judicial oath alone; and that courts must follow the will of the people in interpreting the Constitution.

24 Similarly, ***Kesavananda Bharati v The State of Kerala (1973) 4SCC 225*** described the basic structure as basic features which underlie not just the letter but also the spirit of that constitution. These features constitute the ***Inviolable Core*** of the constitution.

With the above background in mind, the EC is under obligation to carry out its mandate as the Constitution dictates. The duty under article 63(5) is as imperative as the duty to hold elections. This duty forms the wider part of electoral justice and should lead to good governance and provide constitutional order. The EC therefore, has an inescapable duty under article 63(5) which unfortunately has long have been abrogated or abdicated from. The precursor to the EC's Constitutional duty is that the body charged with conducting a decennial population census, currently the Uganda Bureau of Statistics (UBOS) or its equivalent must ensure that a population census is conducted as envisaged under Objective XII of the National Objectives and Uganda Bureau of Statistics Act No. 12 of 1998. Following on UBOS carrying out its role, the EC has a Constitutional duty to then review the existing constituencies in light of the population census. In **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** Edmund Davies J derived meaning from Maxwell on Interpretation of Statutes to propose thus,

'... A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, **it seems neither unjust nor inconvenient to exact a rigorous observance of them** as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature.

But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.'

I would hasten to say that it is neither unjust nor inconvenient to expect a rigorous observance of article 63(5). It is my considered view the EC cannot shy away from its duty to demarcate constituencies. It is an important principle of Constitutional interpretation that all provisions of the Constitution concerning an issue should be considered all together, no single provision should be considered in isolation of the other. In essence, the Constitution must be interpreted as a whole.

The Petitioners argued that reviewing the Constituencies by the EC is not related to the prescription of the Constituencies by Parliament. I would agree with that proposition. The ECs duty is to delimit or provide and review boundaries and to specifically do so after a general population census which supposedly takes place every 10 years in Uganda.

Notably, by 2002, when the census was carried out, Uganda was by law divided into 214 Constituencies pending the prescription of more Constituencies by the Parliament. Article 63(5) which forms the main object of the Petitioners petition states that as follows:

Subject to clause (1) of this article, the commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result re-demarcate the constituencies.

- 6 It is a cardinal rule of Constitutional interpretation that words must be given their ordinary, natural and plain meaning where there is no ambiguity.

The word *review* is defined by the **Black Laws Dictionary 6th Edition** to mean: To re-examine, judicially or administratively. A reconsideration; second view or examination; revision; consideration for purpose of
12 collection. Used especially of the examination of a decision of a lower court or administrative body by an appellate court or appellate administrative body.

By the framers of the Constitution using the word *review* the division of Uganda into constituencies, they presupposed that the division of Uganda would have happened immediately after the publication of the
18 population census. Furthermore, the clause clearly states that; *Subject to clause (1) of this Article*. This ordinarily means that the Article 63(5) is subject to Article 63 (1) of which provides:

Subject to clauses (2) and (3) of this article, Uganda shall be divided into as many constituencies for the purpose of election of members of Parliament as Parliament may prescribe; and each constituency shall be
24 *represented by one member of Parliament.*

There is a failure by both the EC in not carrying out this constitutional obligation. This court required the Petitioners to provide some evidence of electoral data and the petitioners did provide as part of their petition, loose statistical data relating to electoral census; population density, gendered and other representation quotas for all the constituencies in Uganda. In extrapolating this data in line with Article 63(4) & (5), I found that in 2014, the population quota stood at 249,677 for Wakiso District with a population of over 1,997,418 people who were represented by only 9 MPs. Kampala District's population quota stood at 188,385 with a population of over 1,607,080 people being represented by only 9 MPs. Arua District was also represented by the same number of MPs although it had a population quota of 111,725 and a population of 787,077 people. This was almost half the population of Wakiso. In the smaller districts, and perhaps for reasons such as the need to bridge the communication, infrastructural and social services' needs, the less populated but harder to reach counties are granted representation. The foregoing are compelling reasons. To drive the point home, however, it is equally compelling and inescapable to take into consideration the rural-urban migration which continues to explain the larger populations in the cities. The attraction to the cities is for various reasons including better social services including health and education, better chances for jobs, better income and a higher standard of life. As a result, there are higher birth rates and accelerated population growth in the cities. It has been noted also that the number of people in the city during day may be almost two times higher than the

population that resides therein for 24/7; for 24hours and 7days a week. These and many others are the considerations the EC needs to be obsessed with after every population census. The EC ought to pay attention to population density; mobility and morbidity.

- 6 The above reasons prove that there is need to review the constituencies overpopulated areas. While in a densely populated area the ratio per capita is almost 300,000 a look at the data shows that the representation per capita in the sparse areas can ebb as low as 74,109; 75,931; 88,456; 95,301 or 102,011. This is three and more times the quotient of representation. Clearly, there is a glaring disparity in the representation
- 12 of Kampala, Wakiso and other fairly densely populated cities such as Masindi, Mbale and Jinja. If the review after each population census was carried out, hopefully the picture would change. I suppose the role of drawing electoral borderlines is the reason the Electoral Commissions are often referred to as Independent Boundaries Commission. It should further be noted that legislators represent people not areas and weighing
- 18 votes differently according to where citizens happen to reside is discriminatory. Seats in Parliament must be apportioned substantially on a population basis and the legislative districts must as nearly as practical be of equal population and failure to do so renders the apportionment constitutionally invalid. The principle of one man one vote should be respected and enforced. I find, however, that no effort has been made by
- 24 the EC to enforce this sacred right.

In conclusion I would find that the failure by the EC to review the demarcation of Uganda into Constituencies after the publication of the results of the 2002 and 2014 census of the inhabitants of Uganda was an abrogation that violated articles 61 and 63 of the Constitution. I would answer this ground in the positive.

Whether the resolutions by Parliament to maintain one woman Member of Parliament for each district violated articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62, 63 and 78 of the constitution and was therefore unconstitutional

Article 78 (2) of The Constitution expressly provides that:

78. Composition of Parliament

(2) Upon the expiration of a period of ten years after the commencement of this Constitution and thereafter, every five years, Parliament shall review the representation under clause (1)(b) and (c) of this article for the purposes of retaining, increasing or abolishing any such representation and any other matter incidental to it.

