

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM: BAMUGEMEREIRE, MUSOTA, MADRAMA, KIBEEDI, MULYAGONJA,
JJA/JJCC)

CONSTITUTIONAL PETITION NO. 15 OF 2021

10 HON. JUSTICE (RTD) DR. YOROKAMU BAMWINE} PETITIONER
VERSUS

ATTORNEY GENERAL} RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

15 This Petitioner brought this petition under Article 2 (2), Article 137(3)(a)(b)
of the Constitution of the Republic of Uganda 1995 (herein after referred to
as the "Constitution") and Rules 3(1), (2) of the Constitutional Court
(Petitions and References) Rules, SI 91/2005 in which he alleged that
sections 22 and 25 and Schedules 2 and 5 of the Administration of the
20 Judiciary Act, 2020 (AJA) are inconsistent with and contravene Articles 21
(1), 2 (1) 40 (1) (b) and 128 (7) of the Constitution for being discriminatory in
nature. The Administration of the Judiciary Act 2020 was assented to by the
President on the 19th day of June, 2020. The petition was accompanied by the
affidavit sworn by the petitioner.

25 The petitioner is a retired Principal Judge of the Republic of Uganda having
served the Judiciary from 1983 to December, 2019 in different capacities.

The petitioner averred that from the long title of the AJA, the objective of
the Act, *inter alia*, is to give effect to Chapter 8 of the Constitution which
deals with the Judiciary and provides for retirement of judicial officers
30 among others.

The petitioner contends that Sections 22 and 25 read together with the 2nd,
3rd, 4th, 5th and 6th schedule to the Administration of the Judiciary Act
contravene and are inconsistent with Articles 2(1) and 21(1) of the
Constitution of Uganda in so far as:

- 5 a. Upon retirement, while the Chief Justice and Deputy Chief Justice as administrative heads of the Judiciary get 100% of their monthly emoluments for life, the Principal Judge is not.
- 10 b. Upon retirement, while the Chief Justice and Deputy Chief Justice are entitled to a fuel and vehicle repair allowance, the Principal Judge is not.
- 15 c. Upon retirement, while the Chief Justice and Deputy Chief Justice are entitled to a consolidated allowance to cater for airtime and internet, the Principal Judge is not.
- 20 d. The petitioner contends that as administrative heads of the Judiciary under the Constitution, Chief Justice, Deputy Chief Justice and the Principal Judge are entitled to equal treatment before and under the law.

The petitioner contends that Section 25 and Schedule 5 of the Administration of the Judiciary Act, 2020 contravenes and are consistent with Articles 141(1)(a) of the Constitution in as far as:

- 25 (a) In spite of their difference in rank, status and dignity under the Constitution, a retired Principal Judge is treated at par with a retired Judge of the High Court.
- 30 (b) In spite of their hierarchical difference under the Constitution, the said impugned sections treat a retired Principal Judge at par with the retired Judge of the High court.

The petitioner further averred that Sections 25 and schedule 5 of the Administration of the Judiciary Act, 2020 contravene and are inconsistent with Article 128(7) of the Constitution in as far as the varying of the Principal Judge's monthly emoluments upon retirement to 80% the salary of a sitting

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- 5 Principal Judge in spite of the status, dignity and responsibility of his office is a disadvantage.

Further that the Constitution provides that the Chief Justice, the Deputy Chief Justice and Principal Judge shall head the Supreme Court, the Court of Appeal and the High Court respectively under Articles 133(a), 136(1)(b) and
10 Article 141 (1)(a) of the Constitution.

That the impugned sections of the Administration of the Judiciary Act, 2020 are inconsistent with Articles 133(1), 136(1) (b) and 141 (1)(a) of the Constitution to the extent that they provide for the grant of retirement benefits in an order disregarding the hierarchy of the Judiciary.

- 15 The petitioner contends that the implementation of the impugned law by the respondent if not restrained by court threatens to infringe rights and freedoms guaranteed under the Constitution of the Republic of Uganda and the petitioner being aggrieved seeks the following orders;

- 20 (i) A declaration that Section 22 and Schedule 2 of the Administration of the Judiciary Act, 2020 are unconstitutional in as far as Schedule 2 excludes the retired Principal Judge.
- (ii) A declaration that Section 25 and Schedule 5 of the
25 Administration of the Judiciary Act, 2020 are unconstitutional.
- (iii) A declaration that as administrative head of the Judiciary under the Constitution, the retired Principal Judge's retirement benefits should be aligned with retirement benefits of the Chief Justice and the Deputy Chief Justice.
- 30 (iv) An order of injunction restraining the implementation of the impugned provisions of the law by the respondent.
- (v) Costs of the petition.

- 5 The Petition is supported by the affidavit of the Petitioner deposed to on the 19th of May 2021 in which the petitioner repeats the averments in the petition that I need not regurgitate here.

The respondent opposed the petition and in the answer to the petition averred that:

- 10 The office of the Chief Justice, Deputy Chief Justice and Principal Judge are differing in duties and responsibilities.

Under Article 133 (1) (a), the Chief Justice is the head of the judiciary and is responsible for the administration and supervision of all courts in Uganda.

- 15 Under article 136 of the Constitution, the Deputy Chief Justice deputises for the Chief Justice as and when the need arises, he heads the Court of Appeal and in that capacity assists the Chief Justice in the administration of that court.

- 20 Further under article 141 (1) of the Constitution, the Principal Judge is the head of the High Court and in that capacity assists the Chief Justice in the administration of the High Court and subordinate courts.

- 25 Further Parliament debated on 2nd June 2020 and they resolved that due to the nature and seniority of the office of the Chief Justice and the Deputy Chief justice, the two are entitled to 100% of their monthly emoluments and all the benefits provided for under the second schedule of the Administration of Judiciary Act 2020.

Further, the respondent averred that the retirement benefits of the Principal Judge and a Judge of the High Court as provided for under section 25 and schedule 5 of the AJA, 2020 do not contravene and are not inconsistent with article 141 (1) and 128 (7) of the Constitution.

- 30 The respondent averred that Parliament resolved and deemed it fit that upon retirement, all judicial officers including Justices of the Supreme Court, Court of Appeal and High Court judges, Registrars and Magistrates should receive 80% of their monthly emoluments.

5 With specific reference to the sections 25 and 22 of the AJA read together with the second and fifth schedule, are not inconsistent or in contravention of articles 133 (1), 136 (1) (b) and 141 (1) (a) of the Constitution.

10 In the premises the respondent asserted that the petitioner is not entitled to the orders and declarations sought and prayed that the petition be dismissed with costs.

15 The petition is further supported by the affidavit of Adolf Mwesige the Clerk to Parliament of Uganda who deposed that he read and understood the contents of the constitutional petition number 15 of 2021 and the affidavit deposed by the Hon Justice (retired) Dr Yorokamu Bamwine to which he replied that:

20 Parliament considered the fact that the different levels of administration in the judiciary and different levels of salary depend on the positions they hold. Parliament in enacting the AJA, 2020 took into account the constitutional hierarchy of the judiciary for which he attached a copy of the Hansard dated 2nd June 2020. He deposed that Parliament in considering the hierarchy, nature and structure of the judiciary, debated and resolved that the Chief Justice and the Deputy Chief Justice receive 100% of their monthly emoluments. That Parliament resolved that all judicial officers including justices of the Supreme Court, justices of the Court of Appeal, High Court judges, Registrars and Magistrates should receive 80% of their monthly emoluments and in the premises he deposed that the impugned provisions of the AJA, 2020 are not discriminatory.

30 In further opposition to the petition, the respondent also filed the affidavit of Tumwine N. Apophia a female adult of sound mind and the Commissioner Human Resource Management in the Judiciary since 8th November 2021, and competent to swear an affidavit in that capacity. She deposed that her duties include participating in the initiation, development, implementation and review of comprehensive Human Resource policies, plans, strategies and guidelines in the areas of planning, management, analysing staff performance and career progression and making appropriate

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5 recommendations, ensuring correct interpretation and implementation of Human Resource Management policies, rules and regulations including those relating to pensions and salary, administration, labour laws and other statutes relating to Human Resource Management and any other duties assigned to her from time to time.

10 Together with lawyers from the Attorney General's Chambers, they carefully read and understood the contents of the constitutional petition and the affidavit of the petitioner to which she deposed in reply as follows:

The petitioner was appointed Principal Judge of the High Court of Uganda on 9th March 2011. The petitioner retired on 25th of December 2019 before
15 the commencement of the Administration of the Judiciary Act, 2020 according to a letter dated 8th October 2019. She deposed that the retirement benefits payable to Public Officers are commensurate with the salary at retirement and years of service. She knows that upon the petitioner's retirement, he was paid his retirement benefits as follows:

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- Gratuity of Uganda shillings 1,247,040,000/=.
 - Monthly pension of Uganda shillings 13,857,000/=
 - Housing allowance of Uganda shillings 300,000,000/=
 - Security amounting to Uganda shillings 2,400,000/=
 - Chauffeur driven new car.

25 She contends that upon the enactment of the Administration of Judiciary Act 2020, the Pensions Act, cap 286 was repealed and the benefits effective July 2020 were paid in accordance with the Administration of Judiciary Act 2020. She deposed that this means that a retired Principal Judge would receive retirement benefits as follows:

- 30
- Monthly retirement benefits equivalent to 80% of the salary payable to the sitting Principal Judge totaling to Uganda shillings 19,200,000/=.
 - Monthly medical allowance equivalent to the medical allowance payable to exiting Principal Judge totaling to Uganda shillings 500,000/=.
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- Security provided by The Government of Uganda.

5 In further support of the opposition to the petition, Apophia Tumwine
deposed that the variation of the retirement benefits of the petitioner does
not in any way disadvantage him under the Pensions Act, cap 286 that is;
the housing allowance, medical allowance, security, chauffeur driven car
were not provided for but were however paid for administratively by the
10 judiciary. She states that she knows that the Administration of the Judiciary
Act, 2020 provides for the stated benefits under the law. In the premises
she made the affidavit in opposition to the petitioner's petition.

ISSUES FOR DETERMINATION

- 15 1. Whether the petition raises any issues / questions for Constitutional
interpretation.
- 20 2. Whether sections Section 22 and section 25 read together with
schedule 2 and 5 of the Administration of the Judiciary Act, 2020 are
inconsistent with Article 2(1) & 21(1) and article 128(7) of the
Constitution.
- 25 3. Whether Section 25 and 5th schedule of the Administration of the
Judiciary Act, 2020 are inconsistent with Articles 133(1) and 141 (1)(a)
of the Constitution to the extent that they provide for the grant of
retirement benefits in an order disregarding the hierarchy of the
Judiciary.
4. Whether there are any remedies available to the parties.

30 When the petition was called for hearing, learned Counsel Mr. Edgar Tabaro
together with learned Counsel Mr. Kenneth Kipaalu appeared for the
petitioner. The respondent was represented by the learned Principal State
Attorney Mr. Jeffrey Atwiine appearing jointly with the learned Senior State
Attorney Ms. Charity Nabasa. The Parties had leave of court and addressed
35 the court in written submissions which had been filed on court record

5 whereupon the hearing of the Petition was adjourned for judgment on notice.

SUBMISSIONS OF COUNSEL FOR THE PARTIES

10 The petitioner's counsel submitted that the Petition seeks to uphold the sanctity, dignity and honour of the Constitutionally established office of the Principal Judge. He asserted that due acknowledgement and understanding ought to be given to the position, and the insurmountable responsibilities and duties entrusted and eventually executed by the occupant of the office of Principal Judge which leads to effective service delivery by the Judiciary as a whole.

15 1. Whether the petition raises any issues / questions for Constitutional interpretation.

The petitioner's counsel submitted that **under Article 137(3)** of the Constitution Any person who alleges that (a) an Act of Parliament or any other law or anything in or done under authority of any law; or (b) any act
20 or omission by any person or authority, is inconsistent with or in contravention of a provision of the constitutional, may petition the constitutional court for a declaration to that effect and for redress where appropriate.

He submitted that a cause of action that entitles the petitioner to Lodge a
25 constitutional petition under article 137 () of the Constitution was discussed in several precedents and particularly in **Baku Raphael Obudra and Another Vs. Attorney General Supreme Court Constitutional Appeal No. 1 of 2005**. Where it was held by the Supreme Court that "the petition must show on the face of it, that interpretation of a provision of the constitution is required.
30 It is not enough to allege merely that a constitutional provision has been violated. The applicant must go further to show a prima facie case, the violation as alleged and its effect before a question could be referred to the Constitutional Court." He submitted that it follows that the jurisdiction conferred upon the constitutional court under article 137 is not only to
35 ascertain whether the subject of the constitutional litigation, be it an Act of

5 Parliament or any other law or an act or omission done under the authority, is or is not in violation of the constitution, but also establish the resultant negative effect of the said violation of the particular provision of the Constitution.

10 Further, the petitioner's counsel submitted that pursuant to article 137 (3) (a) of the constitution, the petitioner has stipulated the impugned provisions of the Administration of the Judiciary Act 2020 that are inconsistent with and in violation of the highlighted provisions of the constitution but also categorically stated the resultant negative effect of the said violation namely: (a) undermining the constitutional position of the Principal Judge
15 as head of the Judiciary in the High Court of Uganda. (b) treating the retired Principal Judge on an equal footing, status and responsibility with a retired judge of the High Court in terms of entitlements to retirement benefits under the said law.

20 In the premises, he submitted that prima facie, the petitioner established that the impugned provisions of the Administration of the Judiciary Act, 2020 contravene specific provisions of the constitution and the effect of the said contravention to the detriment of the office of the Principal Judge thus entitling this court to hear and determine the case as a matter of constitutional interpretation.

25 **In reply to issue 1, the respondents counsel submitted that:**

The respondent submitted that under Article 137 of the Constitution the jurisdiction of this Constitutional Court is limited to interpretation of the Constitution under article 137 (1) thereof. The respondent contends that the petition does not raise any issues for Constitutional interpretation and this
30 Court has no jurisdiction to determine the petition (See **Ismail Serugo Vs Kampala City Council and The Attorney General; Supreme Court Constitutional Appeal No. 2 of 1998.**

Further, that the Petition of the Petitioner does not disclose any question as to interpretation of any provision of the Constitution. The respondents
35 counsel further referred to **Mbabali Jude Vs. Edward Kiwanuka Sekandi;**

5 **Constitutional Petition No. 28 of 2012** where Justice Kenneth Kakuru cited with approval the decision in **Serugo vs KCC and Attorney General** (Supra) per Kanyeihamba JSC (as then he was) who cited **Attorney General versus Major General David Tinyenfuza** for the holding that:

10 *"Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court had no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The Judgment of the majority in that case, is that to be clothed with*
15 *jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. "*

Hon. Justice Kenneth Kakuru further observed that Justice Kanyeihamba made a very important and pertinent clarification that, not every violation of
20 the Constitution or a validity of a claim must end up at the Constitutional Court.

The Respondent submitted that it is not enough for a Petitioner to demonstrate that the Constitution is applicable or needs to be enforced under Article 50 of the Constitution but that there must be a question for
25 interpretation by this Court for the court to have jurisdiction.

The Petitioner seeks declarations that section 25 and schedule 5 of the Administration Act, 2020 are unconstitutional, a declaration that as an administrative head of the Judiciary under the Constitution, the retired Principal Judge's retirement benefits should be aligned with the retirement
30 benefits of the Chief Justice and Deputy Chief Justice and an order of injunction restraining the implementation of the impugned provisions of the law by the Respondent and costs.

The respondent's counsel relied on **Mbabaali Jude-vs- Edward Ssekandi Constitutional Petition No. 0028 of 2012**, where Kenneth Kakuru, JCC cited
35 with the Supreme Court decision in **Attorney General Vs. Major General**

5 **David Tinyefuuza, and Ismail Serugo Vs. Kampala City Council and Attorney General**, for the proposition 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."* Further that *"not every violation of the Constitution or a*
10 *validity of a claim (sic) must end up at the Constitutional Court"*

Kakuru JCC held that on the issue of the allegation that the acts of the petitioner were contrary to the Leadership Code Act and the Parliamentary Elections Act, *"all laws in this Country emanate from the Constitution,"* and as such, *"violation of any law by any act or omission directly or by*
15 *implication is also a violation of the Constitution."* The solution proposed in case of such a violation *"must be addressed to and settled by an appropriate court or tribunal and not by this court, unless there is an issue for Constitutional interpretation."*

The respondent's counsel submitted that the allegation of the petitioner is
20 that there was a variation of his retirement benefits under the Administration of Judiciary Act but the declarations and orders sought by the Petitioner cannot be granted unless and until the issues of fact complained of and denied by the Respondent have been proved and as such, ought to be placed before a court with competent jurisdiction to determine
25 whether, indeed, there was a variance between the Pensions Act and the Administration of Judiciary Act as alleged by the Petitioner.