(3) The representatives referred to in clause (1) (a) of this article shall be elected on the basis of universal adult suffrage and by secret ballot.

(4) Parliament shall, by law, prescribe the procedure for elections of representatives referred to in clause (1) (b) and (c) of this article.

The Constitution gives the Parliament discretion to either increase, maintain or reduce the representation of special groups and women MPs.

The Petitioners concede that Parliament has constantly reviewed the position of women and during the reviews, Parliament has always maintained the status quo of one woman MP for each district.

Since the Parliament has reviewed and found it necessary to maintain the representation as is provided for by the Constitution, that is, one woman

MP per district, as long as they are elected during the general electoral cycle, we find that maintaining the women's slot does not contravene the Constitution. The framers of the Constitution gave the Legislators discretion **to retain, increase or abolish** altogether the representation.

- 6 Notably every woman Member of Parliament is elected by universal adult suffrage as part of the affirmative action to ensure a fair representation in Parliament. As a result women, and given their mode of election, MPs do not represent women as such but represent the entire constituency.

I would answer this ground in the negative.

- 12 I will now consider the next two grounds together as one since they relate to similar issues. The grounds are concerned with the conflicting roles of Parliament in regard to the devolved local governments when it comes to the creation of districts, counties and other local government electoral areas.

- 18 **1. Whether the creation of Counties by Parliament contravenes Articles 1, 2, 3, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62, 63, 177 and 179 of the Constitution and is therefore unconstitutional.**
- 2. Whether Districts created by Parliament without amending the Constitution and/or following the laid down procedures in the Constitution violate Articles 1, 2, 3, 5, 8A, 20, 21, 24, 38, 43, 44, 59, 61, 62, 63, 177, 179 and 260 of the Constitution and are therefore unconstitutional.**

- 24 The Counsel for the Petitioners submitted that the Constitution does not envisage the formation of new counties by either Parliament or the District Councils. It was their contention that in purporting to pass a resolution creating new Counties, Parliament acted ultra vires. The gist of

Counsel's submission was that Article 207 did not include counties when it specified which administrative units could be created as new lower Local Governments by a District Council or the lower Local Government subdivisions whose boundaries the District Local Government could
6 alter.

The Constitution is silent on the definition of what amounts to a 'county'. However, section 45 of the Local Governments Act stipulates the creation of a 'county'. It provides that *there shall be administrative units based on the county; the parish; and the village*. What is clear though is that a 'county' is now less effective as an administrative unit and most of its roles have been
12 devolved to sub counties or swallowed up by districts. And now with the 'Parish Model' gaining prominence the parish as an administrative unit gains prominence and power will be devolved further. When it was an active administrative unit, the county was a large division comprised of several sub-counties and of the administrative units in rural areas. In that
18 respect the nomenclature an 'electoral county' will still be seen in the light of the spatial administrative unit which embraces several sub counties, parishes, villages.

Article 179 (3) of the Constitution stipulates that Parliament shall by law empower District Councils to alter the boundaries of Local Government Units and to create new local government units within their districts. Article 176 (1) of the Constitution empowers the Parliament at its
24 discretion to prescribe such local governments and administrative units as it deems fit by law. It provides:

176. *Local government system.*

(1) The system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units as Parliament may by law provide.

6 From the foregoing, it would appear like counties can be created in two ways: by prescription of Parliament under the mandate conferred upon it by Article 176 of the Constitution or under a law passed by Parliament authorising district councils to act as local government under Article 179(3) of the Constitution. The Petitioners disapproved of the actions of the Executive in increasing the number of Constituencies at will, instead
12 of following the Local Governments Act and the Constitution. Under s.7 of the Local government Act the creation of local government is prescribed. Boundaries of local council units.

(1)The boundaries of a local government or of an administrative unit shall be those which existed immediately before the coming into force of this Act.

18 **(2)Boundaries of a district unit may be altered or new district units formed, in accordance with article 179 of the Constitution.**

According to the Petitioners, the Parliament is partisan and if left to demarcate Constituencies, the party with the majority is bound to engage in gerrymandering.

The notion of gerrymandering and the word itself have roots in the
24 United States of America and in its politics. It is a practice intended to establish an unfair political advantage for a particular party or group by manipulating the boundaries of electoral districts. The primary goals of

gerrymandering are to maximize the effect of supporters' votes and to minimize the effect of opponents' votes.¹

Apparently, incumbent MPs normally employ gerrymandering during their incumbency to entrench themselves in power. Wayne Dawkins
6 described it as politicians picking their voters instead of voters picking their politicians.² Thomas Hofeller, the Redistricting Chair of the Republican National Committee, stated "Redistricting is like an election in reverse. It's a great event. Usually, the voters get to pick the politicians. In redistricting, the politicians get to pick the voters."³

Some political science research suggests that rather than packing the
12 voters of their party into uncompetitive districts, party leaders tend to prefer to spread their party's voters into multiple districts, so that their party can win a larger number of races.

The effect of gerrymandering for incumbents is particularly advantageous, since it creates conditions that make it conducive for the incumbents to be re-elected. In this regard it has proved successful given
18 that incumbency provides advantages which are not available the new entrants into the race.⁴

Incumbents are likely to be of the majority party orchestrating a gerrymander, and incumbency plays to their advantage in subsequent

¹ Wells, John (3 April 2008). *Longman Pronunciation Dictionary* (3rd ed.). Pearson Longman.

² Dawkins, Wayne (9 October 2014). "In America, voters don't pick their politicians. Politicians pick their voters | Wayne Dawkins". *The Guardian*. ISSN 0261-3077. Retrieved 28 June 2019

³ "2000 Redistricting Review | C-SPAN.org". www.c-span.org. 13 August 2001. 33:50. Retrieved 10 May 2020

⁴ Mann, Thomas E. "Redistricting Reform." The Brookings Institution. Brookings.edu, 1 June 2005. Web. 5 February 2013.

elections. Even incumbents among the minority party tend to get re-elected.

Mann, a Senior Fellow of Governance Studies at the Brookings Institution, has also noted that "Redistricting is a deeply political process, with
6 incumbents actively seeking to minimize the risk to themselves (via bipartisan gerrymanders) or to gain additional seats for their party (via partisan gerrymanders)".⁵

Gerrymandering of state legislative districts can effectively guarantee an incumbent's victory by 'shoring up' a district with higher levels of partisan support, without disproportionately benefiting a particular political
12 party. This is problematic from a governance perspective, because forming districts to ensure high levels of partisanship often leads to higher levels of partisanship in legislative bodies. If a substantial number of districts are designed to be polarized, then those districts' representation will also likely act in a heavily partisan manner, which can create and perpetuate partisan gridlock. This demonstrates that
18 gerrymandering can have a detrimental effect on the principle of democratic accountability. With uncompetitive seats/districts reducing the fear that incumbent politicians may lose office, they have less incentive to represent the interests of their constituents, even when those interests conform to majority support for an issue across the electorate as

⁵ Mann, Thomas E. "Redistricting Reform." The Brookings Institution. Brookings.edu, 1 June 2005. Web. 5 February 2013.

a whole. Incumbent politicians may look out more for their party's interests than for those of their constituents.

On the positive side, if any, gerrymandering may be advocated to improve representation within the legislature among otherwise under-
6 represented minority groups by packing them into a single district.⁶

Due to the perceived problems associated with gerrymandering and its effect on competitive elections and democratic accountability, numerous countries have enacted reforms making the practice either more difficult or less effective. Countries such as the UK, Australia, Canada and most of those in Europe have transferred responsibility for defining Constituency
12 boundaries to neutral or cross-party bodies. In Spain, they are constitutionally fixed since 1978.

There has been a growing trend for Parliament to turn itself into a local government and purport to create counties. This goes against the grain of s.7 of the Local Government Act as amended. The process is a step by step progressive process and largely empowers the local governments to
18 define their local boundaries. This is what the law states from s.2 to s.10.

(2)Boundaries of a district unit may be altered or new district units formed, in accordance with article 179 of the Constitution.(3)Subject to the Town and Country Planning Act, the Minister may, in consultation with the district with the approval of Cabinet after satisfying himself or herself that the requirements under paragraph 32 of the Third Schedule are met, declare an area to be a town.(4)A district may with the approval of the Minister, within its area of jurisdiction, at the request of or in consultation with the
24

⁶ CED (13 March 2018). "[Let the Voters Choose](#)". Committee for Economic Development. Retrieved 7 June 2019.

relevant municipal council, alter the boundaries of or create a new municipal division council.(5)A district council may, within its area of jurisdiction and with the approval of the Minister at the request of or in consultation with the relevant subcounty councils, alter the boundaries of or create a new subcounty.(6)A subcounty or city division council may, within its area of jurisdiction with the approval of the district or city council and at the request of or in consultation with the relevant parishes or wards, alter the boundaries of or create a new parish or ward.(7)A district or city council may, within its area of jurisdiction with the approval of Parliament and in consultation with or at the request of the relevant county council or city division council, alter the boundaries of or create a new county or a city division.(8)A municipal division or town council may, within its area of jurisdiction and at the request of or in consultation with the relevant wards, alter the boundaries of or create a new ward.(9)A parish or ward council may, with the approval of a subcounty, division or town council and at the request of or in consultation with the relevant villages as the case may be, alter the boundaries of or create a new village.(10)Where an approval required under this section is not given, the authority withholding its approval shall, in writing, give reasons for its action.

In analysing Articles 63, 179(1) of the Constitution together with s. 7 of the Local Government Act the conclusion drawn is that it was never envisaged that the Parliament would solely be responsible for the creation of local government units. Parliament got itself deeply involved in the demarcation of voting units. This has, consciously or subconsciously led to the weighting of votes differently according to where citizens happen to reside and as a result is discriminatory in nature. The right of suffrage is denied by debasement or dilution of a citizen's vote. Voting units whether as constituencies or as counties must have roughly equal populations based on the principle of "one person, one vote". I find this to be against the spirit of devolution which is the transfer of power to local

governments. By not involving the local governments in the creation of counties, without amending the Constitution and/or following the laid down procedures in the Constitution and the Local Government Act the Parliament contravened Articles 63 and 179 of the Constitution. I find that
6 a claim for debasement of the right to vote through mal-apportionment presents a justiciable cause Article 63 and 179 of the Constitution.

It is my finding therefore that the resolutions by the 7th, 8th, 9th and 10th Parliament and their failure to involve the local governments in the creation of counties without amending the Constitution, and/or following the laid down procedures in the Constitution and the Local Government
12 Act the Parliament contravened Articles 63 and 179 of the Constitution. I would find the actions the actions complained of unconstitutional.

Whether the holders of the office of chairperson, vice chairperson, secretary and members of the Electoral Commission from 2003 to date were/are incompetent, abrogated the constitution and should be referred to the High Court to answer the charge of treason.

18 The office of the Chairperson of the EC is provided for by Article 60 of the Constitution. The question in issue is whether officers stipulated above including the **chairperson, vice chairperson, secretary and members of the Electoral Commission** can hold both constitutional positions and not be in violation of the Constitution. It should be noted that at the time the Hon. Justice Simon Byabakama was appointed as Chairman of the EC he
24 was a sitting Justice of the Court of Appeal. I am aware of the majority position of this court in **Bob Kasango v Attorney General. Constitutional Petition No. 16 of 2016** which is now on appeal to the

Supreme Court. I would therefore not offer any other position on this matter.

Having cautiously reviewed the grounds of this petition and give much consideration to the constitutional provisions, I would declare as follows:

6 **1. The omission by the Independent Electoral Commission to review the division of Uganda into Constituencies after the publication of the results of the 2002 census of the population of the inhabitants of Uganda was an abrogation that violated Articles 61 and 63 of the Constitution and was therefore unconstitutional.**

12 **2. The omission by the Independent Electoral Commission to review the division of Uganda into Constituencies after the publication of the results of the 2014 census of the population of the inhabitants of Uganda was an abrogation that violated Articles 61 and 63 of the Constitution and was**
18 **therefore unconstitutional.**

3. The resolutions by the 7th, 8th, 9th and 10th Parliaments of Uganda to retain one-woman representative for every District did not contravene any provision of the Constitution.