The Respondent submitted that it is a trite principal of law that every statutory provision is presumed Constitutional and consequently a citizen challenging the Constitutionality of a statutory provision has the burden to
30 prove its unconstitutionality. Where a petitioner challenges discrimination on the basis of a ground not specifically mentioned in the provisions prohibiting discrimination, the complainant has the burden of proving that the ground in issue has the potential to impair the human dignity of the group "discriminated "against or affect them seriously in a manner
35 comparable to that of people discriminated against on the basis of grounds specifically mentioned in the law (See **Christopher Martin Madrama Izama**

5 **-vs- Attorney General, Constitutional Appeal No. 01 of 2016** and Judgment of Prof Tibatemwa -Ekirikunbinza at page 12). The Respondent asserts that the Petitioner has not discharged the stated burden of proof.

10 In conclusion the respondent submitted that the petition does not raise any question for interpretation of the Constitution and should be dismissed for want of jurisdiction of this court.

In rejoinder the petitioner's counsel submitted that:

15 The petitioner re-iterated earlier submissions and again relied on Article 137 (3) of the Constitution. He submitted that Mulenga JSC in **Ismail Serugo Vs Kampala City Council and Attorney General Constitutional Appeal No. 02 of 1998** held that "*A petition brought under this provision, in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of, and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission, and prays for a declaration to that effect*". Further in **Uganda Law Society Vs Attorney General Constitutional Petition, no. 52 of 2017**, the Constitutional Court observed that "A petition therefore discloses a cause of action as long as it has pleaded certain allegations that, if true, would entitle the petitioner to relief from the Court".

25 The word interpretation was considered in **Mbabali Jude vs. Edward Sekandi Constitutional Petition No. 28 of 2012** wherein Court found that; *Interpretation of the Constitution is the ascertaining of the meaning of specific Constitutional provisions and how they should be applied in a particular context*. He submitted that meanings are assigned to words of the Constitution so as to enable legal decisions to be made by the court vested with competent jurisdiction to interpret the Constitution to determine whether or not the matter before it is in compliance with or consistent with the Constitution. That interpretation of the Constitution also embraces the term "construction" that is inferring the meaning of the provision(s) of the Constitution from a broader set of evidence, such as considering the whole structure of the Constitution as well as its legislative

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5 history. Counsel further referred to **Alenyo vs. AG Constitutional Petition No. 5 of 2002** where court noted that: "The Constitution does not define the word "interpretation". However, Article 137(3) gives a clear indication of what the word means The respondent's counsel submitted that the
10 allegations pleaded if in conformity with Article 137(3), give rise to the interpretation of the Constitution and the Court has jurisdiction to entertain them.

The Respondent's counsel relied on **Uganda Law Society Vs Attorney General (supra)** which cited with approval **Trop Vs Dulles 356 86 (1958)** where court observed that,

15 *"We are both bound to defend the Constitution. This obligation requires that congressional enactments be Judged by the standards of the Constitution If we do not, the words of the Constitution become little more than good advice.*

*When it appears that an Act of Congress conflicts with one of those
20 provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate a challenged legislation. We must apply these limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of
25 Constitutional adjudication".*

In the premises, counsel submitted that the petition discloses questions for Constitutional interpretation under Article 137(3) of the Constitution and it is the paramount duty of this Court to consider this Petition and deal with all the impugned provisions which are contrary to the supreme law of the
30 land. Counsel further submitted that upon finding that the impugned provisions are inconsistent with or contravene constitutional provisions as alleged, the court has jurisdiction to grant the appropriate redress (See **Attorney General vs. Major General David Tinyefunza and Ismail Serugo v Kampala City Council and Attorney General** where the court held *inter alia*
35 that: *It follows therefore, that it is immaterial that the Appellant seeks the*

5 *nature of redress that he indeed prays to be granted by this Honourable Court because the Constitutional Court, pursuant to Art 137(3) and (4) is clothed with jurisdiction to grant the said remedies and or any other order of redress when exercising its powers of Constitutional interpretation under Art 137 (l)".*

10 The Petitioner's counsel further submitted that the case of **Mbabali Jude vs. Edward Sekandi Constitutional Petition No. 23 of 2012** is distinguishable from the petition before court because in that petition, the petitioner set out acts that the respondent is stated to have carried out during the campaigns for Parliament in Bukoto Central Constituency preceding the election of
15 18.02.2011, which acts, according to the petitioner, were contrary to the Constitution, the Parliamentary Elections Act and the Leadership Code Act. The petitioner on the basis of those acts prayed for the reliefs. The court found that the facts did not disclose any question for Constitutional interpretation and dismissed the petition. On the other hand, the petitioner
20 set out the Articles of the Constitution sought for interpretation and also highlighted the issues for determination by this Court.

It was submitted that the Petitioner's case is rightly before this honorable Court for Constitutional interpretation and Court ought to exercise its jurisdiction as bestowed upon it pursuant to Article 137 (3) and (4) of the
25 Constitution.

ISSUE 2

Whether sections Section 22 and section 25 read together with schedule 2 and 5 of the Administration of the Judiciary Act, 2020 are inconsistent with Article 2(1) & 21(1) and article 128(7) of the Constitution

30 The petitioner's counsel submitted that to resolve the second issue, it was necessary determine the position of the Principal Judge within the hierarchy in the judiciary in accordance with the Constitution. Further, petitioner's counsel submitted that it is a historical fact that after the collapse of the East African Community (EAC), the government with the dual
35 from the Court of Appeal for eastern Africa and created a national Court of

5 Appeal. In 1980, the government made the chief justice the High Court of
Uganda only and appointed a separate president of the Court of Appeal.
Secondly it is a historical fact that the problems in the administration of the
judiciary stemmed primarily from the anomalous position of the Chief
Justice who was constitutionally restricted to be head of an inferior court.
10 The petitioner submitted that to contain the problems in the administration
of the judiciary, the government of Uganda introduced the Constitutional
(Amendment) Act, 1987 and the Judicature Act, (Amendment), 1987 which
was passed into law in August 1987.

In the amendments, the Court of Appeal renamed the Supreme Court of
15 Uganda and the chief justice became the head of the Supreme Court and the
chief administrator of the judiciary. New positions were created namely the
position of the Deputy Chief Justice of the Supreme Court and the position
of the Principal Judge, who became the head of the High Court. In 1995 the
Constitution placed the administration of the courts of judicature in a
20 tripartite arrangement headed by the Chief Justice, deputy chief justice and
the Principal Judge as regards the Supreme Court, the Court of
Appeal/Constitutional Court and the High Court respectively. Out of these
positions, the Principal Judge has the widest constituency in that he/she is
the superintendent of the subordinate courts as well. The petitioner's
25 counsel submitted that since 1995, the emoluments of the offices have
always been determined together. In 2017, when the Principal Judge was
left out of the tripartite arrangement, the government of Uganda through
the president was drawn to the omission and it was included and paid
before that of other justices and judges.

30 The petitioner's counsel submitted that Parliament in the enactment of the
Administration of Judiciary Act, carried the apparent error forward and it is
inconsistent with the 1995 Constitution in as far as the Principal Judge
belonged to Schedule 2 not Schedule 5 of the Act.

The petitioner's counsel submitted that sections 22 section 25 read in
35 conjunction with Schedule 2 and 5 of the Administration of the Judiciary Act,
2020 are inconsistent with article 2 (1), 21 (1) and 128 (7) of the Constitution

5 in as far as there are discriminatory against the Principal Judge, who, like the Chief Justice and Deputy Chief Justice, is equally an administrative head of the judiciary in the High Court pursuant to article 141 (1) (a) of the Constitution.

10 The petitioner submitted that Section 25 and Schedule 5, does not prescribe fuel and vehicle repairs allowance and /or an airtime and internet allowance; yet the same is allocated to the Chief Justice and the Deputy Chief Justice.

15 The Petitioner contends that **Articles 133(1) (a), 136 (1) (b) and 141(1)(a)** of the Constitution envisage an apex structure in the administration of the Judiciary with the highest persons in the hierarchy bestowed with the mandate and authority to run the Judiciary. These are; Chief Justice, Deputy Chief Justice and the Principal Judge.

20 That the above provisions envisaged a structure where the Deputy Chief Justice and Principal Judge work hand-in-hand in their positions and capacity to assist the Chief Justice in the efficient administration of the judicial functions in the country without displacing the Constitutionally stipulated position of the Principal Judge as "the head" of the High Court.

25 The Petitioner's Counsel submitted that one of the fundamental principles of Constitutional interpretation as stated in **Attorney General vs. David Tinyefuza; Supreme Court Constitutional Appeal No. 1 of 1997** is that; "words must be given their primary, plain, ordinary or natural meaning where they are clear and unambiguous. The language used must be construed in its natural and ordinary sense." He contended that the ordinary and plain meaning of the words used in Art 141 (1) (a) and 136 (1) (b)
30 envisaged a position where the Principal Judge, is within the apex structure of the Judiciary with the Chief Justice at the top, with the Principal Judge in charge of the High Court of Uganda on one hand and the Deputy Chief Justice on the other side of the seesaw so as to balance the flow of authority and accountability within the Judiciary.

5 Under Art 141 (1) (a) of the Constitution, the Principal Judge is the head of
and in command the High Court and help the Chief Justice in the
administration of the High Court and Magistrates Courts. The petitioner's
counsel submitted that the import of the of the Volvo Constitution is that the
Principal Judge holds the highest level of authority in the judiciary the High
10 Court and in that capacity help to the Chief Justice to supervise and to run
the affairs of the High Court and magistrate's courts. This authority is
qualified by the decision and in essence the authority as the head of the High
Court can only be taken away upon amendment of the said provision of the
Constitution and not according to the whims of the Chief Justice or any other
15 authority whatsoever.

For comparative analysis, the petitioner's counsel submitted that he
considered the position in other jurisdictions as stated below where the
said office of the Principal Judge or its equivalent is established in the
respective Constitutional instrument which is silent on the functions of the
20 said office and or its position in the Judiciary structure. In such a scenario,
the natural and resultant effect is that the framers of the said Constitutional
documents did not intend the occupant of the said position to exercise any
administrative authority and functions beyond being and having the title of
the President and or Principal Judge of the High Court.

25 Counsel submitted that **Article 161 (2) of the Constitution of the Republic of
Kenya and Act 108 of 1996 and S. 165(5) of the Constitution of the Republic
of South Africa** are distinguishable from the Uganda position.

Article 161 (2) of the Constitution of the Republic of Kenya establishes the
office of the Chief Justice as the head of the judiciary, The deputy Chief
30 Justice as the deputy head of the Judiciary and the Chief Registrar as the
Chief Accounting Officer of the Judiciary. Further, article 163 (1) stipulates
that the Supreme Court of Kenya comprise of the Chief Justice and Deputy
Chief Justice as the president and vice president of the Supreme Court of
Kenya. Article 165 establishes the High Court and goes further in article 165
35 (2) to provide that there shall be a Principal Judge of the High Court shall
be elected by the High Court from among themselves.

5 On the other hand, in South Africa, the Constitution of the Republic of South Africa, Act 108 of 1996 and section 165 (5) establishes the Chief Justice as the head of the Judiciary and exercises responsibility of the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. Pursuant to section 167 (1), the Constitutional Court (which is
10 the highest court record in South Africa) consists of the Chief Justice, the Deputy Chief Justice and nine other judges. When it comes to the High Court, section 169 (3) (a) and (b) is as far as the plating that each division of the High Court of South Africa has a Judge President and may have one or more deputy judges' president.

15 He submitted that unlike the constitutional the Republic of Uganda, the above illustrations do not envisage the possibility of the Principal Judge in Kenya and are all Judge President in the case of South Africa, having constitutional mandate to be the head of the High Court in the judiciary and or administrative power and functions to supervise the lower courts in the
20 judicial system.

He submitted that the Principal Judge as the Administrative Head of the Judiciary at the level of the High Court, the Chief Justice, Deputy Chief Justice and the Principal Judge ought to be treated equally in allocation of retirement benefits under the law. In the absence of the aforementioned, it
25 is detrimental, callous and in contravention of Article 21 (1) 40 (1) (b) and 128 (7) of the Constitution.

Interpretation of Articles 21 (1), 40(1)(b) and 128(7) of the Constitution

The petitioner submitted that **Article 21 (1)** of the Constitution guarantees the right to equal treatment before and under the law and in this spirit, the
30 Principal Judge, being an administrative head of High Court tasked with the Constitutional mandate to head the High Court, in that capacity assists the Chief Justice in the administration of the High Court and subordinate Courts, and bestows upon the person occupying that office the right to be treated with equality before and under the Administration of the Judiciary Act, 2020

5 that seeks to provide for benefits and emoluments upon retirement, like the Chief Justice and Deputy Chief Justice.

The petitioner's counsel submitted that the right to equal treatment before and under the law is a fundamental human right and the Supreme Court of Uganda pronounced itself that right in **Attorney General versus Uganda Law**
10 **Society Supreme Court Constitutional Appeal No. 1 of 2006**. In that decision, the Supreme Court observed that; "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
15 social economic and political, cultural values so as to extend the benefit of the right to those it is intended for."

The petitioner's counsel submitted that in the circumstances before the court, equality before the law also encompasses equal treatment and entitlement to emoluments and retirement benefits commensurate with the
20 rank and status of a judicial officer. Further that section 22 and section 25 read in conjunction with Schedule 2 and 5 of the Administration of the Judiciary Act, 2020, have the effect of entitling the other Administrative Heads of the Judiciary; the Chief Justice and the Deputy Chief Justice to retirement benefits at a rate higher and greater than that of the Principal
25 Judge who is equally a head of a vital component of the Judiciary; namely the High Court. He submitted that the entitlements were allocated in a manner that is not commensurate with the work or the office of the Principal Judge.

Counsel further relied on the definition of equality in **Sollo Nzuki v Salaries**
30 **and Remuneration Commission and Judicial Service Commission; Constitutional Commission Petition No. 18 of 2008** at page 15 where the High Court of Kenya cited with approval the constitutional court of South Africa in the **Minister of Home Affairs versus Fourie 9 (2005) ZACC 16; 2006 (1) is a 524 (CC)** which defined equality as: "Equal concern and respect across
35 differences. It does not presuppose the elimination or suppression of difference. Respect for human dignity requires the affirmation of self, not

5 denial of self... At the very least it affirms the difference should not be the basis for exclusion, marginalisation or stigma.

Counsel submitted that in the absence of equality, what follows is that discrimination which is unfair, unjustified and arbitrary and that the law as is in the present case during the enactment of section 22 and 25 together
10 with the 2 and 5 Schedules of the Administration of the Judiciary Act.

The petitioner's counsel further relied on the decision of the constitutional court of South Africa in the **State v Makwanyane (1995) (6) BCLR 759** where they held that "Arbitrary noise must also inevitably, it is very nature, lead to the and equal treatment of persons. Arbitrary action, or decision-making, is
15 incapable of providing a rational explanation as to why similarly placed persons are treated in substantially different way. Without such a rational justifying mechanism, and equal treatment must follow".

That in the absence of equality, what follows is discrimination which is unfair, unjustified and arbitrary under the law as is in the present case
20 during the enactment of S.22 and S.25 together with the 2nd and 5th Schedules of the Administration of the Judiciary Act.

In light of the above, the petitioner submitted that the justifications followed distinguish the benefits of a retired Justice and Deputy Chief Justice on one hand from those of a Principal Judge, by the Parliament as seen from the
25 Parliamentary Hansard are arbitrary and irrational hence resulting into unfair discrimination between the 3 (three) Constitutional and administrative heads of the Judiciary.