24 **4. The resolutions by the 7th, 8th, 9th and 10th Parliament and failure to involve the local governments in the creation of counties without amending the Constitution, and/or following the laid down procedures in the Constitution and the Local Government Act the Parliament contravened**
30 **Articles 63 and 179 of the Constitution. There actions were hence unconstitutional.**

5. My view on the last question is that it is subject of an appeal and awaits the decision of the Supreme Court sitting as an Appellate Constitutional Court.

6

I would find that this Petition only succeeds in part. This Petition was lodged in public interest. Although the petitioners prayed for costs, the issues did not involve infringements to individual rights. I would not impose or grant any costs to any party.

12 Dated this.....18th.....Day of...March.....2022



18 Catherine Bamugemereire JA
Justice of Constitutional Court

5 **THE REPUBLIC OF UGANDA**
IN THE CONSTITUTIONAL COURT AT KAMPALA
CONSTITUTIONAL PETITION NO. 13 OF 2019

10 **BETWEEN**

1. DR. KAMBA SAMUEL BALEKE
2. MR. LUTAAYA SONKO GERALD
15 3. MR. MUGANDA FAISAL :..... PETITIONERS

AND

20 1. THE ELECTORAL COMMISSION
2. THE ATTORNEY GENERAL :..... RESPONDENTS

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE KENNETH KAKURU, JCC
25 **HON. JUSTICE CATHERINE BAMUGEMEREIRE, JCC**
HON. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. JUSTICE IRENE MULYAGONJA, JCC

30 **JUDGMENT OF BUTEERA RICHARD, DCJ**

I have had the benefit of reading in draft the Judgment of my learned
sister, Hon. Lady Justice Catherine Bamugemereire, JJA/JCC and I am
in agreement with her reasoning and conclusions on all the grounds. I
35 only wish to add some emphasis on ground one and on the award of
costs for clarity.

Ground One

The issue for resolution on this ground is; -



5 "Whether the failure of the Electoral Commission to review and demarcate Uganda into Constituencies after the publication of the results of 2002 and 2014 Census was all abrogation and violation of Articles 1,2,3,8A,20,21,24,38,43,44,59,61,62 and 63 of the Constitution and therefore unconstitutional?"

10

SUBMISSIONS OF COUNSEL

The Petitioner submitted that The Uganda Bureau of Statistics conducted a census of the inhabitants of Uganda in 2002 and 2014 and published the results. Pursuant to **Article 63(5) of the Constitution**, the Electoral Commission was obliged to review the division of Uganda into Constituencies and re-demarcate the Constituencies but never did so basically abrogating **Article 2(1) of the Constitution**.

As a result of this abrogation the population of the various Constituencies is nowhere near the population quota as required by **Article 63(3) of the Constitution**.

The Petitioner contended that the Electoral Commission should have reviewed the division of Uganda into Constituencies basing itself on **Article 294 of the Constitution**.

The Petitioner submitted that **Article 63 of the Constitution** prescribes the procedure to be followed when demarcating Constituencies in Uganda and the procedure is as follows;

(i) Parliament prescribes the number of Constituencies to exist in Uganda.

(ii) The Electoral Commission demarcates the boundaries of the Constituencies.

(iii) Within one year of the publication of the results of a population census the Electoral Commission reviews the division of Uganda into Constituencies to ensure that the requirements of Article 63 (3), that the population of each constituency is as nearly as possible equal to the population quota are complied with and if not;

(iv) The Electoral Commission re-demarcated the Constituencies.

5 The Petitioner submitted that the Uganda Bureau of Statistics conducted a census of the inhabitants of Uganda in 2002 and 2014 and published results.

Pursuant to Article 63(5), the Electoral Commission was obliged to review the division of Uganda into Constituencies and re-demarcate the
10 Constituencies but did not do so thus abrogating the Constitution.

As a result of this abrogation the population of various Constituencies is nowhere near the population quota as required by Article 63(3) of the Constitution and some Constituencies have a population as little as one twentieth of others.

15 According to the Petitioner under Article 63(1) of the Constitution, Parliament's prescribing of the number of Constituencies is subject to the Electoral Commission having reviewed the demarcation of Uganda into Constituencies as provided under **Article 63(2) and 63(3) of the Constitution**. The Petitioner contended that as long as the Electoral
20 Commission had not reviewed the Division of Uganda into Constituencies, Parliament's hands were tied and the number of Constituencies remained sealed at those that existed before coming into force of the Constitutional Amendment Act, 2005.

The Petitioner submitted that the mandate of Parliament to create
25 Constituencies is subject to **Article 63(2) and 63(3) of the Constitution**, by implication therefore Parliament cannot create Constituencies without being prompted by the Electoral Commission.

Counsel for the first respondent submitted that the first respondent's mandate of demarcation and/or redemarcation of Constituencies only
30 arises when the Parliament has prescribed the number of Constituencies.

Counsel submitted that the Petition is premised on misconception of the provisions of the Constitution.

Counsel for the second respondent submitted that the Electoral
35 Commission did not abrogate its duty to review the demarcation of Uganda into Constituencies as it can only demarcate Constituencies that Parliament has prescribed and demarcation follows prescription by Parliament. Counsel contended that Article 63(1) of the Constitution gives Parliament exclusive power to prescribe Constituencies and

5 Parliament need not be prompted by the Electoral Commission. Parliament's duty according to Counsel is independent of the 1st respondents' function of demarcation of Constituencies.

According to Counsel for the second respondent, it is inconceivable to carry out a review envisaged under **Article 63(5) and (6) of the**
10 **Constitution** unless the prescription of Constituencies envisaged under **Article 63(1) of the Constitution** is made by Parliament.

DETERMINATION BY COURT

15 I have carefully considered the submissions of the Petitioner, and those by Counsel for the 1st and 2nd respondents together with the accompanying affidavit evidence.

I have also considered the authorities supplied to Court by both parties and others that I find relevant and will proceed to resolve the issue.