Counsel quoted the Hansard at Page 9 where a Member of Parliament proposed that;

30 *"I would like to persuade Parliament to leave the Chief Justice and the Deputy Chief Justice at the original proposal of retiring with their salaries. First of all, not only because of their numbers but also because of their offices. My view is that if we put the Chief Justice and Deputy Chief Justice*

5 *at the same percentage of 80% with other Judges will be under looking those two offices"*

The petitioner asserted that the members of Parliament, in essence, created an absurdity when they failed to appreciate the Constitutional position of the Principal Judge as enunciated in Art 141 (1) (a) of the Constitution thereby
10 arbitrarily varying the retirement benefits of the Principal Judge in disregard to his rank, status, dignity and responsibility contrary to Art 128(7) and Article 254 (1) of the Constitution which provides that "a public officer shall upon retirement, receiving such pension as is commensurate with his or her, salary and length of service." Further, article 128 (7) of the
15 constitutional provides that: "they salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.

Article 128 (7) was considered by the Supreme Court in **Masalu Musene and others v Attorney General; Supreme Court Constitutional Appeal No. 07 of 2005** where Court defined the words "alter and "vary: as follows:

"In our view the words "alter" and "vary" can be used interchangeably as they mean the same thing on the other hand, the Oxford Advanced Learners Dictionary defined vary thus;

25 *To make, changes to something to make it slightly different The emoluments of the persons concerned could not be changed to their disadvantage"*

Compared to the retirement benefits of the Chief Justice and Deputy Chief Justice, who retire with 100% of salary, upon retirement payable for life, a
30 fuel and vehicle allowance of one Hundred currency points and ninety currency points respectively and a consolidated allowance to cater for airtime and internet the Principal Judge was denied the benefit of 100% of the salary accorded to the other two heads of the judiciary and other stated benefits. Without any reasonable justification, the corresponding Section 25
35 and 5th Schedule did not provide the same benefits to the Principal Judge to

5 his inconvenience, detriment and in total disregard of the superior position
of the office of the Principal Judge as the Constitutional head of the High
Court in the Judiciary. The disadvantage is manifested in the fact that in
comparison with the other two Constitutional heads of the Judiciary, the
change in the Principal Judge's retirement benefits excluded the above
10 entitlements and or denied the Principal Judge the benefit of his entire
salary at the time -of retirement and the above highlighted benefits without
just cause.

The Petitioner's counsel submitted that it is a fundamental rule of
Constitutional interpretation that the entire Constitution has to be read
15 together as an integrated whole with no particular provision destroying the
other: but rather sustaining the other as held in **Paul Kawanga
Ssemwogerere vs. Attorney General; Supreme Court Constitutional Appeal
No. 1 of 2002** where the Supreme Court stated that;

20 *"No one provision of the Constitution is to be segregated from the others
and to be considered alone but that all the provisions bearing upon a
particular subject are to be brought into view and to be interpreted as to
effectuate the greater purpose of the instrument. This is the rule of
harmony, the rule of completeness and exhaustiveness"*

Counsel submitted that the entirety of the impugned provisions Section 22
25 and Section 25 read in conjunction with Schedule 2 and 5 of the
Administration of the Judiciary Act, 2020, is that they contravene Articles
21(1), 2(1), 40(1)(b), 128(7) and 254(1) of the Constitution to the extent that they
arbitrarily and irrationally deny the Principal Judge retirement benefits
equal to and or proportionate to the retirement benefits of the Chief Justice
30 and Deputy Chief Justice in disregard of the Constitutionally established
position of the Principal Judge as the Constitutional head of the High Court
and in charge of supervision of all the Courts subordinate thereto. The
extent of this unequal treatment is illustrated by the unjustified variance in
entitlement to retirement benefits to the detriment of the Principal Judge.

5 The Petitioner submitted that without any justification and or considerations
for varying and or reduction of the Principal Judge's retirement benefits to
his detriment as against the benefits of the Chief Justice and Deputy Chief
Justice renders the said provisions of the Administration of the Judiciary
Act, 2020 unconstitutional, null and void to the extent of their inconsistency
10 with the Constitution. He prayed that Court finds so accordingly.

In Reply to issue number 2 the respondents counsel submitted that:

Section 22 of the Act states that the position of the petitioner is that, as
Administrative heads of the judiciary under the Constitution, the Chief
Justice, the Deputy Chief Justice and the Principal Judge are entitled to
15 equal treatment before and under the law and that equality of the law
encompasses equal treatment and entitlement to emoluments and
retirement benefits commensurate to the rank and status. The respondents
counsel submitted that the respondents are alive to the fact that a
constitutional provision containing a fundamental right is a permanent
20 provision intended to cater for all times to come and therefore should be
given dynamic, progressive and flexible interpretation keeping in view the
ideals of the people, their social economic and political cultural values so
as to extend the benefit of the same to the maximum possible. (See Okello
John Livingstone and six others versus the Attorney General and another
25 Constitutional Petition Number one of 2005, South Dakota versus South
Carolina 192, USA 268.1940.)

The Respondent contends that the impugned provisions contravene the
Constitution to the extent that they discriminate against the Principal Judge
in terms of rank and status as administrative heads of the Judiciary.

30 Further Article 21 (3) of the Constitution defines what amounts to
discrimination and to "discriminate" means to give different treatment to
different persons attributable only or mainly to their respective
descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion,
or social or economic standing, political opinion or disability and Article 21
35 (4), provides that Nothing in this article shall prevent Parliament from

5 enacting laws that are necessary for- (a) implementing policies and
programmes aimed at redressing social, economic or educational or other
imbalance in society; or (b) making such provision as is required or
authorized to be made under this Constitution; or (c) providing for any
matter acceptable and demonstrably justified in a free and democratic
10 society.

The article allows Parliament to make laws for purposes of implementing
policies and programmes for affirmative action in the social, economic,
educational and other imbalances in society as long as they are
demonstrably justified in a free and democratic society

15 The Respondent submitted that while differential treatment on the specified
grounds, are generally prohibited, not all forms of distinction or
differentiation amount to discrimination. A distinction or differential
treatment only qualifies as discrimination 'when it does not have objective
and rational justification and, in the circumstances where it is not necessary
20 and proportional (**See African Commission on Human and Peoples' Rights v
Kenya, Application 006/2012, Judgment, 26 May 2017, para 139**).

The Respondent's counsel submitted that if a provision is alleged to offend
equality, the question to consider is whether there exists a difference that
bears a reasonable object to the legislation; and, that if the difference has
25 a reasonable connection with the object intended to be achieved, the law
with such a provision is Constitutional and where there is no such
difference, the difference is thus discriminatory and the provision can
rightly be said to be repugnant to justice and morality (See **Federation of
Women Lawyers (FIDA-K) & 5 Others v The Attorney General & Another
30 Case Kenya Petition No. 102 of 2011.**)

The respondent's counsel further submitted that the guiding principles in a
case of this nature are clear. First, the court has to establish whether the
law differentiates between different persons. Second, whether the
differentiation amounts to discrimination, and, third, whether the
35 discrimination is unfair. The respondent relied on **Willis vs. The United**

5 **Kingdom (Application no. 36042/97)**, where the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. The court stated that discrimination is:

10 *"... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society."* (See **Andrews v Law Society of British Columbia [1989] 1 SCR 143, as per McIntyre J.) 288.**)

15 It was the Respondents submission that from the above definition, it is safe to state that the Constitution only prohibits unfair discrimination and that unfair discrimination is differential treatment that is demeaning. Further, the rest for determining whether a claim based on unfair discrimination

20 should succeed was set out by the **South Africa Constitutional Court in Harksen vs. Lane NO and Others [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC** in when the Court stated:

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance

25 *on article 9 (3),*

They are: (a) Does the provision differentiate between people or categories of people" If so, does the differentiation bear a rational connection to a legitimate purpose" If it does not, then there is a violation of the Constitution. Even if it does bear a rational connection, it might nevertheless

30 *amount to discrimination. (b) Does the differentiation amount to unfair discrimination " This requires a two stage analysis: - (i) Firstly, does the differentiation amount to 'discrimination' If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether,*

35 *objectively, the ground is based on attributes and characteristics which*

5 *have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

10 *(ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination' "If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant.*

That the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation ... *(c) If the discrimination is found to*
15 *be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.*

The Respondent submitted therefore that the clear message emerging from these persuasive authorities is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate
20 reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

Further, the respondent's counsel submitted that the hierarchy and stature classification that was considered by the legislature in enacting the
25 Administration of Judiciary Act, 2022 was just and reasonable and in line with the objective and purpose of the Administration of Judiciary Act.

The Respondent further submitted that the legislature further considered that the Chief Justice and Deputy Chief Justice were not too many to hurt the treasury and that if they were put at 80% as other Judges, the two offices
30 would be under looked. **(refer to pg. 9 last paragraph and page 10 of the Hansard dated 2nd June 2020.)** That in considering schedule 5 Part A where the Principal Judge's benefits were considered, consideration was given on whether to subject it to 60% and members realized that it would disadvantage the officers, Consideration was then given to 80% for Principal
35 Judge. **(refer to pg. 14 and 25 of the Hansard dated 2nd June 2020)**

5 The Respondent submitted that the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory.

10 *"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view.*
"

15 Further that the legislature in considering Section 25 read together with the Schedule 5 found that the Chief Justice and the Principal Judge are different in rank, status and privileges and conferred 80% of the retirement benefits to the Principal Judge.

20 That in that regard, therefore, it is not every differentiation that amounts to discrimination. It is always necessary to identify the criteria that separates legitimate differentiation from Constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the
25 differentiation and the purpose.

It is the Respondents submission that the purpose of the Administration of Judiciary Act was to operationalize the independence of the Judiciary. The Petitioner's contention in the circumstances that he was disadvantaged cannot stand. Further that in passing the Administration of Judiciary Act
30 Parliament, considered the hierarchy, nature and structure of the Judiciary, resolved and deemed it fit that all judicial officers including Justices of the Supreme Court, Justices of the Court of Appeal, High Court Judges, Registrars and Magistrates should receive 80% of their monthly emolument.

On the contention of the Petitioner that the Administration of Judiciary Act
35 has varied his benefits in contravention to Article 128(7) of the Constitution

5 the petitioner has the burden to show that the rule is clearly inconsistent and incompatible with the principles laid down in the Constitution. (See **Phillip Karugaba Vs. Attorney General Constitutional Petition No. 11 of 2002'**)

10 The Respondent submitted that "*The underlying principle of the entire Article 128 is the issue of judicial independence and security of tenure, the latter being among the traditional safeguards of the former. This means amongst other things that the term of office, emoluments and other conditions of service of Judicial Officers generally shall not be varied or altered to their detriment or disadvantage. This is an elementary safeguard to be found in most developed legal systems where it took many historic*
15 *struggles to establish on a firm footing as the most fundamental of all safeguards of Judicial officers' security of tenure. When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the executive or at the whims of the legislature, the independence of the Judiciary is the first victim. The*
20 *rationale under article 128(7) is that there should be adequate salaries and pensions for Judicial officers commensurable with their status, dignity and responsibility of their office.*" (See **Attorney General -vs- Musalu Musene Wilson & 4 Ors, Constitution Petition No. 7 of 2007 at page 6 and 8.)**

25 The Respondent's counsel submitted that the petitioner's emoluments were not varied (See affidavit of Apophia. N. Tumwine, the Commissioner Human Resource in the Judiciary that the Petitioner did not show Court in any way that his salaries were varied).

30 The Respondents contended that the additional affidavit of Apophia Tumwine, the Commissioner Human Resource to the Judiciary indicates that the Petitioner was paid all his emoluments as referred to in the receipts of payments. All the entitlements as per the law were paid.

In conclusion, the respondents counsel submitted that sections 22 and 25 read together with schedule 2 and 5 of the Administration of Judiciary Act do not infringe Articles 2, 21(1) and 128(7) of the Constitution of Uganda.

5 **In rejoinder the petitioners counsel submitted** that the Respondent
contended that variation in the retirement benefits of the Principal Judge on
one hand from those of the Chief Justice and The Deputy Chief Justice
amount to fair, reasonable, legitimate and justified discrimination as the
legislature considered the hierarchy and stature of classification in the
10 enactment of the Act together with the objective and purpose of the said
Administration of the Judiciary Act, 2020.

The petitioner submitted that the office of the Principal Judge is equally a
unique one and there is only one Principal Judge and placing its retirement
benefits at the same rate at those of the Chief Justice and the Deputy Chief
15 Justice would not have amounted to an undermine of the latter office. That
in fact, it would have resulted into giving due recognition to the unique and
vantage position of the office of the Principal Judge in the Administration of
the Judiciary as the head of the High Court recognized under Article 141 (1)
(a) of the Constitution over and above other Judges of the High Court and
20 Justices of the Court of Appeal and Supreme Court.

Further the petitioners counsel submitted that it is a well-known principle
of Constitutional interpretation that in determining the Constitutionality of
legislation, both purpose and effect are relevant in determining the
Constitutionality of either the effect animated by or the object the legislation
25 intends to achieve. **(See Uganda Law Society Vs Attorney General (supra)**

Counsel submitted that the resultant effect of sections 22 and 25 read
together with schedule 2 and 5 of the Administration of Judiciary Act is to
turn the Principal Judge into an ordinary Judge of the High Court and the
Deputy Chief Justice and Chief Justice as the only heads of the Judiciary
30 worthy of recognition. He prayed that this honorable Court does not
condone such absurdity.

With reference to the decision in **State v Makwanyane (1995) (6) BCLR 759**
the petitioner's counsel submitted that an arbitrary action or decision
making, is incapable of providing a rational explanation as to why similarly
35 placed persons are treated in substantially different ways. That the question

5 now is why, if the Chief Justice, Deputy Chief Justice and Principal Judge
are Constitutional heads of the Supreme Court, Court of
Appeal/Constitutional Court and High Court respectively, is it that at the
time of allocation of the retirement benefits pursuant to the Administration
of the Judiciary Act in the impugned provisions, legislature opted to allocate
10 the Principal Judge a reduced percentage following irrational
considerations. In absence of rational justification for the distinction, it
leaves no room for any other conclusion other than the fact that the said
distinction was unjustified thus amounting to unfair discrimination contrary
to Article 2(l) and 21(1) of the Constitution.

15 Counsel further submitted that there is no justification whatsoever for the
discriminatory legislation under the Administration of Judiciary Act, to the
effect that *Upon retirement, while the Chief Justice and Deputy Chief Justice
are entitled to a fuel and vehicle repairs allowance, the Principal Judge is
not* and *Upon retirement, while the Chief Justice and Deputy Chief Justice
20 are entitled to a consolidated allowance to cater for airtime and internet,
the Principal Judge is not.*

Counsel reiterated earlier submissions on the role and responsibilities of
the Principal Judge and submitted that no tenable reason has been given to
this Court to demonstrate why it was justifiable to treat the Principal Judge
25 differently from the treatment of the Chief Justice and the Deputy Chief
Justice.

Counsel submitted that under the new dispensation of the Administration of
Judiciary Act, retirement benefits are a continuation of salary earnings and
emoluments as set out under the Act. Further it was recognized that as
30 Constitutional heads of the Judiciary, the full salaries of heads of the
Judiciary need to be maintained. He argued that upon passing of the Act, the
Principal Judge's retirement salary was varied to 80% of a sitting Principal
Judge. This amounted to variation of the Principal Judge's retirement
benefits contrary to Article 128 (7) of the Constitution.

5 To support their argument, they cited **Kenya Magistrates and Judges Association vs. Salaries and Remuneration Commission and Judicial Service Commission Petition No. 29 of 2019** wherein Court considered issue of whether the Commission failed to consider material considerations in setting the remuneration and benefits of judicial officers. Court disregarded
10 the reason by the commission for not providing for transport allowances to all judicial officers that the fiscal sustainability could not allow for the provision of official transport to all judicial officers. Court held that no plausible reason was tendered to the Court to demonstrate why it was justifiable to treat judicial officers who have not been provided with official
15 transport differently and found that there had been discrimination by the Commission.

The petitioner invited Court to find that Section 22 and 25 read together with schedule 2 and 5 of the Administration of Judiciary Act, 2020 are inconsistent with Articles 2 (1), 21 (1) and 128 (7) of the Constitution of the
20 Republic of Uganda.

ISSUE 3:

**Whether Section 25 and 5th schedule of the Administration of the Judiciary Act, 2020 are inconsistent with Articles 133(1) and 141 (1) (a) of the Constitution in spite of their difference in rank, status, hierarchical
25 difference and dignity under the Constitution, a retired Principal is treated at pari passu and at par with the retired Judge of the High Court.**

The Petitioners counsel submitted that Section 25 of the Administration of Judiciary Act, 2020 read in conjunction with Schedule 5 of the Act provides that upon retirement, the Principal Judge shall be paid 80% of his monthly
30 emoluments for life in addition to other benefits as set out in Part A of the 5th Schedule. He emphasized that this is the same treatment accorded to other Judges of the High Court vide the Part B of the 5th Schedule.

The Petitioners counsel submitted that the said provision of the Administration of Judiciary Act, 2020 together with the Part A and B of the
35 Constitution ignore the broad administrative responsibilities taken on by the

5 Principal Judge over and above those of an ordinary High Court Judge. It is
no secret that in performance of his duties the Principal Judge as the Head
of the High Court is in charge of the supervision of 7 Divisions of the High
Court and 20 circuits of the High Court located country wide and a huge
number of Magistrates Courts country wide to ensure the efficient
10 administration of Justice in those Courts. The Principal Judge in essence
takes on a wide base of responsibility in execution of his administrative
functions bestowed upon that office pursuant to Art. 141 (1)(a) of the
Constitution.

Further, counsel submitted that as head of the High Court, the Principal
15 Judge also enjoys a higher rank and status than any other High Court Judge.
In contrast, the duties and responsibilities of a High Court Judge are
restricted to affairs that lie within the area of Jurisdiction situate within
area where the respective High Court Circuit is situated and or upon special
delegation of duties by the Principal Judge.

20 Counsel submitted that the sum total of the above is that the Principal Judge
is charged with a greater responsibility, higher volume of work, and an
elevated rank within the High Court over and above any other High Court
Judge and or Magistrate for that matter. Indeed, during service, the
salary/emoluments of a sitting Principal Judge are far superior to those of
25 High Court Judges, Justices of the Court of Appeal/Constitutional Court and
the Supreme Court. The official vehicle allocation of 2 plus security
outriders to a sitting Principal Judge is equally superior to all the other
Judges and Justices. The substantive work and responsibilities of a
Principal Judge are much wider, deeper, extensive and onerous than those
30 of individual Judges and Justices. The Principal Judge also administratively
handles country-wide complaints concerning the professionalism and
discipline of Judges, Registrars and Magistrates.

The Petitioners Counsel contended that it is patently unfair, inequitable and
illogical to treat the Principal Judge at par with other Judges/ Justices.
35 Further that this argument is buttressed by Section 2 of the Judicature Act,
Cap 13 which gives the order of precedence of Judges as Chief Justice,

5 Deputy Chief Justice, Principal Judge, Justices of the Supreme Court, Justices of the Court of Appeal and lastly Judges of the High Court. He argued that had the law intended a High Court Judge and the Principal Judge to be of same status and rank, it would have specifically stated so. Counsel for the Petitioner invited court to find that the substantive work and
10 responsibilities of a Principal Judge are much wider, deeper, extensive and onerous than those of individual Judges and Justices since the wording of the Constitution is plain, clear, and unambiguous to this effect. It followed that in allocation of entitlement to retirement benefits, the Principal Judge being the head of High Court ought not to have been subjected to retirement
15 benefits whose resultant effect is to treat the Principal Judge at the same rank as the other Judicial Officers who include a High Court Judge over whom he/she exercises their leadership and authority. It is patently unfair, inequitable and illogical.

That Section 25 read together with Schedule 5 of the Administration of the
20 Judiciary Act, 2020 have the purpose and effect of treating the Principal Judge and other High Court Judges at par to the effect that both are entitled to 80% of their monthly emoluments for life upon retirement together with the same set of benefits in Part A and Part B of the 5th Schedule, in disregard to the responsibilities, status and dignity of the Principal Judge; thereby
25 contravening Articles 138(1) , 141(1) and 254(1). This resulted into varying the retirement benefits of the Principal Judge to his disadvantage contrary to Art 128(7) of the Constitution which renders the said provision unconstitutional, hence the Petitioner's prayer is that this court equally finds so.

30 The Administration of the Judiciary in accordance with the Constitution is an apex structure whereat the Chief Justice, Deputy Chief Justice and Principal Judge are at the top helm overseeing the seamless, efficient, and effective running of the court system in Uganda. Therefore, as the Constitution recognizes the said persons as administrative heads of the
35 respective components of the Judiciary, their retirement benefits in the Administration of the Judiciary Act ought to be commensurable to their

5 rank, status, dignity, and responsibility of their offices. In the above
submissions, the petitioner asserted to have illustrated that the three
administrative heads deserve to be treated equally in terms of retirement
benefits of judicial officers. The Constitution is the supreme law of the land
and any Act of Parliament inconsistent with the Constitution is null and void
10 to the extent of the inconsistency.

Remedies

In the premises, the Petitioner prays that this Court finds that Sections 22
and 25 of the Administration of the Judiciary Act, 2020 read together with
Schedules 2 and 5 of the said Act are inconsistent with Articles 2 (1) & 21 (1)
15 128(7), 133 (1), and 141 (1) (a) 40 (1) (b) and 254 (1) of the Constitution and
ought to be declared null and void to the extent of their inconsistency with
provisions of the Constitution and that the Petition be granted in the terms
prayed for in the Petition with costs to the Petitioner.

In reply, the respondent's counsel set out Article 133 of the Constitution of
20 Uganda which sets out the Administrative functions of the Chief Justice.
Further, Article 141 (1) that sets out the roles of the Principal Judge as head
of the High Court and in that capacity to assist the Chief Justice in
administration of the High Court and subordinate courts.

The respondent's counsel submitted that The Administration of Judiciary
25 2020 and section 21 applies to all judicial officers who retire after the
commencement of the Act and all judicial officers who retire before the
commencement of the Act and who, on the commencement of the Act, are
receiving pension respect of his or her service under the Pensions Act. As
further submitted that Parliament considered the fact that different levels
30 of administration in the Judiciary earn different levels of salaries depending
on the position they hold and Parliament in enacting the Administration of
Judicial Act 2020 took into consideration the constitutional hierarchy of the
Judiciary.

The Respondent further submitted that to determine the Constitutionality of
35 a Section of a statute or Act of Parliament, the Court has to consider the

5 purpose and effect of the impugned statute or section thereof. If its purpose
does not infringe a right guaranteed by the Constitution, the Court has to go
further and examine the effect of the implementation. If either its purpose
or the effect of its implementation infringes a right guaranteed by the
Constitution, the impugned statute or section thereof shall be declared
10 unconstitutional" (**See Olum and another v Attorney General [2002] 2 EA
508**).

Respondent's Counsel further submitted that the purpose of the
Administration of Judiciary Act was to operationalize the independence of
the Judiciary. In passing the Administration of Judiciary Act, Parliament
15 considered the hierarchy, nature and structure of the Judiciary and
resolved and deemed it fit that all Judicial officers including Justices of the
Supreme Court, Justices of the Court of Appeal, High Court Judges,
Registrars and Magistrates should receive 80% of their monthly emolument.

Further, the respondents counsel submitted that whereas the Principal
20 Judge is responsible for the administration of the court and has general
supervisory powers over Magistrate's Courts, he is still a Judge of the High
Court. Further that legislature applied the principle of 80% of emoluments
across the board to Justices of the Supreme Court and Court of Appeal who
are above in rank and stature.

25 Counsel further submitted that the whole purpose of Government providing
for pensionable entitlement to public officers is so that public officers who
have served the stipulated period and reached the stipulated age do not get
help from the state to support them in their retirement. It calls for careful
planning by the state. The number of officers is known; their ages also are
30 known. This enables Government to plan and make provision for the
payments to be made smoothly without disrupting the operation of
government.

The respondent's counsel submitted that the Petitioner in this case was paid
his retirement benefits according to the law and reiterated submissions

5 that mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause.

On the question of remedies, the respondent asserts that section 21 of the Administration of Judiciary Act applies to all judicial officers who retire after the commencement of the Act and all judicial officers who retired
10 before the commencement of the Act and who, on the commencement of the are receiving pension in respect of their service under the Pensions Act.

The respondent submitted that the Act was already in force and the Petitioner was paid his benefits according to the Administration of Judiciary Act as evidenced by the additional affidavit of the Commissioner Human
15 Resource. If the prayer for injunction is granted, it would have the effect of denying other judicial officers a right to a fair hearing since the same would impact all judicial officers who are beneficiaries under the Act.

Counsel further submitted that it is trite law that Courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories. (See **Okale vs Republic (1965) EA 555; Kanalusasi vs Uganda [1998 - 1990] HCB and Silaagi Buroro Gordon vs Uganda Court of Appeal Criminal Appeal No. 122/2005, (unreported))**).

In the premises, the respondent's counsel submitted that that there is no
25 evidence to warrant the issuing of an injunctive order against operation of the Administration of Judiciary Act. He prayed that the Petition is dismissed and that all declarations and orders sought in the Petition be denied.

In rejoinder the Petitioner's counsel submitted that the petition is not about the Petitioner espousing individual grievances as wrongly postulated by the
30 respondent in their submissions but about the sanctity of the Constitution. The petition is to determine the Constitutional hierarchy of the Principal Judge in relation to the Chief Justice, Deputy Chief Justice and other Justices and Judges of the Courts of Judicature. The overarching questions underlying the issues before this Court are whether the Principal Judge is
35 a Constitutional head in the Judiciary like the Chief Justice and Deputy Chief

5 Justice or a mere administrative head without any Constitutional guarantees in terms of rank, status and hierarchy.

To the extent that the respondent claims the Principal Judge is an ordinary Judge of the High Court and does not rank any higher in status and hierarchy, the petitioner's counsel submitted that the respondent's
10 submissions are absurd. Further, that to claim that this is an affront on the Administration of Judiciary Act, 2020 in its entirety, should be disregarded.

The respondent contended that whereas the Principal Judge is responsible for the administration of the Court and has general supervisory powers over Magistrate's Courts, he is still a Judge of the High Court. The
15 respondent further argued that parliament considered the fact that different levels of administrators in the Judiciary earn different levels of salaries depending on the positions they hold and Parliament in passing the Administration of the Judiciary Act 2020 took into consideration the Constitutional hierarchy of the Judiciary.

20 Further that under Article 141 (1) (a) of the Constitution, the Principal Judge is the head of the High Court and to that extent, the Principal Judge is not an ordinary Judge of the High Court as wrongly submitted by the respondent. The petitioners counsel with reference to Article 141 (1) noted that provides that the Principal Judge is head of High Court. The Principal
25 Judge is not an ordinary Judge of the High Court and his administrative work and hierarchy are stipulated in the law. Counsel invited Court to find that the Principal Judge is higher in hierarchy, rank and status than an ordinary Judge of the High Court. Further the fact that the Principal Judge earns a higher salary than an ordinary Judge of the High Court does not
30 mean in any way that the same should be treated in the same manner in the allocation of percentage rates for retirement benefits.

The Petitioner submitted that under Article 254(1) of the Constitution, a public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service.

5 The petitioner's counsel conceded that upon his retirement in 2019, the petitioner received benefits purportedly under the existing laws but there was unfair treatment under the Administration of Judiciary Act, 2020 especially with regard to the application of the Judicature Act. Counsel cited **Uganda Law Society Vs Attorney General (supra)**, for the proposition that
10 *"in determining the Constitutionality of legislation, both purpose and effect are relevant in determining the Constitutionality of either the effect animated by or the object the legislation intends to achieve"*.

He submitted that the effect of this legislation would be inconsistent with the Constitution to the extent that the Principal Judge is treated at par with
15 an ordinary Judge of the High Court and yet he is higher in hierarchy, rank and status as earlier demonstrated.

Petitioner prayed that Court finds that Section 25 and 5th schedule of the Administration of Judiciary Act are inconsistent with Articles 254 (1), 133 (1) and 14 (1) (a) of the Constitution and allows the prayers in the petition.

20 **Consideration of Appeal**

I have carefully considered the petition together with the affidavit evidence in support as well as in opposition. I have read the submissions of the parties as set out above and I have also considered the preliminary
25 objection of the respondent that the petition raises no question for interpretation of the Constitution raised in the first issue. The issues for consideration are:

1. Whether the petition raises any issues / questions for Constitutional interpretation.

- 30 2. Whether sections Section 22 and section 25 read together with schedule 2 and 5 of the Administration of the Judiciary Act, 2020 are inconsistent with Article 2(1) & 21(1) and article 128(7) of the Constitution.

5 3. Whether Section 25 and 5th schedule of the Administration of the
Judiciary Act, 2020 are inconsistent with Articles 133(1) and 141 (1)(a)
of the Constitution to the extent that they provide for the grant of
retirement benefits in an order disregarding the hierarchy of the
Judiciary.

10 4. Whether there are any remedies available to the parties.

Issue 1

The first issue is a preliminary issue as to whether this court has
jurisdiction to entertain the petition, I will determine the preliminary point
15 first.

I will rephrase the question following the wording of article 137 (1) of the
Constitution which provides that:

137. Questions as to interpretation of the Constitution.

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

The wording of article 137 (1) of the Constitution should not be substituted
with the phrase "questions for constitutional interpretation." While it can be
understood as meaning any matter that requires the Constitution to be
interpreted, article 137 (1) of the Constitution is clear and provides for "*any*
25 *question as to interpretation of the Constitution*". In other words, article 137
(1) does not deal with enforcement of any provision of the Constitution
unless it is a consequential remedy upon determination of any question as
to interpretation of the Constitution but deals with questions as to
interpretation of the Constitution.

30 Article 137 (1) of the Constitution confers jurisdiction only on the Court of
Appeal sitting as a Constitutional Court to determine "any questions as to
the interpretation of this Constitution". On the other hand, Article 137 (3) of
the Constitution deals with the necessary cause of action to plead in a

5 Petition before this court when it enjoys jurisdiction under article 137 (1) of the Constitution. Article 137 (3) provides that:

(3) A person who alleges that –

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

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

The cause of action of the Petitioner falls under article 137 (3) (a) in that the petitioner challenges sections 22 and 25 read together with the Second and
15 Fifth Schedule of the Administration of Judicial Act for inconsistency with article 2(1) and 21 (1), 40 (1) (b) and article 128 (7) of the Constitution. Secondly, the petitioner asserts that sections 25 and the Fifth Schedule of the Administration of the Judiciary Act are inconsistent with article 128 (7), 133 (1) and 141 (1) (a) of the Constitution.

20 In other words, the petitioner has a cause of action as far as pleadings are concerned because he has cited in terms of article 137 (3) (a) that a provision of an Act of Parliament or any other law is inconsistent with or in contravention of a provision of the Constitution and the only question for determination is whether this court has jurisdiction by establishing whether
25 there is any question as to interpretation of the Constitution disclosed in the petition in terms of article 137 (1) of the Constitution.

Article 137 (3) (a) covers any action to declare an Act of Parliament or any other law or anything in or done under the authority of any law inconsistent with a provision of the Constitution. In **Ismail Serugo Vs Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998**, Prof.
30 Kanyeihamba JSC held that there is a distinction between a consideration of whether the Constitutional Court has jurisdiction from a consideration of whether the petition discloses a cause of action. Prof Kanyeihamba JSC stated that:

5 In my opinion, the question of cause of action must be distinguished from the
matter of jurisdiction. A court may have jurisdiction while the plaintiff lacks a cause
or a reasonable cause of action and vice versa. In other words, a Plaintiff may
have a perfectly legitimate and reasonable cause but the court before which the
10 plaintiff is filed lack jurisdiction, just as the court may have jurisdiction but the
litigant before it lacks a cause of action.

There is a distinction between 137 (1) of the Constitution which confers on
the Constitutional Court exclusive jurisdiction to determine any question as
to interpretation of the Constitution and a cause of action that must be
pleaded in terms of article 137 (3) of the Constitution for the petition to
15 disclose a cause of action. In **Ismail Serugo Vs Kampala City Council &
Attorney General** (supra) Wambuzi, CJ held that it was not enough to plead
violation of a provision of the Constitution. The Petitioner must show that
there is a question as to interpretation involved when he held that:

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

The word "interpretation" was used in terms of determining a controversy,
25 issue or dispute about the interpretation of the Constitution. The
respondents counsel submitted that the petition was seeking for remedies
that are available and can be granted by a court of competent jurisdiction in
terms of enforcement of his fundamental rights.