20 The issue in contention in respect of ground one is in the main premises on the Provisions of **Article 63 of the Constitution** and I find it appropriate to reproduce the whole Article hereunder for ease of reference:

"63 Constituencies

25 (1) Subject to clauses (2) and (3) of this article, Uganda shall be divided into as many constituencies for the purpose of election of members of Parliament as Parliament may prescribe; and each constituency shall be represented by one member of Parliament.

30 (2) When demarcating constituencies for the purposes of clause (1) of this article, the Electoral Commission shall ensure that each county, as approved by Parliament, has at least one member of Parliament; except that no constituency shall fall within more than one county.

35 (3) Subject to clause (2) of this article, the boundary of a constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota.

5 (4) For the purposes of clause (3) of this article, the number of inhabitants of a constituency may be greater or less than the population quota in order to take account of means of communication, geographical features, density of population, area and boundaries of districts.

10 (5) Subject to clause (1) of this article, the Commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result redemarcate the constituencies.

15 (6) Where the boundary of a constituency established under this article is altered as a result of a review, the alteration shall come into effect upon the next dissolution of Parliament.

20 (7) For the purposes of this article, "population quota" means the number obtained by dividing the number of inhabitants of Uganda by the number of constituencies into which Uganda is to be divided under this article".

I find it appropriate to state some of the basic principles of Constitutional interpretation that may be relevant and applicable in resolution of the instant Petition on this ground: -

25 1. The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See: **Article 2(2) of the Constitution**. See also The Supreme Court in **Presidential Election Petition No. 2 of 2006 (Rtd) Dr. Col. Kiiza Besigye vs Y.K Museveni** and Supreme Court **Constitutional Appeal No. 2 of 2006, Brigadier Henry Tumukunde vs The Attorney General and Another**.

35 2. In determining the Constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See **Attorney General vs Salvatori Abuki Constitutional Appeal No. 1/1998(SC)**.

5 3. The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See **P.K Ssemogerere and Another vs Attorney General Constitutional Appeal No. 1/2002 (SC)** and **The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010].EA13.**

10 4. A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible.

15 See **Okello Okello John Livingstone and 6 others vs The Attorney General and another, Constitutional Petition No. 1 of 2005(CA); Kabagambe Asol and 2 others vs The Electoral Commission and Dr. Kiiza Besigye, Constitutional Petition No. 1 of 2006 (CA)** and **South Dakota vs South Carolina 192, U.S.A 268, 1940.**

20 5. Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

25 6. Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it.

30 See **The Attorney General vs Major General David Tinyefuza (Supra).**

35 7. The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in Constitutional interpretation.

40 See **Okello Okello John Livingstone and 6 others vs the Attorney General and Another, Constitutional Petition No. 4 of 2005 (CA).**

5 8. The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

10 Bearing in mind the above principles of Constitutional interpretation among others, I shall now proceed to consider submissions of Counsel for all the parties, the evidence on record, the Law and relate them to the issue in ground one.

15 The Constitutional interpretation of the Provisions of Article 63 of the Constitution was handled by this Court in **Constitutional Petition No. 20 of 2018, Eddie Kwizera vs The Attorney General** where Madrama JJA/ JJCC stated:-

20 ***“Article 63 (1) of the Constitution clearly stipulates that Uganda shall be divided into as many Constituencies for the purposes of election of members of Parliament as Parliament may prescribe and that each constituency shall be represented by one member of Parliament.***

25 ***A literal reading of Article 63 (2) clearly and unequivocally gives direction to the Electoral Commission when demarcating Constituencies for purposes of the prescription by Parliament under clause 1 of Article 63 of the Constitution. It presupposes that Parliament has prescribed the number of Constituencies into which Uganda shall be divided for purposes of election of members of Parliament.***

30 ***Demarcation of Constituencies is done after the prescription of the number of Constituencies into which Uganda shall be divided by Parliament. Prima facie, there is no conflict between Article 63(1) and Article 63(2) of the Constitution which each confer distinct and different roles on Parliament and on the second respondent respectively. The two distinct roles of the prescription of the number of Constituencies and the demarcation of Constituencies should not be mixed up. Clause 1 of Article 63 deals with the power of Parliament to prescribe the number of Constituencies for purposes of***
35 ***election of members of Parliament as Parliament may***
40

5 *prescribe, Clause 2 of the Article 63 deals with demarcation*
of the Constituencies which have been prescribed by
Parliament under clause 1 of Article 63. The rest of Article
63 of the Constitution deals with the considerations that the
Electoral Commission shall have regard to in demarcating
10 *boundaries of Constituencies.*

The Constitution clearly under clause 1 of Article 63 provides
that Parliament may prescribe the number of Constituencies
which shall each be represented by one member of
Parliament. Clause 2 Article 63 deals with demarcation of
15 *Constituencies for purposes of clause 1 of Article 63. It can*
be concluded without much ado that clause 1 of Article 63 of
the Constitution gives powers to Parliament prescribe the
number of Constituencies into which Uganda shall be
divided. On the other hand, clause 2 of Article 63 gives power
20 *to the second respondent to demarcate the boundaries of*
Constituencies. Demarcation of boundaries of Constituencies
is therefore a different thing from the prescription of the
number of Constituencies."

25 This Court in ***Eddie Kwizera vs the Attorney General*** (*Supra*) above
quoted stated the law in interpretation of Article 63 that provides
guidance in the resolution of the issue in ground one of the instant
Constitutional Petition.

30 The following are important legal principles that the Court stated: -

(1)**Article 63(1)**, gives power to Parliament to prescribe the number
of Constituencies into which Uganda shall be divided for purposes
of Election of Members of Parliament. Each Constituency shall be
35 represented by one Member of Parliament.

(2) Demarcation of Constituencies is done after the prescription of the
number of Constituencies into which Uganda shall have been
divided by Parliament.

40 (3)**Article 63(2)** gives power to the Electoral Commission to
demarcate the boundaries of Constituencies which have been

5 prescribed by Parliament under **clause 1 of Article 63 of the Constitution**. Each County shall be represented by one member of Parliament and no Constituencies shall fall in more than one County.

10 In my view, following this Court's decision in **Eddie Kwizera vs The Attorney General** (*Supra*), Parliament alone has a distinct role of prescribing the Constituencies and when that is done then the duty of the Electoral Commission to demarcate Constituencies follows.