I have carefully considered the question before the court. The petition
30 primarily deals with the issue of whether the Administration of the Judiciary
Act, 2020 is discriminatory in terms of not according the Principal Judge the
same treatment after retirement in certain respects with the other
administrative heads of the judiciary namely the Chief Justice and the
Deputy Chief Justice. The question is whether the issue for interpretation in
35 this court involves a question as to interpretation of the Constitution. The
word "question" means a controversy or an "issue" and therefore article 137
(1) of the Constitution deals with controversies as to interpretation of the

5 Constitution. In civil procedure, issues are framed for determination of the court in terms of the rules of procedure of the High Court under Order 15 of the Civil Procedure Rules. Particularly instructive is the stipulation in Order 15 rule 1 (4) of the Civil Procedure Rules that there are two kinds of issues. These are issues of fact and issues of law. In **Hon. Ssekikubo Theodore (NRM) MP – Lwemiyaga County and 10 Others v National Resistance Movement; Constitutional Petition No 09 of 2019**; this court attempted to set out the meaning of the word “interpretation” using the definition of the word “construction” and “interpretation” from **Black’s Law Dictionary 8th Edition** and held that the word “question under article 137 (1) of the Constitution
10 means that there is in existence or apparent in the petition:
15

a doubt about the meaning, scope, purpose, ambit etc. or a dispute or controversy about the meaning of an Article or Articles or their application in terms of scope, ambit etc. in short it means *a controversy as to interpretation*.

Further according to **Black’s Law Dictionary 8th Edition** the word
20 interpretation means *inter alia*:

Some writers treat interpretation as something which is only called for when there is a dispute about the meaning of statutory words, while speaking of construction as a process to which all statutes, like all other writings, are necessarily subject when read by anyone. Others treat interpretation as
25 something which is mainly concerned with the meaning of statutory words, while regarding construction as a process which mainly relates to the ascertainment of the intention of legislature." Rupert Cross, Statutory Interpretation 18 (1976).

The court took the meaning that interpretation is called for when there is a dispute as to the meaning of statutory words. This may include, its
30 application in terms of scope or application.

As far as the constitutional court is concerned, it determines questions or issues or controversies as to interpretation of the provisions of the Constitution. The question is whether there are questions as to the interpretation or controversies as to interpretation of *inter alia* article 21 of
35 the Constitution which forms the core of the alleged controversy because the other articles such as article 141 of the Constitution which gives the

5 administrative functions of the Principal Judge, article 133 of the
Constitution, which gives the administrative functions of the Chief Justice,
article 136 of the Constitution which give the administrative functions of the
Deputy Chief Justice are not controversial and there is no question as to
their interpretation but rather the provisions are used by the Petitioner to
10 assert that the offices are administrative offices which should be treated
equally in terms of article 21 which outlaws discriminatory laws and article
40 which deals with economic rights. Where this court determines that a
controversy as to interpretation of the Constitution is disclosed in the
petition, such a controversy can only be resolved by the Court of Appeal
15 sitting as the constitutional court.

In my assessment of the petition, the petition and the answer to the petition
disclose a dispute about the scope of article 21 of the Constitution in terms
of whether it applies to sections 22 and 25 as well as schedule 2 and
Schedule 5 of the Administration of the Judiciary Act, 2020. This is to
20 determine the controversy whether the provisions discriminate against a
retired Principal Judge when compared to the retirement benefits under the
law of a Chief Justice and a Deputy Chief Justice. As such the question is
whether the impugned laws are discriminatory? Secondly there is a clear
controversy about the inapplicability of article 21 of the Constitution, where
25 a matter is provided for in the Constitution on the question of whether
article 254 (1) allows retirement benefits to be differentiated on the basis of
the rank of a retired public officer and whether this applies to judicial
officers.

Further, the very questions set by the parties for determination of the
30 Petition are questions as to interpretation of the constitution because the
court has to establish the meaning and scope of provisions of the
Constitution. The agreed issues for determination disclose questions for
interpretation of the Constitution for instance of whether sections 22 and 25
read together with the Second and Fifth Schedule of the Administration of
35 Judicial Act are inconsistent with articles 2 (1) and article 21 (1), 40 (1) (b)
and article 128 (7) of the Constitution. Similarly, whether sections 25 and the

5 fifth Schedule of the Administration of the Judiciary Act are inconsistent
with article 128 (7), 133 (1) and 141 (1) (a) of the Constitution. Clearly the
issues framed disclose questions as to interpretation of the Constitution in
that the court is required to consider the scope of article 21 (1) of the
Constitution as well as article 40 and my conclusion is that the petition does
10 not only deal with enforcement of those articles only but calls for resolution
of controversies about their application in the circumstances of this petition.

I would in the premises overrule the preliminary objection to the effect that
this court does not have jurisdiction and find that this court enjoys
jurisdiction by virtue of the facts the petition raises questions as to
15 interpretation of the Constitution relating to the scope and applicability of
article 21 in the circumstances of the petition and in relation to articles 254
(1), 40 (1), and 128 (7) of the Constitution on the question of whether the
Constitution allows discriminatory differential payment based on rank to
which article 21 does not apply among others questions and articles and for
20 the reasons I have set out above.

I have considered issues 2 and 3 and will handle them concurrently because
they are intertwined. Issues 2 and 3 are:

2. **Whether sections Section 22 and section 25 read together with
schedule 2 and 5 of the Administration of the Judiciary Act, 2020 are
25 inconsistent with Article 2(1) & 21(1) and article 128(7) of the
Constitution.**

3. **Whether Section 25 and 5th schedule of the Administration of the
Judiciary Act, 2020 are inconsistent with Articles 133(1) and 141 (1)(a)
30 of the Constitution to the extent that they provide for the grant of
retirement benefits in an order disregarding the hierarchy of the
Judiciary.**

Relevant Legal Provisions to the Petition.

I would start with considering the scope of article 21 of the
35 Constitution upon which the core of the petition revolves. The

5 question for consideration is whether certain laws which provide different treatments for the Principal Judge in comparison to the Chief Justice and Deputy Chief Justice are discriminatory for giving the Principal Judge *inter alia* 80% monthly payment equivalent to the salary of a sitting Principal Judge upon retirement while giving the Chief Justice and Deputy Chief
10 Justice 100% monthly payment equivalent to the salary of a sitting Chief Justice and Deputy Chief Justice respectively upon retirement. The alleged discriminatory laws and treatment are found in the following laws as averred in the petition.

The Petitioner averred that sections 22 and 25 of the Administration of the
15 Judiciary Act contravene and are inconsistent with articles 2 (1) and 21 (1) of the Constitution in as far as upon retirement, while the Chief Justice and Deputy Chief Justice as administrative heads of the judiciary get 100% of their monthly emoluments for life, the Principal Judge gets only 80%. Secondly, upon retirement, while the Chief Justice and Deputy Justice are
20 entitled to a fuel and vehicle repairs allowance, the Principal Judge is not. Thirdly, upon retirement, while the Chief Justice and the Deputy Chief Justice are entitled to a consolidated allowance to cater for airtime and Internet, the Principal Judge is not. The basis of the contention is that as administrative heads of the judiciary under the Constitution, the Chief
25 Justice, the Deputy Chief Justice and the Principal Judge are entitled to equal treatment before and under the law.

The basis for asserting equality before and under the law is the contention of the petitioner that the Chief Justice, the Deputy Chief Justice and the Principal Judge are all administrative heads of the courts of judicature
30 under the Constitution in that, the Chief Justice heads the Supreme Court, the Deputy Chief Justice heads that the Court of Appeal/Constitutional Court and the Principal Judge heads the High Court and is also a supervisor of the subordinate courts. The administrative functions of the three heads of the Judiciary namely the Chief Justice, the Deputy Chief Justice and the
35 Principal Judge are found in the following articles of the Constitution.

Article 133 of the Constitution of the Republic of Uganda provides that:

5 133. Administrative functions of the Chief Justice.

(1) The Chief Justice –

(a) shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and

10 (b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice.

(2) Where the office of the Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his office or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those
15 functions shall be performed by the Deputy Chief Justice.

In addition, article 130 of the Constitution provides that the Supreme Court shall consist of the Chief Justice and such number of justices of the Supreme Court as Parliament may by law prescribe. In addition, article 131
20 (3) provides that the Chief Justice shall preside at each sitting of the Supreme Court and in the absence of the Chief Justice, the most senior member of the court as constituted shall preside.

As far as the Deputy Chief Justice is concerned, the role is set out under article 136 of the Constitution which provides that:

136. Administrative functions of the Deputy Chief Justice.

25 (1) Subject to the provision of article 133 of this Constitution, the Deputy Chief Justice shall –

(a) deputise for the Chief Justice as and when the need arises;

(b) be the head of the Court of Appeal and in that capacity assist the Chief Justice in the administration of that court; and

30 (c) perform such other functions as may be delegated or assigned to him or her by the Chief Justice.

(2) Where –

(a) the office of the Deputy Chief Justice is vacant;

- 5 (b) the Deputy Chief Justice is acting as the Chief Justice; or
- (c) the Deputy Chief Justice is for any reason unable to perform the functions of his or her office,
- then, until a person has been appointed to and has assumed the functions of the office of the Deputy Chief Justice, those functions shall be performed by a justice
- 10 of the Supreme Court or a justice of Appeal designated by the President, after consultation with the Chief Justice, or the acting Chief Justice, as the case may be.

As far as the High Court is concerned, article 138 of the Constitution of the Republic of Uganda provides that the High Court shall consist of the

15 Principal Judge and such number of judges of the High Court as may be prescribed by Parliament. Secondly the High Court shall sit in such places as the Chief Justice may, in consultation with the Principal Judge, appoint; and in so doing, the Chief Justice shall, as far as practicable, ensure that the High Court is accessible to all people.

20 Last but not least article 141 of the Constitution provides for the administrative functions of the Principal Judge and states that:

141. Functions of the Principal Judge.

(1) Subject to the provisions of article 133 of this Constitution, the Principal Judge shall –

- 25 (a) be the head of the High Court, and shall, in that capacity, assist the Chief Justice in the administration of the High Court and subordinate courts; and
- (b) perform such other functions as may be delegated or assigned to him or her by the Chief Justice.

(2) Where –

- 30 (a) the office of the Principal Judge is vacant; or
- (b) the Principal Judge is for any reason unable to perform the functions of his or her office,

then, until a person has been appointed to and has assumed the functions of that office, or until the Principal Judge has resumed those functions, those functions

5 shall be performed by a judge of the High Court designated by the President after consultation with the Chief Justice.

It is the only basis of the above constitutional provisions that the petitioner asserts that there is a tripartite arrangement in which the Chief Justice heads the entire judiciary and also heads the Supreme Court. He is
10 deputed by the Deputy Chief Justice who heads the Court of Appeal/Constitutional Court and the Principal Judge who heads the High Court and is the supervisor of the subordinate courts. The contention is that the three principal offices are administrative offices. In addition, the holders of the administrative offices are also judicial officers who head the courts
15 to which they are assigned namely the Supreme Court for the Chief Justice, Court of Appeal/Constitutional Court as far as the Deputy Chief Justice is concerned and the High Court as far as the Principal Judge is concerned.

In the premises, as administrative heads of the Judiciary in the various capacities stated above, the petitioner's petition is that section 22 and
20 Schedule 2 of the Administration of the Judicial Act is unconstitutional insofar as it excludes a retired Principal Judge while it includes the Chief Justice and the Deputy Chief Justice. Section 22 of the Administration of the Judiciary Act 2020 provides that:

22. Retirement benefits for Chief Justice and the Deputy Chief Justice.

25 A Chief Justice and Deputy Chief Justice shall, upon retirement from office, be granted the retirement benefits prescribed respectively in relation to their offices in Schedule 2 to this Act.

Further Schedule 2 of the Act provides for the benefits payable to a retired Chief Justice and a retired Deputy Chief Justice and *inter alia* provides that
30 upon retirement, the Chief Justice and the Deputy Chief Justice will be paid a monthly retirement benefits equivalent to the salary payable to a sitting Chief Justice and Deputy Chief Justice respectively. Secondly the said retirement benefits shall be paid to the Chief Justice for life. There are other paragraphs which deal with other benefits upon retirement that I do not
35 need to refer to but significantly mentioned by the petitioner is the provision

5 of fuel and vehicle repairs allowance of 100 currency points per month. Secondly a consolidated allowance of 11.75 currency points per month to cater for airtime and Internet. A similar provision is made for the Deputy Chief Justice.

10 On the other hand, Schedule 5 and paragraph A of the Act deals with the benefits upon retirement of a Principal Judge and a judge of the High Court. As far as a Principal Judge is concerned, a monthly retirement benefit equivalent to 80% of the salary payable to a sitting Principal Judge is payable. The monthly retirement benefit shall be paid to a retired Principal Judge for life.

15 Similarly, a retired judge of the High Court in paragraph B is entitled to 80% of the salary payable to a sitting judge of the High Court and the monthly benefit shall be paid to a Judge of the High Court for life.

The alleged discrimination is therefore that firstly, a retired Principal Judge does not get a 100% salary equivalent to the salary of a sitting Principal
20 Judge unlike the provision made for a retired Chief Justice and Deputy Chief Justice respectively. Secondly, for the other benefits, a retired Principal Judge does not get a fuel and vehicle repairs allowance of 100 currency points per month as well as a consolidated allowance of 11.75 currency points per month to cater for airtime and Internet, which benefits are
25 accorded to a retired Chief Justice and the Deputy Chief Justice respectively.

The question for consideration is whether the law infringes or discriminatorily treats the Principal Judge differently from a Chief Justice and a Deputy Chief Justice in contravention of article 21 of the Constitution.

30 The petitioners case is that the law stated above is discriminatory in so far as the Petitioner is not accorded the same benefits as a Chief Justice and a Deputy Chief Justice. I further wish to add that the petition does not assert that a retired Principal Judge should be paid the same quantum of benefits and kinds of benefits. Because the petition by dealing with percentages,
35 claims 100% of the salary of a sitting Principal Judge and therefore it is a

5 question of whether an equitable formula is being used. A retired Chief Justice and a retired Deputy Chief Justice are entitled to be paid 100% of the salary of the person holding the respective offices while a retired Principal Judge is to be paid 80% of the salary of a sitting Principal Judge. It follows that if the office of the Chief Justice and that of the Deputy Chief Justice
10 have varying salaries from each other and which salaries vary and are higher than that of the Principal Judge, even if the Principal Judge is paid 100%, it would not compare with the payments of a Chief Justice and a Deputy Chief Justice. The grievance is therefore not about the actual quantum of monthly retirement benefits pegged on the salary of a sitting
15 Principal Judge, Chief Justice or Deputy Chief Justice respectively but is about percentages of payment upon retirement of the salary of a sitting holder of the relevant office.

In addition, the petitioner's grievance is about payment of fuel and vehicle repairs allowance of 100 currency points per month and a consolidated
20 allowance of 11.75 currency points per month to cater for airtime and Internet which is not paid to a retired Principal Judge while it is payable to a retired Chief Justice and Deputy Chief Justice upon retirement. The above in a nutshell is the gist of the background to the petition. The petitioner added that a retired Principal Judges should not be treated at par with a
25 retired High Court judge because the Supreme Court justices are not treated at par with the Chief Justice upon retirement in relation to their benefits and similarly the justices of the Court of Appeal are not treated at par with the Deputy Chief Justice upon retirement in relation to the retirement benefits. The question is why a retired Principal Judge should be
30 accorded equal treatment in terms of retirement benefits with retired judges of the High Court unlike the other two offices mentioned above? This also belies the argument that the Deputy Chief Justice, the Chief justice and the Principal Judge are tripartite administrative heads of the judiciary heading different courts in addition to their functions as judicial officers
35 thereby justifying a better retirement package than that of the judicial officers in the various courts which they head.

5 As stated above, I will handle issues 2 and 3 concurrently even though they
can be separately set out because they are intertwined in that, resolution of
issue 2, would substantially resolve the petition and issue 3 as well. I have
already resolved that the first issue in the affirmative that the petition raises
10 questions *as to interpretation of the Constitution* and this court has
jurisdiction to determine the petition.

Issue 2 is:

**Whether sections 22 and 25 read together with the Second and Fifth
Schedule of the Administration of the Judiciary Act are inconsistent
with article 2 (1) and 21 (1), 40 (1) (b) and 128 (7) of the Constitution.**

15 I have carefully considered issue 2 and find that section 22 of the
Administration of the Judiciary Act, 2020 alone is not inconsistent with any
provisions of the Constitution to the extent that the petitioner is not
asserting that these provisions should be nullified except in a formal
contradictory pleading of prayers as I will set out below. Article 2 of the
20 Constitution is clear and provides in article 2 (2) that;

"if any other law or any custom is inconsistent with any of the provisions of this
Constitution, the Constitution shall prevail, and that other law or custom shall, to
the extent of the inconsistency, be void."

In other words, throughout the submissions of the petitioner's counsel,
25 there is no single submission that section 22 of the Administration of the
Judiciary Act, 2020 is inconsistent with a provision of the Constitution.
Instead, the petitioner wants to uphold section 22 and Schedule 2 of the
Administration of the Judiciary Act, 2022 in that the petitioner would like to
be accorded the same treatment found in that schedule. Schedule 5 of the
30 Administration of the Judiciary Act deals with the benefits payable to a
retired Principal Judge and a Judge of the High Court. The only assertion
that I have considered and perceived through the submissions is the fact
that the Principal Judge is not accorded the same treatment like the
treatment of the Chief Justice and the Deputy Chief Justice as stipulated in
35 section 22 of the Administration of the Judiciary Act, 2020 and the Schedule

5 2 thereof. The inconsistency that the petitioner asserts in the petition and the submissions is not the inconsistency of section 22 and Schedule 2 of the Administration of the Judiciary Act. In other words, the petition does not seek nullification of those provisions but inclusion of a retired Principal Judge to the same percentage or proportion of benefits. Nevertheless, in
10 paragraph 13 (a) of the Petition, the petitioner seeks a declaration that section 22 and Schedule 2 of the Administration of the Judiciary is unconstitutional in as far as Schedule 2 excludes a retired Principal Judge. This is inconsistent with paragraph 13 (c) where the Petitioner prays that the retirement benefits of a Principal Judge be aligned with that of the Chief
15 Justice and a Deputy Chief Justice.

Paragraph 13 (8) of the petition cannot be granted for the simple reason that section 22 and Schedule 2 of the Administration of the Judicial Act do not deal with the Principal Judge but deal with the retirement benefits of a retired Chief Justice and a retired Deputy Chief Justice. The petitioner has
20 no quarrel with the retirement benefits accorded to those Judicial Officers under section 22 of the Administration of the Judiciary Act. Similarly, the petitioner has no quarrel with the retirement benefits specified in Schedule 2 of the Administration of the Judiciary. The entire petition of the petitioner and submissions in support thereof relate to the lack of provision in
25 Schedule 5 of the Administration of the Judiciary Act, 2020 insofar as it, instead of providing for 100% of the salary payable to a sitting Principal Judge upon retirement as a monthly payment, the Principal Judge is only accorded 80% of the salary payable to a sitting Principal Judge. Secondly, the petition is about the omission of two items in Schedule 5 of the
30 Administration of the Judiciary Act in that a retired Principal Judge is not accorded therein a fuel and vehicle repairs allowance of 100 currency points per month. Secondly, Schedule 5 does not include a consolidated allowance of 11.75 currency points per month to cater for airtime and Internet. The petition therefore deals with the exclusion and omission under Schedule 5
35 of a fuel and vehicle repair allowance of 100 currency points per month and a consolidated allowance of 11.75 currency points, to cater for airtime and Internet. In any case, the petitioner also asserts that article 128 (7) of the

5 Constitution for the provision that the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage. The petitioner further asserts and relies on article 158 (1) of the Constitution which similarly provides that:

10 Where any salary or allowance of the holder of any office is charged on the Consolidated Fund, it shall not be altered to his or her disadvantage after he or she has been appointed to that office.

The administrative expenses of the judiciary, including all salaries, allowances, gratuities, and pension payable to or in respect of persons
15 serving in the judiciary shall be charged on the consolidated fund under article 128 (5) of the Constitution though it is doubtful by use of the phrase "holder of any office" whether article 158 (1) of the Constitution is applicable to the, allowances, salary and pension payable to a retired Chief Justice, a retired Deputy Chief Justice and a retired Principal Judge. A holder of office
20 is a person currently holding the office and not a retired officer who held that office.

Further it must be pointed out that while the Chief Justice is accorded a 100% currency points for fuel and vehicle repairs per month, the Deputy Chief Justice is accorded 90 currency points per month for the same item.
25 Secondly, while the Chief Justice upon retirement is entitled to a consolidated allowance of 11.75 currency points per month to cater for airtime and Internet, the Deputy Chief Justice is entitled 10.25 currency points per month for the same item. The petition is silent about the disparity between benefits accorded to the Chief Justice and the Deputy Chief Justice.
30 The petition can logically be restricted to the omission to include the office of the Principal Judge in respect of provisions upon retirement of the holder thereof of all the items in the Fifth Schedule to the Administration of the Judiciary Act, 2020.

The Constitutional Prohibition of discrimination

5 The headnote of Article 21 of the Constitution gives an indication that the article is about "Equality and freedom from discrimination." Article 21 of the Constitution provides:

21. Equality and freedom from discrimination.

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

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

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

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

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

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

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

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

30 A literal reading of Article 21 (1) of the Constitution discloses that it has the following elements namely; it declares equality of all persons before the law and under the law in all spheres of political, economic, social and cultural life. It also has the element of equal protection of the law. There are two concepts to be considered broadly from the headnote of Article 31 of the Constitution. These are equality before and under the law and freedom
35 from discrimination under article 21 of the Constitution. It may be asserted

5 that equality before and under the law and equal protection may lead to
freedom from discrimination but these concepts can be addressed on their
own premises even if they are intertwined. Equality is a concept that can be
dealt with separately from the concept of freedom from discrimination.
Further the underlying thread between the concepts is the element of law
10 on the basis of which equality or freedom from discrimination can be
established. Equality before and under the law proceeds from an
understanding of the law. Freedom from discrimination can also be
conceived in terms of legal provisions which are neutral or discriminatory
in purpose or effect. Discrimination as defined may be positive or negative.
15 Article 21 (1) of the Constitution declares that all persons are equal before
and under the law in all spheres of political, economic, social and cultural
life and in every other respect and they are entitled to enjoy equal protection
of the law. Do the impugned provisions of the law promote formal
inequality? Secondly in terms of equal protection of the law, do the laws
20 accord the petitioner formal equal protection? Article 21 (1) of the
Constitution should be read in harmony with other clauses of the article and
also other provisions of the Constitution.

As far as the envisaged discrimination set out under Article 21 (2) of the
Constitution is concerned, the Constitution outlaws discrimination against
25 any person on the ground of sex, race, colour, ethnic origin, birth, creed or
religion, social or economic standings, political opinion or disability. The
question of whether any person has been discriminated against on any of
the grounds of personal classification or attributes mentioned in Article 21
(2) of the Constitution may be a question of fact that requires evidence and
30 perhaps a question of law in terms of definition of what amounts to
discrimination as well as whether the Petitioner fall within the classification
or personal characteristics of the Petitioner in terms of his social or
economic standing. This freedom is the subject of several judicial
precedents that I will consider below. For now, we can consider article 21
35 (3) of the Constitution in that it defines what is meant by the word
"discriminate" as used in article 21 and provides that it is to give different
treatment to different persons attributable only or mainly to their respective

5 descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion,
social or economic standings, political opinion or disability. Does the law
accord the petitioner different treatment on account of his personal
characteristics such as his social or economic standing or any of the other
personal characteristics listed in the article? The controversy when further
10 narrowed down to the Petitioner's petition includes classifications and
benefits in the public service based on rank and status as well as
responsibilities and whether such differentiation in benefits associated with
office can be taken to be discriminatory.

To support the claim of discriminatory treatment, the petitioner also relied
15 on article 40 (1) (b) of the Constitution which provides *inter alia* that
Parliament shall enact laws to ensure equal payment for equal work
without discrimination. In other words, the petitioner asserts that the work
that a Principal Judge performs deserves commensurate benefits upon
retirement which was not accorded in comparison to the remuneration
20 upon retirement of a Chief Justice and a Deputy Chief Justice. The petitioner
brought into view article 254 of the Constitution's which provides in clause
1 thereof that a public officer shall, upon retirement, be paid such pension
as is commensurate with his or her rank, salary and length of service. The
provision for equal payment for equal work without discrimination has to
25 be clearly contextualised since the petition clearly indicates that the Deputy
Chief Justice and the Chief Justice perform different functions and head
different courts.

Last but not least article 21 (4) (a) enables limitations to the declared rights
because it allows Parliament to enact any law or implement policies and
30 programs aimed at redressing social, economic, educational or other
imbalances in society. Administration of the Judiciary Act, 2020 and the
particular provisions do not deal with laws enacted to redress imbalances
created by circumstances which may be advanced. The Administration of
the Judiciary Act, was established *inter alia* to operationalise constitutional
35 provisions on the Judiciary.

5 Article 21 (4) (b) of the Constitution further allows Parliament to enact law
and make provision that is required or authorised by the Constitution. In
article 21 (4) (c), it also enables Parliament to make a law which is
acceptable and demonstrably justifiable in a free and Democratic society.
Putting the matter in the context of the petitioner's petition, and by
10 necessary implication, the issue is whether the unequal remuneration
according to position, rank or status in the public service is permissible
under the Constitution or whether it is provided for by the Constitution itself.
It requires an examination of the constitutional provisions which allow
Parliament by law to provide for remuneration according to rank and status.
15 Lastly it is provided in article 21 (5) of the Constitution that nothing provided
for in the Constitution shall be taken to be inconsistent with Article 21 of the
Constitution. The mandate of Parliament is to enact laws that are necessary
for the matters set out under Article 21 (4) and 21 (5) of the Constitution. It
makes an exception of those matters in the law enacted by Parliament to
20 implement constitutional provisions.

As far as judicial precedents are concerned, equality before and under the
law as well as freedom from discrimination has been the subject of
numerous precedents which I will consider below.

The Concept of Equality before and under the law and Freedom from Discrimination.

25

In **Andrews v Law Society of British Columbia [1989] 1 S.C.R. page 143**
Section 15 (1) of the Canadian Charter of Rights and Freedoms was
considered by the Supreme Court of Canada. Section 15 of the Canadian
Charter (supra) provides that:

30 15 (1) Every individual is equal before and under the law and has the right to the
equal protection and equal benefit of the law without discrimination and, in
particular, without discrimination based on race, national or ethnic origin, colour,
religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its
35 object the amelioration of conditions of disadvantaged individuals or groups

5 including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In **Andrews v Law Society** (supra) the facts were that Mr. Andrews, a British subject permanently resident in Canada met all the requirements for admission to the British Columbia bar except that of Canadian citizenship. He brought an action for declaration that the requirement for Canadian citizenship for admission to the bar violated section 15 (1) of the Canadian Charter. The issue framed for consideration was

1. Does the Canadian citizenship requirement to be a lawyer in the province of British Columbia as set out in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15 (1) of the Canadian Charter of Rights and Freedoms?
2. If the Canadian citizenship requirement to be a lawyer in the province of British Columbia as set out in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15 (1) of the Canadian Charter of Rights and Freedoms, is it justified by s.1 of the Canadian Charter of Rights and Freedoms?

McIntyre J held at pages 163 and 164 that section 15 (1) of the Charter:

Section 15 (1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law", as employed in section 15 (1), can arise in this case because it is an Act of the Legislature which is under attack.

Further, McIntyre J stated at page 164 that:

The concept of equality has long been a feature of Western thought. As embodied in s. 15 (1) of the Charter, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the Charter, it lacks precise definition....

5 It is a comparative concept, the condition of which may only be ascertained or
discerned by comparison with the condition of others in the social and political
setting in which the question arises. It must be recognized at once, however, that
every difference in treatment between individuals under the law will not
necessarily result in inequality and, as well, that identical treatment may
10 frequently produce serious inequality. This proposition has found frequent
expression in the literature on the subject but, as I have noted on a previous
occasion, nowhere more aptly than in the well-known words of Frankfurter J, in
Denis v United States, 339 U.S. 162 (1950), at p. 184:

15 It was a wise man who said that there is no greater inequality than the equal treatment
of unequals.

At page 165:

The same thought has been expressed in this Court in the context of section 2 (b)
of the Charter in R v Big M Drug Mart Limited [1985] 1 S.C.R 295: ...

20 In simple terms, then, it may be said that a law which treats all identically and
which provides equality of treatment between "A" and "B" might well cause
inequality for "C", depending on differences in personal characteristics and
situations. To approach the ideal of full equality before and under the law – and
in human affairs an approach is all that can be expected – the main consideration
must be the impact of the law on the individual or the group concerned.
25 Recognizing that there will always be an infinite variety of personal
characteristics, capacities, entitlements and merits among those subject to a law,
there must be accorded, as nearly as may be possible, an equality of benefit and
protection and no more of the restrictions, penalties or burdens imposed upon
one than another. In other words, the admittedly unattainable ideal should be that
30 a law expressed to bind all should not because of irrelevant personal differences
have a more burdensome or less beneficial impact on one than another.

The interpretation of section 15 (1) of the Canadian Charter is relevant and
persuasive in interpretation of the Ugandan article 21 of the Constitution in
so far as it also guarantees equality before and under the law and forbids
35 discrimination on the basis of personal characteristics which are set out in
the article. **Andrews v Law Society** (supra) is relevant for the proposition
that the provision for equality before and under the law and freedom from
discrimination does not provide for equality in a general or abstract sense.
Equality has to be applied in a variety of contexts which has to be

5 established. The concept of equality before and under the law is concerned
with the application of the law which applies to diverse categories of people.
The law does not impose obligations on individuals to treat others equally.
Equality before and under the law is a comparative concept and therefore
the application of the law has to be viewed in terms of the impact of the law
10 on others. Further, identical treatment may cause inequality in certain
contexts. The court should also be concerned with the infinite variety of
personal characteristics, merits, capacities and entitlements when
considering the concept as equality in certain contexts cannot be applied.
Emphasis should be on the impact of the law which is expressed to bind all
15 and which should not have a more burdensome or beneficial impact on one
category or individual than another or others based on his or her or their
personal characteristics.

In **Gosselin Vs Quebec (Attorney General)** [2002] 4 S.C.R. 429 McLachlin C.J.
in the judgment of the Supreme Court of Canada considered the tests to be
20 applied to establish a violation of section 15 (1) of the Canadian Charter. The
matter for consideration by the Supreme Court of Canada included the
question of "how to determine when the differential provision of
government benefits crosses the line that divides appropriate tailoring in
light of different groups' circumstances, and discrimination". Secondly to
25 "what extent does the Canadian Charter limit or restrict "a government's
discretion to extend different kinds of help, and different levels of financial
assistance, to different groups of welfare recipients?"

Particularly the questions as to interpretation of the Constitution *inter alia*
were:

- 30 1. Did s. 29(a) of the Regulation respecting social aid, R.R.Q. 1981, c. A-16,
r. 1, adopted under the Social Aid Act, R.S.Q., c. A-16, infringe s. 15(1) of
the Canadian Charter of Rights and Freedoms on the ground that it
established a discriminatory distinction based on age with respect to
individuals, capable of working, aged 18 to 30 years?

35

5 2. If so, is the infringement justified in a free and democratic society under s.1 of the Canadian Charter of Rights and Freedoms?

McLachlin C.J on the tests to be applied under section 15 (1) of the Canadian Charter of Rights and Freedoms said that:

10 To establish a violation of s. 15 (1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.
15 In this case, the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

My colleague Bastarache J. and I agree that *Law* remains the governing standard. We agree that the s. 15 (1) test involves a contextual inquiry to determine whether a challenged distinction, viewed from the perspective of a reasonable person in the claimant's circumstances, violates that person's dignity and fails to respect her as a full and equal member of society. We agree that a distinction made on an enumerated or analogous ground violates essential human dignity to the extent that it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others: ... We agree that a
20 claimant bears the burden under s. 15(1) of showing on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society. We agree that, if a claimant meets this burden, the burden shifts to the government to justify the distinction under s.1.