15 I do not agree with the Petitioners submission that Parliament has to be prompted by the Electoral Commission in order to prescribe Constituencies.

The power of Parliament to prescribe Constituencies is independent and not limited or dependant on any action by the Electoral Commission.

20 The demarcation of Constituencies by the Electoral Commission has to be in accordance with;

Article 63(2)

25 **"When demarcating constituencies for the purposes of clause (1) of this article, the Electoral Commission shall ensure that each county, as approved by Parliament, has at least one member of Parliament; except that no constituency shall fall within more than one county."**

30 See the underlined. The counties have to be approved by Parliament. This Article has got to be read together with **Article 63(5) of the Constitution**. The Article provides: -

(5) "Subject to clause (1) of this article, the commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result redemarcate the constituencies."

35 I wish to point out the underlined words under **Article 63(5);**

"Subject to clause (1) of this Article."

What is stated in **Article 63 (5)** is subject to provisions in **Article 63(1)**.



5 The mandate of the Electoral Commission under **Article 63(5) of the Constitution** is subject to the Provisions of Article 63(1). For purposes of election of Members of Parliament, Parliament has to prescribe the number of Constituencies.

10 The Electoral Commission can only demarcate Constituencies that Parliament has prescribed. It cannot increase or reduce the number of Constituencies. That is the mandate of Parliament.

15 The Commission, however, has a role under **Article 63 (5)** to review the division of Uganda into Constituencies within twelve months after the publication of results of census of the population and may as a result redemarcate the Constituencies.

20 The Petitioners contention is that after a census of the population was conducted in 2002 and 2014 and the results were gazetted, the Electoral Commission did not play its role under **Article 63(5) of the Constitution**.

25 The duty of the Electoral Commission under **Article 63(5) of the Constitution** does not require Parliament to prescribe Constituencies afresh. The review and resultant re-demarcation would be conducted even without a fresh prescription of Constituencies by Parliament. The population changes may have affected the quotes within existing Constituencies. There is no evidence that the Electoral Commission acted as mandated by **Article 63(5) of the Constitution**.

30 The issue before Court in the instant Petition is whether the Electoral Commission played its role as commanded by **Article 63(5) of the Constitution**. I agree with Lady Justice Bamugemereire that the Electoral Commission did not play its role.

35 For the reasons stated above and the ones expressed in Lady Justice Bamugemereire's Judgment, I agree that ground one of the Petition should succeed.

Costs

40 I agree with my learned sister that each party bears its costs. The practice of this Court has been for parties to bear the costs of litigation in cases similar to this one.

5 See (1) *Constitutional Petition No. 40 of 2013, Advocates for Natural Resources governance and development Irumba Asuman and Peter Magelan vs Attorney General and UNRA* and (2) *Supreme Court Constitutional Appeal No. 01 of 2008.Kwizera Eddie vss Attorney General* where court held: -

10
15 “As to costs, a practice has evolved in this and other courts that parties who seek to enforce in courts of law fundamental human rights enshrined in the bill of rights in this country’s Constitution should not seek legal costs. This is a good practice that was adopted in this very petition.

20 The rationale for this is that no one should be seen to be profiting from a matter in which he or she has no interest beyond that of other members of the public. Secondly, in every constitutional petition or reference, the Attorney General is a statutory respondent, representing a Government elected by the people. Whenever costs are awarded against the Attorney
25 General they are paid out of public funds. A person who brings a public interest action would then be requiring the same public to pay him or her costs. In the event that a public interest petitioner or litigant is unsuccessful and is condemned to pay costs, that too
30 would be unfair. One individual would have to pay costs in a matter that he or she has no interest beyond that of the other members of the public. This would create a

5 **chilling effect and stifle the enforcement of rights and
the growth of constitutionalism.”**

In the instant Petition the Petitioner has not succeeded on a number of the grounds he raised.

10 I find this Petition to be one in which we have no reason to award costs to the Petitioner contrary to established practise of this Court.

Since Kakuru, Madrama and Mulyagonja, JJA/JJCC also agree, this Petition succeeds in part and the declarations of this Court are as contained in Justice Bamugemereire’s Judgment.

15 The parties to this Petition will each bear their costs.

Dated at Kampala this18th..... day of ...March..... 2022.

20



Richard Buteera
DEPUTY CHIEF JUSTICE

5 THE REPUBLIC OF UGANDA,
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 13 OF 2019

BETWEEN

- 10 1. DR. KAMBA SAMUEL BALEKE}
2. MR. LUTAAYA SONKO GERALD}
3. MR MUGANDA FAISAL} PETITIONERS

AND

1. THE ELECTORAL COMMISSION}
2. THE ATTORNEY GENERAL}RESPONDENTS

15 CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

20 HON. LADY JUSTICE IRENE ESTHER MULAYGONJA, JCC

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

25 I have read in draft the judgment of my learned sister Hon. Lady Justice Catherine Bamugemereire, JCC and I agree with her that the petition be partially allowed. For purposes of amplification and emphasis, I would like to express myself on a few issues.

I agree with the principles for interpretation of constitutions and statutes as set out in the judgment of my learned sister. I also agree with the authorities on the issue of the dilution of votes. My learned sister has also

5 set out the facts and issues and I need not repeat them here except for purposes of adding a few words.

The first issue is **whether the failure of the Electoral Commission to review and demarcate Uganda into constituencies after the publication of the results of the 2002 and 2014 census was an abrogation and violation of certain Articles of the Constitution and therefore unconstitutional.**
10

My learned sister Hon. Lady Justice Catherine Bamugemereire, JCC answered this issue in the affirmative and I agree with the conclusion on the issue that it is unconstitutional.

I would in addition, like to emphasise, even if it is a repetition, that the
15 essence of Article 63 (1) and 63 (5) is that Parliament prescribes what the number of constituencies in Uganda should be. This is a numerical prescription which makes no reference to names of constituencies and it can be analysed by considering the ramifications of Article 63 of the Constitution, on a step by step basis. Article 63 of the Constitution provides
20 that:

63. Constituencies.

(1) Subject to clauses (2) and (3) of this Article, Uganda shall be divided into as many constituencies for the purpose of election of members of Parliament as Parliament may prescribe; and each constituency shall be represented by one
25 member of Parliament.

(2) When demarcating constituencies for the purposes of clause (1) of this Article, the Electoral Commission shall ensure that each county, as approved by Parliament, has at least one member of Parliament; except that no constituency shall fall within more than one county.

30 (3) Subject to clause (2) of this Article, the boundary of a constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota.

(4) For the purposes of clause (3) of this Article, the number of inhabitants of a constituency may be greater or less than the population quota in order to take

5 account of means of communication, geographical features, density of population,
area and boundaries of districts.

(5) Subject to clause (1) of this Article, the commission shall review the division
of Uganda into constituencies within twelve months after the publication of
10 results of a census of the population of Uganda and may as a result redemarcate
the constituencies.

(6) Where the boundary of a constituency established under this Article is altered
as a result of a review, the alteration shall come into effect upon the next
dissolution of Parliament.

(7) For the purposes of this Article, "population quota" means the number
15 obtained by dividing the number of inhabitants of Uganda by the number of
constituencies into which Uganda is to be divided under this Article.

Starting with Article 63 (1) of the Constitution, it is expressly stated therein
that Article 63 (1) is subject to Articles 63 (2) and 63 (3) of the Constitution.
Save for that, Article 63 (1) provides that Uganda shall be divided into as
20 many constituencies for election purposes as Parliament may prescribe.
Parliament therefore determines the number of constituencies into which
Uganda shall be divided. Secondly, each constituency shall be represented
by one member of Parliament.

The demarcation of constituencies has to proceed on the principles set out
25 under Article 63 of the Constitution. Article 63 (2) of the Constitution
recognises the demarcation of constituencies by the Electoral Commission
for purposes of the numerical division of Uganda into constituencies by
Parliament and it places certain duties on the Electoral Commission in
performing its function of demarcation of constituencies.

30 Firstly, the Electoral Commission has to ensure that each "County"
approved by Parliament shall have at least one member of Parliament.

Secondly, no constituency shall fall within more than one county.

From the above, it can be discerned that the unit referred to as
"Constituency" and the unit called "County" clearly mean different things.

- 5 From these premises, the question is how a county is approved? Does it fall under the local government system?

The other duty imposed on the Electoral Commission in demarcating boundaries of constituencies is found under Article 63 (3) of the Constitution which states that the boundaries of a constituency shall be such that its inhabitants are as nearly as possible equal to the population quota. This leads to the question of what a population quota is.

A population quota is defined under Article 63 (7) of the Constitution to mean the inhabitants of Uganda divided by the number of constituencies prescribed by Parliament under Article 63 (1) of the Constitution.

- 15 Because the population quota shall as nearly as possible be equal for each constituency, some minor variations are acceptable. This is envisaged under Article 63 (4) of the Constitution which provides that the inhabitants of the constituency may be greater or lesser than the population quota to take into account, communication, geographical features, density of population areas and boundaries of districts.

The issue of boundaries of the districts and the other considerations introduce a complex problem in demarcation of boundaries for the Electoral Commission. Firstly, a district is a local government unit established for purposes of local governance. Article 177 (1) of the Constitution provides that the districts shall be those divided into districts referred to in Article 5 (2) of the Constitution. Article 5 (2) of the Constitution provides *inter alia* that Uganda shall be divided into districts as specified in the First Schedule to the Constitution and such other districts as are established under the Constitution. It follows that additional or more districts may be established under Article 179 which allows Parliament to alter boundaries of districts and to create new districts. The First Schedule to the Constitution has 75 districts. Since the promulgation of the Constitution, the number of districts has increased.

- 35 Further, a county is an administrative unit within a district and this was considered in **Eddie Kwizera v The Attorney General and the Electoral**

5 **Commission in Constitutional Petition No. 20 of 2018.** In that petition, the constitutional court held that a county is an administrative unit under section 45 (1) (a) (i) of the Local Government Act because under that provision a unit in the rural area includes a county which consists of sub-counties. The Electoral Commission does not demarcate boundaries of
10 counties and therefore a county is an administrative unit while a constituency is created under Article 63 (1) of the Constitution and demarcated by the Electoral Commission for purposes of holding elections only.

With the above context in perspective, the obligation of the Electoral
15 Commission to review boundaries after demarcation should be understood as having the considerations stated above. Specifically, a population increase or decrease has different impacts on different constituencies based on a host of factors which may include:

- the quantum of births and deaths for the period considered in the
20 census,
- migration on account of socio-economic factors. The socio economic factors may be diverse in nature and there is no need to consider or enumerate them specifically.

In the premises, re-demarcation of constituencies pursuant to a population
25 census is supposed to be done within 12 months after the population census. It ensures that each constituency has approximately the same population quota as defined in Article 63 (7) of the Constitution. Following the model of the constituencies created by Parliament, any population quota in a constituency is represented by one member of Parliament. Hypothetically,
30 if Uganda has a population of about 40,000,000 inhabitants, and Parliament prescribes 219 constituencies into which Uganda shall be divided for purposes of elections, it is implied that each constituency would have approximately 182,648 inhabitants.

The stipulation that each constituency shall have one member of Parliament
35 has other ramifications in terms of representation by women members of

5 Parliament that is based on another criterion. In outline, a constituency should not fall within more than one county. Hypothetically therefore a county can have more than one constituency. As to what a county is in an administrative unit in terms of how it fares on the population quota distribution is a fact to be established by the Electoral Commission. Further
10 it would be material to establish how many counties are represented in each district. Further it would be relevant to establish the ramifications on the population quota formula.

Review of the demarcation of constituencies pursuant to a census is meant to reflect an increase or decrease in population and the demographic
15 dynamics and of the distribution of the population in the territory of Uganda. The review should ensure that a representative quota of inhabitants is present in each constituency and are each represented by one MP. This ensures that each vote of a voter in election of an MP carries the same or relatively similar weight.

20 Hypothetically again if one constituency has 1,000,000 inhabitants while another constituency has 100,000 inhabitants, it implies that in the elections, a vote of one voter in the 1,000,000 inhabitant's constituency is 1/10th of the weight of the voter in the 100,000 inhabitant's constituency.

A re-demarcation of constituencies after a census will ensure parity
25 between voters so that every inhabitant is equally represented quantitatively by an MPs voted in Parliament in terms of the number of voters in each constituency who are eligible to vote for an MP.

In the premises, I agree that it is unconstitutional under Article 63 (5) of the Constitution not to review the demarcation of Uganda into constituencies
30 within 12 months of a population census.

On the 2nd issue of whether resolutions by Parliament to maintain one-woman member of Parliament for each district violates the Constitution, I agree that the Constitutional provisions have to be read in harmony. Article 32 of the Constitution allows the state to take affirmative action in favour of
35 groups marginalised on the basis of gender, age, disability or any other

5 reason created by history, tradition or custom for purposes of redressing
the imbalances which exist against them. Further, Article 33 (5) of the
Constitution provides as follows:

32. Rights of women ...

10 (5) Without prejudice to Article 32 of this Constitution, women shall have the right
to affirmative action for the purpose of redressing the imbalances created by
history, tradition or custom.

In addition, Article 78 which deals with the composition of Parliament
ensures that Parliament shall consist *inter alia* of members directly elected
to represent constituencies and a woman representative for every district.

15 It provides that:

78. Composition of Parliament.

(1) Parliament shall consist of—

(a) members directly elected to represent constituencies;

(b) one-woman representative for every district;

20 (c) such numbers of representatives of the army, youth, workers, persons with
disabilities and other groups as Parliament may determine; and

(d) the Vice President and Ministers, who, if not already elected members of
Parliament, shall be ex officio members of Parliament without the right to vote
on any issue requiring a vote in Parliament.

25 (2) Upon the expiration of a period of ten years after the commencement of this
Constitution and thereafter, every five years, Parliament shall review the
representation under clause (1)(b) and (c) of this Article for the purposes of
retaining, increasing or abolishing any such representation and any other matter
incidental to it.

30 (3) The representatives referred to in clause (1)(a) of this Article shall be elected
on the basis of universal adult suffrage and by secret ballot.

(4) Parliament shall, by law, prescribe the procedure for elections of
representatives referred to in clause (1)(b) and (c) of this Article.

5 Clearly when put in context, Parliament consists of persons who are directly elected to represent constituencies. Following the resolution of the immediately foregoing issue, a constituency created and demarcated as stipulated in Article 63 of the Constitution is represented by anybody who qualifies to be a member of Parliament as stipulated by Article 80 of the
10 Constitution. This is a person who is a citizen of Uganda; is a registered voter; and has completed a minimum formal education of advance level standard or its equivalent as established by law.

The current controversy relates to the duty placed on Parliament after a period of 10 years from 8 October 1995 and thereafter after every 5 years to
15 review the representation under clause (1) (b) and (c) of Article 78. Article 78 (1) (b) of the Constitution requires that there is a woman representative for each district. This should have been reviewed within 10 years after 8th of October 1995. Thereafter, it is reviewed every 5 years for purposes of retaining, increasing or abolishing the representation and any matter
20 incidental to it.

As my learned sister put it, Parliament has consistently maintained the status quo since the promulgation of the Constitution. I wish to add that every woman representative under Article 78 (1) (b) represents a district. The exact number of districts Vis-à-vis constituencies has not been
25 represented in this petition.

However, in terms of representation of the people, so long as every district is represented by a woman, it is assumed that there is a fair representation of the people. The stipulation under Article 63 of the Constitution that every constituency shall have one member of Parliament has to be read in
30 harmony with Article 78 (1) (b) and other provisions which provide for other members of Parliament in addition to those representing constituencies.

In the premises, the women MPS to represent districts as part of the affirmative action to ensure that women are also elected in Parliament which had hitherto been dominated by men. I agree with my learned sister
35 that this ground has no merit and should be disallowed.

- 5 I agree with the judgment and have nothing more or useful to add.

Dated at Kampala the 1st day of March 2022



Christopher Madrama Izama

- 10 Justice of Constitutional Court/ Court of Appeal

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.13 OF 2019

1. DR. KAMBA SAMUEL BALEKE
2. MR. LUTAAYA SONKO GERALD
3. MR. MUGANDA FAISAL PETITIONERS

VERSUS

1. THE ELECTORAL COMMISSION
2. ATTORNEY GENERAL RESPONDENTS

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Lady Justice Catherine Bamugemereire B.K, JA/JCC.
Hon. Mr. Justice Christopher Madrama, JA/JCC
Hon. Lady Justice Irene Esther Mulyagonja, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned sister Hon. Catherine Bamugemereire, JA/JCC.

I agree with her that, this petition ought to succeed to the extent that she has set out in her Judgment.

I agree with the declarations and orders she has made. I have nothing useful to add

Dated at Kampala this 18th day of March 2021.



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

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA
CONSTITUTIONAL PETITION NO. 13 OF 2019**

BETWEEN

DR. KAMBA SAMUEL BALEKE

MR. LUTAAYA SONKO GERALD

MR MUGANDA FAISAL ::::::::::::::: PETITIONERS

AND

THE ELECTORAL COMMISSION

THE ATTORNEY GENERAL :::::::::::::::RESPONDENTS

CORAM:

HON. Justice Richard Buteera, DCJ

HON. Justice Kenneth Kakuru, JCC

HON. Justice Catherine Bamugemereire, JCC

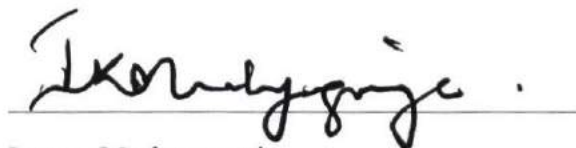
HON. Justice Christopher Madrama, JCC

HON. Justice Irene Mulyagonja, JCC

JUDGEMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my sister, Hon Justice Bamugemereire, JCC. I agree with the findings and the decision that the petition partially succeeds. I also agree with the decision that there will be no order for the costs of the petition.

Dated at Kampala this 18th day of March 2022.



Irene Mulyagonja

JUSTICE OF CONSTITUTIONAL COURT