30 The tests are applicable and persuasive in interpretation of article 21 of the Ugandan Constitution and lay down the following relevant principles:

That a claimant or petitioner should prove on the balance of probabilities or on a civil standard of proof, the following:

35 That the law places a differential treatment between the claimant and others in purpose or in effect. That the differential treatment is on one or more of the enumerated grounds such as gender, sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political

5 opinion or disability as set out in article 21 (2). That the impact of the law is discriminatory in a negative sense of denying human dignity or treating the claimant as less worthy on one or more of the enumerated grounds than others. The tests in *Andrews versus Law Society of British Colombia* (supra) are also set out in **Nancy Law Vs Canada (Minister of Employment and**
10 **Migration) [1999] 1 S.C.R 497** where Iacobucci J at page 524 noted that the analysis of whether there was discrimination should be based on the following criteria namely:

15 In my view, the proper approach to analyzing a claim of discrimination under s.15 (1) of the Charter involves a synthesis of these various articulations. Following the analysis in *Andrews, supra*, the two-step framework set in *Egan, supra*, and *Miron, supra*, a court that is called upon to determine a discrimination claim under s. 15 (1) should make the following three broad enquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the
20 claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15 (1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third,
25 does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15 (1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third enquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15 (1).

30 At page 525:

35 Since the beginning of its s. 15 (1) jurisprudence, this court has recognized that the existence of a conflict between an impugned law and the purpose of s. 15 (1) is essential in order to found a discrimination claim. This principle holds true with respect to each element of a discrimination claim. The determination of whether legislation fails to take into account existing disadvantage, or whether the claimant falls within one or more of the enumerated and analogous grounds, or whether the differential treatment may be said to constitute discrimination within the meaning of s. 15 (1), must all be undertaken in a purposive and contextual manner.

5 In East Africa, and in **The Federation of Women Lawyers of Kenya (FIDA) – K) and 5 Others Vs Attorney General and Another [2011] eKLR in Constitutional Petition No. 102 of 2011** also considered equal protection of the law and held that a mere averment or proof of inequality is not enough to hold that equal protection has been denied. They said that:

10 The inequality produced in order to encounter the challenge of the Constitution must not be actually and palpably unreasonable and arbitrary. The law of equality permits many practical inequalities. In other words, a classification having some reasonable basis does not offend merely because it is not made with mathematical niceties or because in practice it results in some inequalities. We
15 all understand that Government is not a simple thing, it encounters and must deal with the problems which come from persons and infinite variety of relations. Therefore, classification is the recognition of those relations and in making it legislative, provision must be allowed a wide latitude of discretion and judgment. We are also aware that applying the dangerously wide and vague language of
20 equality and nondiscrimination to the concrete facts of life is a doctrinal approach which should be avoided. When a provision is challenged as offending against equal protection the question for determination by the courts is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. In our view mere
25 differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which the Constitution had in view. Equal protection is not violated if the exceptions which is made is required to be
30 made by some other provision of the Constitution. In addressing that issue, it is important to know whether there are other provisions or special provisions that have reserved special seats and benefits for the vulnerable members of our society. We think and state here that it is not possible to exhaust the
35 circumstances of criteria which may afford a reasonable basis for classification in all cases.

The court was interpreting article 27 (1) of the Constitution of Kenya which *inter alia* states that "*every person is equal before the law and has the right to equal protection and equal benefit of the law.*" Further in article 27 (2) it

5 provided that "*equality includes the full and equal enjoyment of all rights and fundamental freedoms.*"

Resolution of the questions in the Petition

10 The Ugandan article 21 which I have set out above is much more elaborate in that it enumerates the grounds of personal characteristics on the basis of which discrimination may be founded. It also provides for the right of legislature to make laws which may be discriminatory and for what is provided for in the Constitution.

15 Coming to the contextual application of Article 21 of the Constitution of the Republic of Uganda, reference must be had from the outset to article 40 (1) (b) which provides that Parliament shall enact laws to ensure equal payment for equal work without discrimination. I have carefully considered the provision for equal payment for equal work without discrimination and find that it is not applicable when one is dealing with the structured payments based on status and responsibilities in the hierarchy of government upon retirement. Particularly, the constitutional provision
20 which deals with Pension under article 254 of the Constitution does not envisage equal payment but provides for the criteria for payment to be made upon retirement. It provides that:

254. Pension.

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

A judicial officer is a public officer as defined in article 257 (2) (a) where it is provided that "*unless the context otherwise requires, a reference to an office in the public service includes (i) a reference to the office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme
30 Court or a justice of Appeal, or a judge of the High Court...*"

It follows that article 254 (1) of the Constitution applies to the office of the Principal Judge, the office of the Chief Justice, and the office of the Deputy Chief Justice in that Parliament is empowered thereunder to make laws in

5 conformity with article 254 (1) of the Constitution so that the public officer
on retirement gets such pension as is commensurate with his or her rank,
salary and length of service. The question of what is commensurate with
the rank, salary and length of service is a complex question that can only
be answered by legislature. The question is whether this court has
10 jurisdiction to determine what is commensurate with the rank and salary of
the public officer in relation to entitlements of Judicial Officers as defined
under article 128 (7) of the Constitution which refers to the conditions of
service of a judicial officer or other person exercising judicial power. The
blanket classification of a judicial officer or other person exercising judicial
15 power under article 128 (7) of the Constitution includes the persons holding
the various offices of the Chief Justice, the Deputy Chief Justice and the
Principal Judge.

In terms of article 21 (4) (b) where the legislature makes such provision as
required or authorised to be made under the Constitution, such provision
20 shall not be taken to be discriminatory. In the circumstances, if the criteria
for the payment of retirement benefits discriminates on the basis of the
rank of the public officer, such discrimination is not prohibited under article
21 of the Constitution because it is provided for in article 254 of the
Constitution. Further it is clear from the enumerated provisions namely
25 articles 133 which sets out the administrative functions of the Chief Justice,
article 136 which sets out the administrative functions of the Deputy Chief
Justice and article 141 which sets out the administrative functions of the
Principal Judge, that the Chief Justice ranks above the Deputy Chief Justice,
followed by the Deputy Chief Justice who ranks above the Principal Judge.
30 The Chief Justice is a justice of the Supreme Court which hears appeals
from the Court of Appeal/Constitutional Court and the Deputy Chief Justice
is a justice of the Court of Appeal or the Supreme Court appointed in that
capacity and hears appeals from the High Court.

The petitioner's counsel relied on article 128 (7) of the Constitution which
35 provides that:

5 The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.

However, no evidence of any variation of the salary, allowances, privileges and retirement benefits and other conditions of service of a retired Principal Judge or any other person exercising judicial power has been proved in the petition. There is no factual data or evidence about the remuneration of the Principal Judge under the 1967 Constitution of the Republic of Uganda and there is no comparative data of the earnings of the Principal Judge under the 1995 Constitution of the Republic of Uganda. It is practically impossible to say that the retirement benefits of the Principal Judge have been varied to the disadvantage of a retired Principal Judge under the Administration of the Judiciary Act, 2020. Further, the transition from the 1967 Constitution the 1995 Constitution does not amount to a variation of the benefits because the 1995 Constitution created new courts in the appellate structure of the judiciary. It added the Supreme Court above the Court of Appeal and made it a second appellate court from decisions of the High Court. Under the 1967 Constitution of the Republic of Uganda as amended, appeals lay from the High Court to the Court of Appeal which was later renamed the Supreme Court before the Supreme Court was created under the 1995 Constitution. Previously, appeals lay from the decisions of the High Court of the three East African countries of Uganda, Kenya and Tanzania to the East African Court of Appeal. Subsequently the East African Court of Appeal ceased to exist and was substituted with the Court of Appeal of Uganda, as far as Uganda is concerned while the other former member states of the East African Community created their own Courts of Appeal. It follows that, the creation of the Supreme Court and the Court of Appeal, under the 1995 Constitution created a new tier of appellate jurisdiction hearing appeals from the appellate court that in turn hears appeals from the High Court. The Supreme Court is therefore a second appellate court from decisions emanating from the High Court and is headed by a Chief Justice unlike what was provided for in the 1967 Constitution where the Chief Justice was a judge of the High Court and subsequently a judge of the Court of Appeal and

- 5 which court had jurisdiction to hear appeals from the High Court. It follows that the Administration of the Judiciary Act, 2020 catered for the new roles of the offices of the Deputy Chief Justice, the office of the Chief Justice and that of the Principal Judge in the administrative setup of the judiciary under the 1995 Constitution.
- 10 What has been demonstrated by examination of the law in this petition is that there were two elements of alleged discrimination for consideration. The first element is that upon retirement, a Chief Justice and a Deputy Chief Justice are entitled to receive 100% monthly allowance equivalent to the salary of a sitting Chief Justice and Deputy Chief Justice respectively. On
15 the other hand, a Principal Judge upon retirement is only entitled to receive 80% monthly payment of the salary of a sitting Principal Judge. All payments are meant to be made for life. The second element of alleged discrimination is the omission in Schedule 5 of the Administration of the Judicial Act, 2020 to include a fuel and vehicle repairs allowance per month and a
20 consolidated allowance per month to cater for airtime and internet expressed in currency points. These allowances, though with some disparity in the amounts are payable to a retired Chief Justice and a retired Deputy Chief Justice. I noted that a retired Chief Justice gets a higher amount of these extra allowances than a retired Deputy Chief Justice. These
25 allowances are not payable to a retired Principal Judge.

- Further, the allowances accorded to a Principal Judge save for one item is the same as that of a High Court judge. The one item is that a High Court judge is entitled to a monthly housing allowance equivalent to the housing allowance payable to a sitting judge of the High Court or a one-off payment
30 of 15,000 currency points, payable in lieu of a house. On the other hand, the Principal Judge is entitled to a monthly housing allowance equivalent to the housing allowance payable to a sitting Principal Judge or a one-off payment of 17,500 currency points, payable in lieu of a house. The rest of the allowances are the same as compared with a retired High Court judge.
- 35 What is clear is that the payments and amounts of payment are not the same in some material respects based on the rank and status of the Judicial

5 Officer in question. Such disparity in retirement payment is permitted by article 254 (1) of the Constitution which allows discrimination on the basis of rank and status. The disparity is not only allowed by the Constitution but has a rational basis.

10 Therefore going to the narrower question of omission to give a retirement package to the Principal Judge of 100% monthly payment of a sitting Principal Judge and only providing 80% of the salary of a sitting Principal Judge, or omitting to pay or provide payment of certain allowances which are accorded to a retired the Chief Justice and a retired Deputy Chief Justice which is not similarly given or provided for a retired Principal Judge, I have
15 carefully considered the administrative functions of the Chief Justice, the Deputy Chief Justice and Principal Judge in accordance with the laws. It is the role of the Principal Judge as another administrative head, heading the High Court in which capacity he assists the Chief Justice that the narrower question of discrimination was presented.

20 The narrower controversy flows from the proposition that the Principal Judge is also a head of a sector of the judiciary namely the High Court (which has over 50 judges and several divisions) and also supervises all subordinate courts. In summary under article 133 of the Constitution, the Chief Justice is the head of the judiciary responsible for administration and
25 supervision of all courts. Secondly in article 130 of the Constitution, the Chief Justice is also the head of the Supreme Court. As far as the Deputy Chief Justice is concerned, he or she heads the Court of Appeal and deputises for the Chief Justice. The Deputy Chief Justice further performs functions delegated to him or her by the Chief Justice (see article 136 of the
30 Constitution). On the other hand, under article 141 of the Constitution, the Principal Judge is the head of the High Court and it is clearly stated that the Principal Judge assists the Chief Justice in administration of the High Court and supervision of subordinate courts. Secondly the Principal Judge may perform other functions delegated to him or her by the Chief Justice.

35 From the above, it is clear that the offices under consideration do not rank at par or are not the same in terms of rank or hierarchy. The Principal

5 Judge, assists the Chief Justice in the administration of the High Court and subordinate courts.

From a consideration of the grievances of the petitioner, there was formal discrimination in that 80% payable to a retired the Principal Judge is a lower sum compared to the 100% payable to a retired Chief Justice and the Deputy
10 Chief Justice in terms of a monthly payment after retirement equivalent to the salary of the holder of that substantive office from which he or she retired. Secondly, there was formal discrimination in terms of fuel and vehicle repair allowances as well as airtime and Internet bundle allowances payable to a retired Chief Justice and a retired Deputy Chief Justice
15 respectively which are some of the allowances not payable to a retired Principal Judge at all.

The first question is whether this formal differential treatment in terms of retirement allowances or remuneration or benefit where the Principal Judge gets less of the heads of benefit as well as less in terms of
20 percentage of the monthly payment of pension compared to the Chief Justice and the Deputy Chief Justice after their retirement, is based on one or more of the grounds enumerated under article 21 (2) and 21 (3) of the Constitution.

The only possible social personal characteristic which falls within the
25 enumerated grounds is that of social or economic standing. However, the office of the Principal Judge is a legal construct which places it in the hierarchy of the Judicial Officers in charge of the Administration of the Judiciary as a social position accorded in the Constitution. It is therefore provided for by the Constitution. It does not exactly fulfil a requirement for
30 finding that it disadvantaged the holder of the office by virtue of the social or economic standing per se.

Further, from a literal reading of article 21 (3) of the Constitution which defines the word "discriminate" as used in the article, the different treatment attributable to different persons on the enumerated personal
35 characteristics seems not to include a public office or title. The law deals

5 with personal attributes rather than official rank or position. The words
"sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or
economic standing, political opinion or disability" are construed
analogously to mean personal characteristics. It follows that the expression
"social or economic standing" should be of a personal nature and the basis
10 of discriminatory differential treatment to the disadvantage of a person of
the "social or economic standing" which is named. Definitely, there is a
hierarchical understanding of the administrative offices we have
considered above with the Chief Justice having the highest rank, followed
by the Deputy Chief Justice and followed by the Principal Judge.

15 The definition of equality in **Andrews v Law Society of British Columbia**
(supra) is very persuasive on the issue and states that the concept of
equality does not provide for equality between individuals or groups within
society in a general or abstract sense. In the sense of the administrative
hierarchy, there is no equality. Further the structured levels of
20 administration are provided for in the Constitution itself.

Going to the first question as to whether the enumerated benefits of the
Principal Judge or that of the Chief Justice or the Deputy Chief Justice are
unequal and to the detriment of the Principal Judge upon retirement, the
question cannot be answered without consideration of article 21 (4) (b) of
25 the Constitution insofar as it provides that nothing in article 21 shall prevent
Parliament from enacting laws that are necessary for making such
provision as is required or authorised to be made under the Constitution.
Specifically article 21 (5) provides that:

30 "Nothing shall be taken to be inconsistent with this article which is allowed to be
done under any provision of this Constitution."

Article 254 (1) of the Constitution allows formal discrimination based on
rank in the payment of pension benefits and allowances. However, even if it
is said for the sake of argument that the formal discrimination violates
article 21, the second test is whether the formal discrimination is based on
35 the enumerated grounds which I have set out above. These grounds include

5 as far as is relevant the "*social or economic standing*". I have already indicated that it is difficult to place the office of the Principal Judge in the category of the personal characteristic of "*social or economic standing*" which is a ground upon which discrimination may be based because the office is not a personal characteristic as enumerated in the other
10 enumerated grounds such as "*sex, race, colour, ethnic origin, tribe, birth, creed or religion, political opinion or disability*." All the other enumerated grounds relate to personal characteristics which may lead to discrimination and may have impact in the words of McIntyre J. in *Andrews v Law Society* (supra), of a more "*burdensome or less beneficial impact on one than*
15 *another*". It stems from the proposition that every person is equal before the law and should enjoy equal protection of the law. But where the law provides for hierarchical ranking, that analogy fails because the law itself provides for more beneficial treatment in terms of remuneration of persons of higher rank than those of lower ranks in terms of article 254 (1) of the
20 Constitution. In the premises, the test of discrimination per se cannot be argued and would open a Pandora's box because there are so many hierarchical rankings in terms of beneficial entitlements. For instance, I have demonstrated above that the Principal Judge enjoys slightly more benefits than a High Court judge upon retirement which may be justifiable and is justifiable because the Principal Judge is also the head of the High
25 Court. The same argument may hold in the view of Parliament for the higher benefits of the Chief Justice and that of the Deputy Chief Justice.

In my humble judgment, it is for Parliament to consider the role of the Principal Judge more deeply so as to reflect the heavy responsibilities of
30 that office rather than get a judicial pronouncement made with no jurisdiction to make policy for Parliament. For that reason, I find that the question is outside the province of the powers of the Constitutional Court under article 137 of the Constitution because it is a matter of policy rather than a question of inconsistency of the law. There are several laws which
35 provide for different levels of remuneration or benefit. To hold otherwise would open up all kinds of litigation based on what somebody thinks is his or her entitlement with regard to his or her responsibilities. Such matters

5 should be left to Parliament which is empowered on behalf of the people of Uganda to make laws to ensure that whatever is paid is commensurate with the rank and status of the public officer in terms of article 254 (1) of the Constitution.

10 Clearly, the question before the court is whether the payments upon retirement of the Principal Judge is commensurate to his or her rank in light of the responsibilities of being the head of the High Court and assisting the Chief Justice in the administration of the High Court and supervision of the subordinate courts. It is my judgment that the petition has no merit as far as the question of differential discriminatory treatment is concerned.

15 I am further of the opinion that it is advisable and recommended that Parliament should look into the matter to ensure that the office of the Principal Judge receives a commensurate payment in terms of retirement benefits that befits a Principal Judge if they find merit in the matter in the grounds of this Petition. It is not upon this court to define what is
20 commensurate but it is for the policymaker which is Parliament to consider what is commensurate after getting advice of the Judicial Service Commission whose functions include under article 147 (1)(b) of the Constitution the function:

25 (b) subject to the provisions of this Constitution, to review and make recommendations on the terms and conditions of service of judges and other judicial officers:

Such terms and conditions of service for review consideration of the Judicial Service Commission include retirement benefits.


30 In the premises, as far as issue number 3 is concerned, the variation between the office of the Principal Judge has clearly been stated as getting slightly a better package upon retirement than a retired judge of the High Court. The petitioner would like this court to find that a Principal Judge should not be treated at par in a retirement package with a retired judge of the High Court. For the same reasons I have stated above, issue number 3
35 of the petition has no merit because it is upon Parliament to find what is

5 commensurate and befitting for the office of the Principal Judge upon retirement I would strongly recommend Parliament to consider the matter further.

10 In the premises, the petitioners petition has no merit for the reasons I have given above and I would dismiss it. I do not need to consider whether the Administration of the Judicial Act also applies to the petitioner having retired just before the law came into force. That is not a question for interpretation of the Constitution and I decline to handle it. In any case, the respondent admitted that the petitioner was paid his lump sum benefits under the Administration of the Judiciary Act and I do not see any reason to
15 make any comments about the issue.

As far as costs are concerned, the petitioner's grievance in the best case scenario should attract the attention of Parliament with clear advice from the Judicial Service Commission under article 147 (1) (b) of the Constitution. I would direct that this judgment be placed before the Judicial Service
20 Commission. Secondly, the Petition was brought in the public interest and does not only concern the petitioner in his personal capacity as a retired Principal Judge but affects all holders of that office entitled in law upon their retirement to benefit from the laws in force and any other offices in the Judicial Service. In the premises, I would dismiss the petition with no
25 order as to costs.

Dated at Kampala the 21st day of Oct 2022



Christopher Madrama Izama

30 Justice of Court of Appeal/Constitutional Court

REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA
CONSTITUTIONAL PETITION NO. 15 OF 2021
(CORAM: Bamugemereire JCC, Musota JCC, Madrama JCC)
(Kibeedi JCC, Mulyagonja JCC)

HON (RTD) JUSTICE YOROKAMU BAMWINE:::PETITIONER

VERSUS

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

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

I have had the privilege of reading the lead Judgment of my learned brother Christopher Izama Madrama JA. I am in agreement with his arguments and the final decisions. I note that my brothers and sister, Musota JA, Kibeedi JA and Mulyagonja JA concur. I would like, on behalf of my colleagues, to thank all the Parties and their Counsel, on both sides, for the well-researched and finely-articulated arguments made before this court. We would wish you to know that we have not only relied on your submissions but also on much further authority both comparative and persuasive in order to arrive at our Judgments. Without getting into any level of detail I note that the issues for consideration were:

1. Whether the petition raises any issues/questions for Constitutional interpretation.
2. Whether sections Section 22 and section 25 read together with schedule 2 and 5 of the Administration of the Judiciary Act, 2020

are inconsistent with Article 2(1) & 21(1) and Article 128(7) of the Constitution.

3. Whether Section 25 and 5th schedule of the Administration of the Judiciary Act, 2020 are inconsistent with Articles 133(1) and 141 (1)(a) of the Constitution to the extent that they provide for the grant of retirement benefits in an order disregarding the hierarchy of the Judiciary.

4. Whether there are any remedies available to the parties.

From the outset let me state, for purposes of clarity, that the decision of this court is fully laid down in the lead Judgment of my brother Madrama JA. However, from a thirty thousand-feet-view, I can surmise that this petition is primarily engaged with the issue whether the impugned sections 22 and 25 of the Administration of the Judiciary Act, 2020 (hereinafter referred to as the AJA) are discriminatory in nature and in effect by not affording the Principal Judge treatment commensurate to the other administrative heads of the Judiciary namely the Chief Justice and the Deputy Chief Justice. It was unanimously agreed, regarding whether this petition raises issues of constitutional interpretation, that the issues raised were indeed legitimate and required the interpretation of the Constitution.

Regarding issues of equality, discrimination and the remedies available as stipulated in issues 2,3 and 4, my granular view is that issues of equality and discrimination are highly contextual, comparative and fact-driven. As noted in the lead judgment, there has been a comprehensive assessment, correlation and comparative analysis of issues which lead to the conclusion that the issues and

remedies are aligned to a specific set of facts and contexts and therefore are not issues of general application.

The main contention in issues 2 and 3 appears to be that the Principal Judge was not rendered the exceptional treatment in the payment of retirement benefits as was accorded to the Chief Justice and the Deputy Chief Justice in accordance with section 22 of the Administration of the Judiciary Act, 2020 and the Schedule 2 thereof.

While the Petitioner relied on Article 40 of the Constitution which stipulates that laws shall be enacted to guarantee equal pay for equal work, his petition brings into sharp focus Article 254 (1) of the same Constitution which is to the effect that a public officer shall, upon retirement, be paid such pension as is commensurate with his or her rank, salary and length of service. The subtle issues here were whether the Chief Justice, Deputy Chief Justice and Principal Judge play the same roles so as to be accorded the same treatment, and therefore whether this is a question of equal work for equal pay? The other question was whether there was an obligation under the law to vest exactly the same retirement benefits based on the same principles to the three offices across board. The other issues were whether by virtue of the Principal Judge's status in the hierarchy of Judiciary he deserved enhanced benefits as compared to the Justices of the Courts of Supreme Court, Court of Appeal or indeed the High Court. Drawing it down further the issue was whether the unequal remuneration accorded to the office of the Principal Judge in relation to their

position, rank or status in the public service was discriminatory and to a greater extent unconstitutional.

In the articulation of the inequality occasioned against a Principal Judge in the assessment of his retirement benefits and other entitlements it was submitted that the wide-ranging administrative responsibilities taken on by the Principal Judge are over and above what an ordinary High Court Judge is charged with. Indeed, as Head of the High Court he is in charge of the supervision of seven (7) or more Divisions of the High Court and twenty (20) and more High Court Circuits not to mention the immediate supervision of the numerous and widespread Magistrates Courts, all of which involves moving from one corner of the country and border to border in order to ensure the efficient administration of Justice both in the High Court and the courts below. It was argued that the Principal Judge is charged with extensive responsibility in execution of his administrative functions pursuant to Art. 141 (1)(a) of the Constitution. Further, counsel submitted that as head of the High Court, the Principal Judge also enjoys a higher rank than that of an ordinary High Court Judge. It was further submitted that in essence, the Principal Judge is charged with a greater responsibility, a higher volume of work, and an elevated rank within the High Court over and above any other High Court Judge and or Magistrate. It was further noted that while in service, the salary, benefits and emoluments of a sitting Principal Judge are far superior to the ones earned by High Court Judges, Justices of the Court of

Appeal and Constitutional Court and the Supreme Court. It was further submitted that the official vehicle allocation of a police outrider back and front to a sitting Principal Judge is equally superior to all the other Judges and Justices. And it was indeed argued that the substantive work and responsibilities of a Principal Judge are much wider, deeper, extensive and onerous than those of individual Judges and Justices.

The Respondents in reply, counsel for the respondent contended that section 22 of the Administration of Judiciary Act 2020 was couched in such a manner as to apply equally to all judicial officers who retire after the commencement of the Act and retrospectively applied to all judicial officers who retired before the commencement of the Act and who, at the commencement of the Act, continue to receive pension in respect of their service under the Pensions Act. It was further submitted that Parliament considered the fact that different levels of administration in the Judiciary earned salaries commensurate to the positions they held and therefore that the Parliament in enacting the Administration of Judicial Act 2020 took into consideration the constitutional hierarchy of the Judiciary.

Counsel for the respondent further submitted that whereas the Principal Judge is responsible for the administration of the court and has general supervisory powers over Magistrate's Courts, he is primarily and substantively a Judge of the High Court, a first among equals in whom is vested administrative powers over magistrates and

his or her peers. And therefore that the legislature applied the principle of 80% of emoluments across board to Justices of the Supreme Court and Court of Appeal who in rank and stature are superior to the High Court.

5 I cautiously considered the arguments of both sides. I will start by stating that discrimination is an issue this court frowns upon. Indeed, it is our call and duty to eliminate all forms of inequality.

10 In order for this court to find that sections 22 and 25 of the AJA lead to unequal treatment of a Principal Judge it has to determine the Constitutionality of a section of a Statute or Act of Parliament. The Court also has to establish the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe upon a right guaranteed by the Constitution, the Court must go a step further to critically scrutinise the effect of its implementation. In **Zachary Olum and another v Attorney General [2002] 2 EA 508** and also in **Salvatori Abuki v Attorney General UGCC No. 2 of 1997** it was held that in determining the constitutionality of any law or legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either effect
15 animated by the object of the legislation intends to achieve.
20

As regards discrimination, Article 21 (2) of the Constitution of Uganda out-laws discrimination against any person on the ground of sex, race, colour, ethnic origin, birth, creed or religion, social or economic standings, political opinion or disability and more recently, age. Age

was recently added as a ground for claiming discrimination. When interpreting discrimination in this particular scenario, it includes allegations of unfair treatment or more precisely, disparate treatment in relation to similarly placed persons in terms of what benefits and other retirement entitlements would accrue to a Principal Judge in the Public Service based on their class category and status in relation to their responsibilities and whether such differential treatment exists as against the Principal Judge in comparison to the Chief Justice or Deputy Chief Justice.

I do agree with my brother that not every differential treatment in law amounts to discrimination. Discrimination occurs when a person is unable to enjoy his or her legal rights on an equal basis with others based on an unjustified distinction made in law, policy or treatment. The classifications for discrimination include age, sex, religion, creed and others as have been enumerated above. The question then is whether this is a classic case of discrimination based on unequal treatment?

In general terms I am persuaded by the thoughts on equality as expressed by the Supreme Court of Canada, that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (see **R v Kapp**, [2008] 2 S.C.R. 483). To a large extent Article 254(1) allows for differential and unequal levels of treatment of public servants as far as retirement benefits are concerned, based on their rank and file. Indeed,

to this extent it was found that the Principal Judge in service and on retirement takes home more income than the justices and judges of the Courts of Judicature. This goes to show that while all persons are equal before the law, where the law itself is not made with
5 'mathematical niceties, it, as a result permits practical inequalities under it. In the result it would become 'burdensome' to find a fine measure of equality in the circumstances. See **The Federation of Women Lawyers of Kenya (FIDA) - K) and 5 Others v Attorney General and Another [2011] eKLR in Constitutional Petition No. 102 of 2011**
10

I agree with counsel for the Petitioner that indeed the office of the Principal Judge is one of the offices in the Judiciary that is accorded respect and honour given the duties and responsibilities it entails. However, and with all due regard to the submissions for and on behalf
15 of the Petitioner, I fail to find that Petitioner's grievance falls in the categories stipulated in Article 21 of the Constitution and neither do I find an unequal application of Article 254 (1). Certainly, and to a great extent, the office of the Principal is an outlier, an anomaly that may call for redress. The issue with the AJA law is that it stipulated remuneration matters and embedded them in the law. Ideally
20 remuneration matters are a function of human resource management and would be in some policy guideline. Undeniably therefore, much of what is complained about is a question of what policy and law

makers can do, and it is within their purview to re-align the retirement benefits of the office of Principal Judge as they deem fit.

Consequently, and as can be deciphered from the lead Judgment of my brother Madrama JA, having carefully considered the deliberations of counsel and as indeed my learned brothers Musota JA, Kibeedi JA and my learned sister Mulyagonja JA agree, we find that although the grounds questioning the applicability of sections 22 and 25 of the AJA merited the requirement for the interpretation of the Constitution, they did not meet the threshold required to make their purpose or effect unconstitutional.

The Petition is dismissed.

No order is made as to costs.



Catherine Bamugemereire
Justice of the Constitutional Court
Court of Appeal

21/10/2022

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 15 OF 2021

HON. JUSTICE (RTD) DR. YOROKAMU BAMWINE ::: PETITIONER
VERSUS

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


CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA/JCC
HON. JUSTICE STEPHEN MUSOTA, JA/JCC
HON. JUSTICE CHRISTOPHER MADRAMA, JA/JCC
HON. JUSTICE MUZAMIRU M. KIBEEDI, JA/JCC
HON. JUSTICE IRENE MULYAGONJA, JA/JCC

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA/JCC.

I agree with his analysis, conclusion and the orders proposed.

Dated this 21st day of Oct 2022



Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Bamugemereire, Musota, Madrama, Kibeedi, Mulyagonja, JJA/JJCC)

CONSTITUTIONAL PETITION NO. 15 OF 2021

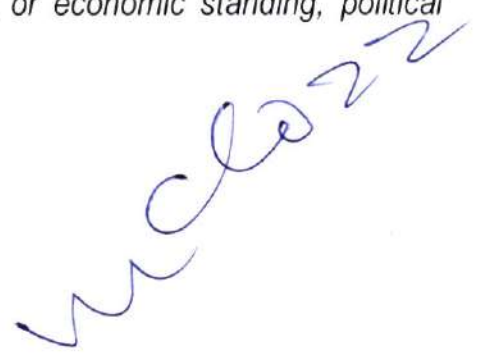
HON. JUSTICE (RTD) DR. YOROKAMU BAMWINE]..... PETITIONER
VERSUS
ATTORNEY GENERAL]..... RESPONDENT

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have had the benefit of reading in draft the judgment of my learned brother, Madrama, JCC, and I agree with the comprehensive reasons given, conclusions made, and the orders proposed.

Article 21 of the Constitution of the Republic of Uganda, by guaranteeing equality and freedom from discrimination, was not intended to mean equal treatment to all persons in all the different aspects of lives. In a society which is heterogeneous, same treatment of "unequal" persons inevitably leads to different unintended consequences for the different persons. It is a recipe for creation of "unintended inequality" and greater injustice in the name of equality. This could not have been the intention of the framers of the Constitution when enacting Article 21.

I agree with the reasoning of my brother, Madrama, JCC, that the differential treatment which is prohibited by Article 21 is that which relates to personal attributes of "sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability".



I also agree that the differential treatment of persons which is provided for in the Constitution itself does not contravene Article 21 of the Constitution and is not unconstitutional.

Signed, dated and delivered at Kampala this ^{21st} day ^{oct} 2022


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MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Bamugemereire, Musota, Madrama, Kibeedi and
Mulyagonja, JJA/JJCC)

CONSTITUTIONAL PETITION NO. 15 OF 2021

HON. JUSTICE (RTD)
DR. YOROKAMU BAMWINE ::::::::::::::::::::::::::::::::::: PETITIONER

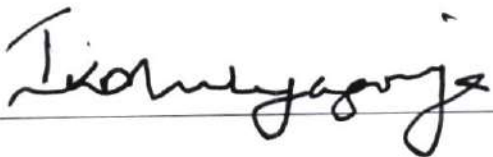
VERSUS

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

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my learned brother, Christopher Madrama, JA/JCC in the petition above. I agree with him that the petition should fail for the reasons that he has clearly articulated. I also agree that the petition ought to be dismissed without costs, for the reasons that he has given.

Dated at Kampala this 21st day of Oct 2022.



Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT