THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM: EGONDA NTENDE, MADRAMA, KIBEEDI, MUGENYI, GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO 0024 OF 2019

1. **SUNDYA MUHAMUDU}**
2. **CHESAKIT MATAYO}**
3. **MUHWEZI PONSIANO}**
4. **OMOLLO BEN}**
5. **OPOLOT BEN}**
6. **GODFREY MPAGI}**

AND 563 OTHERS} .....PETITIONERS

VS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

The petitioners filed this petition under the provisions of article 137 of the Constitution of the Republic of Uganda for declarations that the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions). Legal Notice No 8 of 2013 is unconstitutional to the extent that they were issued ultra vires the powers of the Chief Justice conferred and envisaged under article 133 (1) (b) of the Constitution and have the effect of enacting principal legislation which is the exclusive preserve of Parliament.

The petitioners contend that the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions). Legal Notice No 8 of 2013 was issued by the Learned Chief Justice contrary to the legislative principle of presumption against deprivation of liberty and in contravention and breach of Article 28 (12) of the Constitution. The petitioners are also aggrieved by the decision of the Supreme Court and its effects in **Tigo Stephen Vs Uganda S.C.C.A. No. 089 of 2009 [2011] UGSC 7 (10th May, 2011)** that life imprisonment

is defined as imprisonment for the remainder of the convict's life as well as the holding that commuted sentence of death to life imprisonment shall be served without remission in **Attorney General Vs Susan Kigula and Others**. Wherefore the petitioners seek the following declarations:

1. In invalidating section 47 (6) now section 86 (3) of the **Prisons Act,** the Supreme Court exceeded its jurisdiction and contravened the provisions of Article 132 of the Constitution.

2. The Supreme Court violated the constitutional doctrines of separation of powers and supremacy of Parliament when it infringed upon the lawmaking province of Parliament and substituted its own will for that of Parliament of Uganda when it invalidated section 47 (6) (of the Prisons Act cap 304 (repealed) now section 86 (3) of the **Prisons Act** 2016 and substituted it with a new definition not prescribed by Parliament.

3. The result of the decision of the Supreme Court deprives persons convicted and sentenced to death of their non-derogable and constitutionally guaranteed rights to equal protection of the law and benefit of the period spent on remand before completions of trial and therefore a contravention of Articles 21 (1) and 23 (8) of the Constitution.

4. The decision of the Supreme Court in the ultimate, deprives persons convicted and sentenced to life imprisonment, to their statutory right to remission under the **Prisons Act** and to that end, a contravention of article 21 (1) of the Constitution.

5. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No 8 of 2013 are unconstitutional to the extent that they create a Legal regime of

"minimum sentences" not Legislated by Parliament and introduced

"long-term" sentences in excess of twenty years, not intended or Legislated by Parliament.

6. That "life imprisonment" or "imprisonment for life in Uganda has the meaning ascribed to it by the sovereign Parliament of Uganda under section 86 (2) of the **Prisons Act,** 2006, which statutory provision is valid law unless and until repealed, amended or suspended by Parliament or declared unconstitutional by a court of judicature.

7. All long-term sentences in excess of twenty (20) years were never intended to be life sentences, which is the second gravest sentence after the death sentence and should be referred to the original trial court for mitigation and resentencing in order that they are in tandem with article 28 (8) of the Constitution.

8. The passing of the Law Revision (Penalties in Criminal Matters) Miscellaneous Bill, 2015 by the Parliament of Uganda on 21st of August 2019, cannot and should not act retrospectively in contravention of Article 92 of the Constitution.

Among the relevant facts in support of the petition are that the first petitioner is 92 years old and was sentenced to life imprisonment having been convicted of mob justice. Secondly, the second petitioner is also serving a life sentence and third petitioner is 26 years old and serving a 60-year sentence having been convicted of robbery and murder. The fourth petitioner is a 28 years old convict serving a 50 years' sentence, having been convicted of rape. The 5th petitioner is a 26-year-old man and serving a 49 years' sentence having been convicted of murder. The sixth petitioner is serving a 34-year sentence having also been convicted and sentenced by the courts of judicature of Uganda for mob justice.

The petitioners averred that they are persons convicted and presently serving life sentences and long-term sentences in excess of twenty years

with a vested interest in the rule of law. The 562 other petitioners are listed in an attachment where it is indicated that they aggrieved by numerous sentences which include life imprisonment for numbers 1 to 182 while others are suffering sentences ranging from 75 years' imprisonment. 50 years' imprisonment, 45 years' imprisonment, 68 years' imprisonment and so on down to the lower sentences of 21 years' imprisonment.

The petitioners are aggrieved by the following matters.

That on 10 May 2011, the Supreme Court of Uganda issued Judgment in **Criminal Appeal No 089 of 2009 Tigo Stephen Vs Uganda** on the provisions of section 47 (6) of the **Prisons Act,** cap 304 and later section 86 (3) of the **Prisons Act** 2006. This is because the court held that imprisonment for life which is the second severest punishment next to the death sentence is not defined in the statutes prescribing it. Further the Supreme Court held, based on persuasive case law that life imprisonment means imprisonment for the natural lifetime of a convict. They contend that this result negated the supremacy and will of Parliament to the will of the Indian courts and legislature. Further the petitioners averred that the decision of the supreme court rendered section 47 (6) now section 86 (3) of the **Prisons Act** inoperative and invalid. That by reason of the invalidation, the Supreme Court exceeded its judicial lawmaking powers under common law and in the result, infringed upon and breached the constitutional doctrine of sovereignty and legislative supremacy of Parliament. The petitioners further contend that the court also infringed and breached the constitutional doctrine of separation of powers when it intruded into the lawmaking province of Parliament and substituted the will of Parliament with its own will by pronouncing that life imprisonment means imprisonment for the natural lifetime of a convict as opposed to twenty years Legislated by Parliament within the meaning and scope of the section 47 (6) and (86 (2) of the **Prisons Act,** thereby contravening Articles 79 (1) and (2) of the Constitution.

The petitioners aver that the Supreme Court in interpreting and in the

ultimate, invalidating the provisions of the Prison's Act. overreached its

powers to invalidate a statutory provision to the extent that such power is only exercisable by the Supreme Court in its appellate jurisdiction in constitutional appeals and therefore it contravened article 132 of the Constitution.

Further, the petitioners aver that the decision of the Supreme Court takes away the statutory right to remission in the case of a convict sentenced to life imprisonment within the meaning ascribed to "life imprisonment" by the court, in spite of the vague wording by the court that "though the actual period of imprisonment may stand reduced on account of remission earned."

The petitioners contend that the decision of the Supreme Court in the result, contravenes the provisions of article 23 (8) of the Constitution to the extent that a convict sentenced to life imprisonment is not and cannot take the benefit of the constitutional right guaranteed to all persons convicted without the exception now introduced by the decision of the Supreme Court.

The appellants contend that consequent upon the decision a convict sentenced to life imprisonment, is prejudiced by loss of equality before the law guaranteed to all persons under the equal protection clause of article 21 (1) of the Constitution. Further to the extent that the Supreme Court invalidated the provisions of an existing law and purported to make "new law", the retroactive application of the decision of the court is to that end unconstitutional, being in breach of the constitutional principle forbidding retroactive application of a judicial decisions. Further that consequent upon the decision of the Supreme Court, the learned Hon. Chief Justice issued the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions), Legal Notice No 08 of 2013** in purported exercise of powers conferred upon the Chief Justice under article 133 (1) (b) of the Constitution. The Sentencing Guidelines introduced "minimum sentences" and "long-term sentences" in excess of twenty years that is the second gravest sentence is prescribed and Legislated by the sovereign Parliament under section 86 (3) of the **Prisons Act.**

They contend that the introduction of the "minimum sentencing regime" under the Sentencing Guidelines. ushered in a Legal regime of unconstitutional and wrong sentences in excess of twenty years and in contravention of the provisions of articles 28 (8) and (12) of the Constitution. They averred that article 133 (1) (b) of the Constitution does not confer upon the Chief Justice legislative capacity and/or authority to prescribe sentences for/punishments for offences. which power is the preserve of Parliament. That to the extent that the Sentencing Guidelines have assumed the force of law and have been applied by the courts of judicature against criminal defendants in Uganda, they contravene the provisions of article 79 (1) and (2) of the Constitution. Further the decision of the Supreme Court referred to in **Tigo Stephen** (supra) to the effect that "life imprisonment" is not defined in the offence creating statutes and that the definition of the **Prisons Act.** was only for purposes of calculating remission. is erroneous and contrary to the legislative principle of "cross-referencing" and 1n so finding, the supremacy and finality in legislative prerogative.

The Supreme Court had earlier in the decision of **Attorney General Vs Susan Kigula; Constitutional Appeal No 03 of 2006** imposed "twenty years sentences without remission" upon convicts who at the time had exhausted the appeal process.

The petitioners contend that the imposition of such sentences without remission, a practice that has to date been followed by the other courts of judicature and in particular the High Court, was unconstitutional and all persons having such sentences including those under the **Kigula** decision as having illegal and unconstitutional sentences in contravention of article 28 (8) of the Constitution.

In the premises, the petitioners aver that by reason of the above facts and averments, the decision of the Supreme Court in particular in Tigo Stephen and Susan Kigula contravene the constitutional provisions referred to and to that extent are unlawful and unconstitutional.

Further, the petitioner's state that the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions), Legal Notice No 08 of 2013** are unconstitutional to the extent that they were issued ultra vires the powers of the Chief Justice conferred and envisaged under article 133 (1) (b) of the Constitution and had the effect of enacting principal legislation which is the exclusive preserve of Parliament. That the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions), Legal Notice No 08 of 2013** were issued by the learned Chief Justice contrary to the legislative principle of the presumption against deprivation of liberty and in contravention and breach of article 28 (12) of the Constitution.

The petition is further supported by the affidavit of Godfrey Mpagi, the sixth petitioner which gives the facts in support of the petition that I do not need to repeat here as they are regurgitated in the written submissions of the parties.

In reply, the respondent opposed the pet1t1on and contends that the Supreme Court in **Criminal Appeal No 08 of 2009, Tigo Stephen Vs Uganda** did not invalidate the provisions of section 47 (6) of the **Prisons Act,** cap 304 now section 86 (3) of the **Prisons Act,** 2006. Further, the Supreme Court held that the **Prisons Act** and the Rules made thereunder are meant to assist the prison authorities in administering prisons and in particular sentences imposed by courts. Thirdly, the Supreme Court rightly held that the **Prisons Act** does not prescribe sentences to be imposed for defined offences. Sentences are prescribed in the Penal Code and other penal Statutes and the sentencing powers of courts are contained in the Magistrates Court Act and the Trial on Indictment Act and other Acts prescribing jurisdiction of courts. Fourthly, the reason why the **Prisons Act** provided for twenty years is for purposes of calculating remission. On the fifth ground, the Supreme Court did not relegate the supremacy and will of Parliament of Uganda to the will of the Indian Courts and legislature but rather used case law from India and other jurisdictions as persuasive in interpreting the provisions of the **Prisons Act.** The sixth ground, the respondent contends that the decision of the Supreme Court did not render section 47 (6) and now 86 (3) of the

Prisons Act. inoperative or invalid but rather clarified that the twenty years is for purposes of calculating remission. On the seventh ground, the Supreme Court neither infringed upon the constitutional doctrine of sovereignty and legislative supremacy of the Parliament nor did it breach the doctrine of separation of powers by holding that life imprisonment means imprisonment for the natural lifetime of the convict. On the eighth ground, the Supreme Court did not interpret the provisions of the **Prisons Act** Vis-a-vis the Constitution so as to declare them unconstitutional since it was not exercising its appellate jurisdiction in constitutional appeals. On the ninth ground, the Supreme Court decision did not take away the statutory right to remission because the court was very clear that in fact and held that the actual period of imprisonment may stand reduced on account of remissions earned. On the 10th ground, the Supreme Court decision does not contravene the provisions of Article 23 (8) of the Constitution because the person liable to imprisonment for life or any other person may be sentenced for any short-term. On the 11th ground, the introduction of minimum sentencing regime under the Sentencing Guidelines does not in any way contravene the provisions of Articles 28 (8) and (12) of the Constitution. On the 12th ground, the Chief Justice has powers under Article 133 (1) (b) of the Constitution to issue orders and directions to courts necessary for proper and efficient administration of justice and the said guidelines were issued by the Chief Justice in line with those powers. On the 13th ground, the respondent contends that the Sentencing Guidelines do not prescribe sentences/punishments for offences but rather provide principles and guidelines to be applied by courts in sentencing. Further, on the 14th ground, the respondent averred that the sentencing guidelines have not assumed the force of law but rather only a guide to courts in prescribing sentences for convicts.

On the 15th ground, the respondent contends that the imposition of sentences without remission is not illegal or unconstitutional because the convict has no explicit constitutional right as such to claim any remission of sentence after conviction. On the lb1h ground, the issue of remission only arises after a fair trial and proper conviction and sentence. Further on the

17th ground, the respondent asserts that the denial of remission in accordance with the court has no relevance either to the presumption of innocence on the part of the prisoners or to a fair trial. On the 18th ground, the respondent maintains that the court has the mandate to sentence convicts to serve a certain number of years without remission and this is consistent with the provisions of the Constitution and the law.

Further, the respondent asserts that the state has not by any act or omission violated or infringed any provisions of the Constitution as alleged or at all. In further response to the allegations, the respondent contends that the petition is incompetent on the ground that:

a) It is intended to bring a disguised appeal against those sentences that have been confirmed by the Supreme Court.

b) the petition is intended to confer rights to prisoners in the form of remission and mitigation which is not provided for under the Constitution.

c) the petition is intended to curtail the constitutional mandate and independence of the Judiciary regarding the sentencing of convicts.

The respondent further contends that the petitioners are not entitled to any of the declarations or orders sought in the petition.

The affidavit in support of the answer to the petition is sworn by Charity Nabaasa, state attorney in the Attorney General's Chambers. The affidavit amplifies the answer to the petition which is also addressed in the written submissions of the parties and I do not need to regurgitate it here.

When the petition came for hearing, the learned Senior State Attorney Mr. Mark Muwonge represented the respondent. The petitioners were represented by learned counsel Ms. Jocelyn Kengonzi and learned Counsel Acak Carol holding brief for Kizza and Kayongo Sylvia. The petitioners appeared in court while the petition includes 563 others petitioners who are listed in an annexure to the Petition. The petitioners and the respondent relied on their written submissions. The petitioners sought for time to file a

rejoinder to the written submissions of the respondent within five days from 10 October 2022.

It is on the basis of the written submissions, the petition, the authorities referred to other authorities that the petition has been considered.

Submissions of the petitioners counsel.

The petitioner's counsel relied on the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 417 others; Constitutional Appeal No 03 of 2006** for the decision inter alia that the respondents who sentences were already confirmed by the highest appellate court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of sentence by the highest appellate court. Thereafter, where no decision has been taken by the Executive within three years, the death sentence shall be deemed commuted to imprisonment for life without remission. The appellants counsel submitted that from the decision in 2008 until 2011, the decision in **Tigo Stephen Vs Uganda; Criminal Appeal No 08 of 2008** (also referred to as the **Tigo** decision), led to a consensus in the Judiciary that "life imprisonment" means imprisonment for twenty years within the meaning of the **Prisons Act.** The petitioner's counsel submitted that the **Susan Kigula** (supra) decision led to the courts imposing custodial sentences without remission. The petitioner submitted that convicts who are serving sentences imposed "without remission" do so contrary to section 86 (3) of the **Prisons Act,** cap 304 and in contravention of article 28 (8) of the Constitution of the Republic of Uganda 1995 (the Constitution) to the extent that they are serving sentences which are severer in degree than the sentences that ought to be lawfully imposed upon them.

Further, counsel submitted that on 10th May 2011, the Supreme Court in **Tigo Stephen Vs Uganda; Criminal Appeal No 08 of 2009** held that "life

imprisonment" is not expressly defined under the Penal Code Act. Secondly, they were persuaded by judicial decision on "life imprisonment" or "imprisonment for life" from India which defined life imprisonment or imprisonment for life to mean a term of sentence for the rest of the natural life of the convict. Further the Supreme Court held that section 47 (6) of the **Prisons Act,** cap 304 (repealed) and re-enacted in section 86 (3) of the **Prisons Act,** 2006 which deems a sentence of imprisonment for life to mean twenty years did not denote imprisonment for life to be twenty years' imprisonment. Further, the petitioner's counsel submitted that following the decision in **Tigo Stephen Vs Attorney General,** the Hon. the Chief Justice Benjamin Odoki issued the **Constitution (Sentencing Guidelines for Courts of Judicature ((Practice Directions) Legal Notice No 08 of 2013** also referred to as the Sentencing Guidelines in the exercise of powers conferred upon the Chief Justice under article 133 (1) (b) of the Constitution.

The petitioners submitted that sentencing is a judicial function and not an administrative function envisaged under article 133 of the Constitution and is shielded from administrative orders and directives of the Chief Justice article 128 of the Constitution which petition makes judicial independence a constitutional principle. The appellants rely on article 128 (1) of the Constitution for the principle of judicial independence. Further under article 128 (2), the said that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions meaning that the Sentencing Guidelines interfere with such judicial discretion and independence. He contended that the guidelines introduced prescriptive long-term sentences not enacted by Parliament of Uganda and are not contained in any penal statute in Uganda in excess of twenty years' imprisonment. The petitioners propose the following issues for consideration namely:

1. Whether the **Kigula** decision imposition of life imprisonment without remission contravenes article 21. 126 (2) (a) and article 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

2. Whether the Tigo decision contravenes articles 21. 23 (1) (a - h), 23 (8), 28 (7), 28 (8) and (12) of the Constitution of the Republic of Uganda, 1995.

3. Whether the Supreme Court acted ultra vires in interpreting and invalidating section 47 (6) of the **Prisons Act** - now section 86 (3) of the **Prisons Act** in the Tigo decision contravening article 132 and 137 (1) of the Constitution of the Republic of Uganda, 1995.

4. Whether the minimum and long-term sentences provide in **,he Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No 2013)** are in contravention of Articles 28 (8) and (12), 79 (1), 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

5. Whether the retrospective application of the **Tigo** decision contravenes Articles 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution of the Republic of Uganda, 1995.

6. Whether the petitioners are entitled to the remedies sought.

Whether the **Kigula** decision imposition of life imprisonment without remission contravenes Articles 21, 126, (2) (a) and 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

The petitioners contended that sentences imposed without remission are manifestly unlawful and unconstitutional. Unlike sentencing which is a judicial function, remission is an Executive discretionary administrative function rooted in statute. In **Okello Alfred & five others Vs Uganda; Criminal Appeal Number 028 of 2016** it was held that remission is a statutory right provided for under section 47 of the **Prisons Act** and as such it cannot be taken away by the court. To that extent. they found that the sentence imposed by the trial court was illegal.

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The petitioners counsel contended that section 84 (2) of the **Prisons Act** provides that each prisoner on admission shall be credited with the full term of remission to which he would be entitled at the end of the sentence if he or she has not lost remission of sentence. Further section 84 (1) of the **Prisons Act,** 2006 provides that a convicted prisoner sentenced to imprisonment whether by one sentence of consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences. He submitted that the principle of penal system involving remission arises from the belief that a prisoner's desire for self-improvement will increase significantly if conduct directly affects the jail term. Such a system allows prisoners to take charge of their own lives, to develop a sense of responsibility as well as providing an incentive to serve one's time productively with the mindset of moving forward (see **John Clay Mukono Maconochie's experiment (John Murray Publishers Ltd London 2001).**

The petitioners further submitted that the Kigula decision's life imprisonment without remission discriminates against inmates relative to other inmates sentences which are eligible to remission. Further that the Kigula decision fosters discrimination, creates inequality and it denies some inmates the Executive privilege of remission contrary to articles 21 (2) & (3) of the Constitution. Article 21 (1) of the Constitution provides for the principle of equality before and under the law and the Kigula decision sanctions inequality and discrimination on account of the nature of sentence on the progression of remission for those imprisonment for life sentences. Further the appellants argued that article 21 (3) defines discrimination as the giving of different treatment to different persons attributable mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. The petitioners relied on **Black's Law Dictionary Third Edition** for the definition of discrimination. Further they relied on article 126 (2) (a) of the Constitution for the proposition that justice shall be done to all irrespective of their social or economic status. They submitted that the notion of equality springs from the oneness of humanity and is linked to the essential dignity

of an individual. In the premises, the principle cannot be reconciled with the notion that a given group has the right to be privileged or to mistreatment because of its perceived superiority or inferiority and it is impermissible to subject human beings to differences in treatment that is inconsistent with the Constitution.

Petitioner's counsel further argued that the Supreme Court confirmed the illegality of sentences without remission in **Wamutabanewe Jamiru Vs Uganda; Criminal Appeal No 74 of 2007** and held that remission is a function of the penal institution to which a sentenced convict has been committed and is exercised in tandem with the sentence meted out by court. It would be illogical for any court to ordain that the appellant shall serve his sentence without remission. In the premises, the petitioners prayed that this court finds that a sentence without remission should be found to be unconstitutional and contrary to articles 21 (1) & (3) 43, BA, 17, 79, 99, 126, 129 and 126 (2) (a) of the Constitution. They submitted that remission is an exercise of the Executive Power as opposed to Judicial Power. In the premises, courts have no jurisdiction to interfere with remission under the doctrine of separation of powers which reinforces the rule of law and democracy protected by the Constitution under articles 33, BA. 17, 79, 99, 126, 129 of the Constitution.

The petitioners further argued that remission is not a judicial function and is strictly anExecutive privilege exercised through the Prisons Service. That the courts become *functus officio* upon pronouncing sentence cannot purport to limit or bar remission. They emphasised that judicial power relates to adjudication of cases and does not include decisions on remission which is the preserve of the Executive. Judicial power is exercisable by courts under article 126 (1) & (2), 129 (1) and (3) of the Constitution. Further jurisdiction of courts is defined by Parliament in accordance with article 129 (3) the Constitution. Where the legislature vested remission jurisdiction on prisons authorities and not courts, and it is only proper that it is interpreted as Executive/administrative power and not judicial.

Issue two:

Whether the particular decision contravenes Articles 21. 23 (1) (a - h), 23 (8), 28 (7), (8) and (12) of the Constitution of the Republic of Uganda, 1995.

The petitioners challenged the holding that life imprisonment means imprisonment for the natural life term of the convict though the actual period of imprisonment may stand to be reduced on account of remissions earned. They submitted that the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** came into force and defined life imprisonment in light of the **Tigo** decision. Section 4 of that Act provides that life imprisonment or imprisonment for life means imprisonment for the life of a person without the possibility of being released. They submitted that section 86 (3) of the **Prisons Act** 2006 provides that for purposes of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment. Insofar as the **Tigo** decision held that the Penal Code Act does not define "life imprisonment", and that the deeming of it to be twenty years' imprisonment for purposes of calculating remission is not a definition or a prescription of the term of the sentence of life imprisonment.

Petitioners' counsel submitted on the word "deemed" or deem as used in the statute has been Judicially interpreted. He relied on the holdings of Windener J in **Hunter Douglas Australia Pty Vs Parma Blinds (1970) 44 A.L.J.R 57** where the learned trial judge considered the word "deemed" and held that it usually is used in the statute to "state the effect of or meaning which some matter or things has, the way in which it is to be adjudged, this did not import artificiality or fiction, it may simply be a statement of indisputable conclusion."

The petitioners contended that the Supreme Court of Uganda held that in the absence of the definition of the term "life imprisonment" under the Penal Code Act, there is no definition of the phrase and therefore it was open to the court to define what it meant. The petitioners contend that this was erroneous on the following grounds.

Firstly, the court did not address its mind to the legislative right 15 principle of "cross-referencing" as defined in **Black's Law Dictionary Eighth Edition** as an explicit citation to related provision within the same or closely related document. It followed that the definition of life imprisonment was admitted under the Penal Code Act, and enacted under the **Prisons Act** in order to find and give meaning to the phrase "life imprisonment". That this is a common and generally accepted and recognized practice in legislative drafting and interpretation.

Further and in the alternative counsel submitted that if the court was uncomfortable with the definition of "life imprisonment" enacted under the **Prisons Act,** rather than the Penal Code Act, it had to practice the principle of consolidation to bring about a convenient definition of the term "life imprisonment" without taking on the duty of Parliament to change the law altogether.

Secondly, the Supreme Court found that the **Prisons Act,** does not prescribe sentences to be imposed for defined offences. The petitioner's counsel submitted that the Supreme Court ought to have brought it to bear upon the minds that the **Prisons Act,** is one of the Penal Statutes in Uganda. It contended that the Uganda Prisons Service as established by the Constitution is part of the Justice Law and Order Sector in Uganda insofar as the criminal justice system is concerned, the hierarchy of the system and includes the police, the Prosecution (OPP), the courts and finally the prisons. Prisons execute the sentences of court. It follows that the prisons are an integral and indispensable part of the criminal justice system without which the system would be incomplete. On those premises, the petitioner's counsel submitted that the **Prisons Act** and its provisions relating to the execution of custodial sentences/penalties, is a Penal Statute and the Supreme Court erred in holding that it is not. For that reason, cross-referencing was necessary in deciphering the meaning of the statutory expression; "life imprisonment".

The petitioners also rely on the preamble to the Act which provides that it is an Act to bring the Act in line with effective and humane modern penal

policy. Further in **Wamutabanewe Jamiru V Uganda; Criminal Appeal No 74 of 2007** the Supreme Court repeatedly referred to the prisons authorities as the penal institution to which a convict has been committed. Counsel further submitted that the recognition of the Supreme Court of the Prisons institution as a penal institution is inconsistent with the decision in **Tigo Stephen** (supra).

Further, by making imprisonment of "life imprisonment" an indeterminate sentence, the court by default or design permanently deprived persons sentenced to "life imprisonment" of personal liberty contrary to the provisions of article 23 (1) (a) - (h) of the Constitution. Under those provisions, there is no express or implied intent by the framers of the Constitution to intermittently or permanently deprive an individual of personal liberty. Personal liberty is ought to be deprived for a definite and limited period only in the circumstances expressly stated under the constitutional provisions.

The petitioners also argued that the prescription of "life imprisonment" as being for the remainder of the natural life of the convict renders the sentence indefinite and indeterminate time and space and excludes such persons sentenced to life imprisonment from the benefit of the provisions of article 23 (8) of the Constitution in a segregated manner that clearly was never the intention of the framers of the Constitution. The petitioners further contend that in the subsequent decision of the Supreme Court in **Gad Magezi Vs Uganda; Supreme Court Criminal Appeal No 17 of 2014,** the court departed from its earlier decision holding that the sentence of life imprisonment is not amenable to article 23 (8) of the Constitution. The article only applies where the sentence is for a term of imprisonment which is to terminate and from which a period of time can be deductible. The petitioners contend that the position is the creation of the court and in effect an amendment of article 23 (8) of the Constitution to the extent that the article makes no mention or distinction as to the nature and category of sentences imposed for which a convict should take the benefit to the provisions of the article. They assert that the court unconstitutionally filled

gaps they thought existed in the law and in so doing went beyond their jurisdiction and encroached on the legislative province of Parliament.

The petitioner's counsel submitted that the constitutional provision must be read together with artides 21 (1), 23 (1) (a) - (h) of the Constitution to be understood and applied in its proper context. In **Ogwal Alberto Vs Uganda; Criminal Appeal No 46 of 2010** the Court of Appeal held that in imposing life imprisonment as a sentence, the sentence must comply with article 23 (8) of the Constitution. They wondered how article 23 (8) Constitution is to be applied if the period of life imprisonment is indeterminate and stated that the court would not know from which periods, the period in lawful custody should be deducted. They found that article 23 (8) of the Constitution that commands a judicial officer sentencing a person to a term of imprisonment, to deduct the period they spent in lawful custody before their conviction, applies to all terms of imprisonment including life imprisonment. He contended that in **Gad Magezi** (supra) and **Kabaserebanyi v Uganda; Criminal Appeal No 10 of 2014** the Supreme Court held that it is impossible to deduct the period spent on remand in circumstances since life imprisonment which is for the natural life of the convict. However, in **Tigo Stephen** (supra) the Supreme Court held that; "life imprisonment means imprisonment for a lifetime of a convict, though the actual period of imprisonment may stand to be reduced on account of remissions earned."

Further the Supreme Court in **Rwabugande Moses Vs Uganda; Criminal Appeal No 25 of 2014** held that a sentence of imprisonment that is in violation of article 23 (8) of the Constitution is illegal.

The petitioners contend that the conflicting positions of the Supreme Court are illustrative of the depth and length of judicial lawmaking to which the court went and in so doing unraveled what is not meant for the Judiciary but for Parliament. The court attempted to cure by verdict what they interpreted as a legislative lacuna in the law.

The petitioners contend that in 2019, **the Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act** came into force and in section 4

of the Act defined life imprisonment to mean imprisonment for the natural life of a person without the possibility of being released. The petitioners contend that the invalidation of section 86 (3) of the **Prisons Act** 2006 by the **Tigo Stephen** decision and subsequently by section 4 of **the Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act,** having rendered life imprisonment and indeterminate sentence for the remainder of the natural life of the convict, carried with it social and Legal ramifications beyond the conception of the court at the time.

The petitioner's counsel submitted that article 28 (12) of the Constitution provides that "Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law." The petitioner's counsel further submitted that by the **Tigo decision** (supra), the implication was that until that decision, there was no prescriptive definition of the penalty of "life imprisonment", then all persons convicted and sentenced to life imprisonment prior to **Tigo decision** were unconstitutionally convicted and served unlawful sentences since the sentence was undefined under any penal statute according to the **Tigo decision.** Counsel contended that this is the absurdity of the decision.

The petitioner's counsel submitted that firstly life imprisonment is the most unnatural life and there cannot in reality be natural life in an unnatural setting. Further the petitioners counsel contended that the second and most serious constitutional issue is that in order that the definition of life imprisonment by the Supreme Court is in conformity with the Constitution of Uganda, it should not offend article 21 (1), namely the equal protection clause and article 23 (8) that requires court to credit every convict sentenced to a custodial sentence with the period spent on remand prior to conviction and sentence. The petitioner's counsel submitted that to the extent that the **Tigo decision** and the subsequent section 4 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act** renders life imprisonment sentence an indeterminate sentence, convicts sentenced to life imprisonment. Further, it invalidates section 86 (3) of the **Prisons Act** unconstitutionally and deprives convicts of the benefit of the

right accorded by those provisions. Both articles 23 (8) and 21 (1) of the Constitution make no exception and to that end, the treatment of convicts sentenced to life imprisonment 1s segregated, unlawful and unconstitutional. Further the petitioner submitted that section 4 of the Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act contravenes articles 21. 23 (1) (a) - (h), 23 (8), 28 (7), (8) and (12) of the Constitution.

Issue three

Whether the Supreme Court acted ultra vires in interpreting and invalidating section 47 (6) of the **Prisons Act,** now section 86 (3) of the **Prisons Act** 2006 in the Tigo decision contravening article 132 and 137 (1) of the Constitution of the Republic of Uganda, 1995.

Petitioner's counsel submitted that the Constitutional Court has exclusive jurisdiction under article 137 (1) of the Constitution of the Republic of Uganda to decide any question as to interpretation of the Constitution. Further under article 132 (1), the Supreme Court shall be the final court of appeal under the article and any party aggrieved by the decision of the Constitutional Court is entitled to appeal to the Supreme Court. They contend that the constitutional interpretation mandate of the Supreme Court can only be triggered by an appeal from the decision of the Constitutional Court. Petitioner's counsel emphasised that the **Tigo** decision was not an appeal from a decision of the Constitutional Court but under appeal in an ordinary criminal appeal. Further, in that decision, the Supreme Court took on the role of the Constitutional Court when it decided to interpret and ultimately invalidate the provisions of the **Prisons Act** that is overreaching its power to invalidate a statutory provision to the extent that such power is only exercisable by the Supreme Court in its appellate jurisdiction in constitutional appeals and that this contravened article 132 of the Constitution.

The petitioner's counsel submitted that in so holding, the Supreme Court exceeded its powers to interpret the Constitution with the effect of

invalidated the provisions of section 86 (3) of the **Prisons Act,** 2006 and the subsequent blurring and breaching the constitutional dichotomy between legislature and the Judiciary. By enacting section 86 (3) of the **Prisons Act,** Parliament acted in a proper and lawful manner as mandated by article 79 (1) and (2) of the Constitution and having so acted, the provisions can only be invalidated by a declaration of unconstitutionality of the section. This could only be done by the Constitutional Court under article 137 (1) or the Supreme Court as an appellate court from decisions of the Constitutional Court under articles 132 (1) and (2) of the Constitution.

Issue four.

Whether the minimum and long-term sentences vide "the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice Number 8 of 2013) in contravention of Articles 28 (8) and (12), 79 (1), 128 (1) (2) of the Constitution of the Republic of Uganda, 1995.

The petitioner's counsel relies on the definition of sentencing in **Black's Law Dictionary, 10th edition** as the judicial determination of the penalty for a crime. Counsel submitted that article 128 which provides for the independence of the Judiciary supports the proposition that sentencing is a judicial as opposed to administrative detention of a prisoner for a crime. The petitioners counsel relied on the decision of the Supreme Court in **Attorney General Vs Gladys Nakibuule Kisekka: Constitutional Appeal No 02 of 2016** which also cited with approval the decision of the Chief Justice Dickson in the Queen Vs Beauregard (1987) LRC (constitutional) 180 at 188 that:

> The purpose of judicial independence is the complete liberty of the judicial officer (to) impartially and independently (determine) cases that come before the court and no outsider be in the government, individual or other judicial officer shall interfere with the manner in which the officer makes a decision.

Further, the petitioner's counsel submitted that article 79 (1) the question of the Republic of Uganda, 1995 empowers Parliament to make laws. Under article 79 (2) no person or body other than Parliament shall have power to

make prov1s1ons having the force of law in Uganda except under the authority conferred by an Act of Parliament.

The petitioner's counsel further submitted that article 131 (1) (b) of the Constitution which provides that the Chief Justice may issue orders and directions to the courts necessary for the proper and efficient administration of justice only applies to orders and does not confer any power to legislate. Further the petitioners counsel submitted that article 133 only confers administrative powers to give orders or directives and is not a judicial function. In the premises the petitioners counsel contends that sentencing is a judicial function and cannot be ordered, directed or otherwise influenced as to do so will infringe article 128 that epitomises judicial independence. The petitioner's counsel submitted that following the **Tigo decision** (supra) The Chief Justice issued the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) Legal Notice No 8 of 2013** in purported exercise of powers under article 133 (1) (b) of the Constitution wherein the guidelines introduced "minimum sentences" as well as long-term sentences in excess of twenty years which was not intended or Legislated by Parliament. Particularly, the petitioners challenge the definition of short term of imprisonment to mean a custodial sentence of 15 years and below and a mid-term imprisonment to mean 15 years to 29 years while long-term imprisonment means 30 to 45 years' imprisonment. Further guidelines 19 prescribes sentencing ranges in capital offences to be long-term sentences above 30 years' imprisonment. The petitioner's counsel reiterated submissions that the powers exercised by the Chief Justice can only be exercised by Parliament and is therefore unconstitutional.

The petitioner's counsel relies on the comments of Lord Steyn in **Re McFarland (2005) UK HL 17, (2004) 1 WLR 1289** that delegated legislation is meant to legislate "soft law" which are less formal than tertiary legislation which results into "hard law".

With regard to minimum sentences, it results in the courts of judicature sentencing criminal defendants in pursuance of policy rather than law. All

sentences for offences in Uganda are prescribed and enacted by Parliament and the introduction of minimum sentences outside the provisions of the relevant offence creating statutes is a usurpation of the sovereign legislative authority and supremacy of Parliament and in breach of the doctrine of separation of powers.

With regard to long-term sentences, the petitioners' counsel submitted that the Sentencing Guidelines ushered in a Legal regime of unconstitutional long sentences in excess of twenty years in contravention of article 28 (8) and (12) of the Constitution as well as section 86 (3) of the **Prisons Act** 2006. The petitioners emphasized Guideline 4 as well as Guidelines 19. The petitioner's counsel reiterated submissions about the effect of the **Tigo decision** (supra) in relation to the definition of "life imprisonment or imprisonment for life" and submitted that to the extent that sentences imposed are in excess of twenty years' imprisonment, they contravene articles 28 (8) and (12) of the Constitution.

With regard to the doctrine of separation of powers, the petitioner's counsel reiterated submissions that article 79 (2) of the Constitution gives exclusive mandate to Parliament to make provisions having the force of law in Uganda except in the case of delegated legislation under an Act of Parliament. Petitioner's counsel further reiterated submissions about the effect of the decision of the Supreme Court in **Tigo Stephen Vs Uganda** (supra). With regard to the decision of the Constitutional Court in **David Wesley Tusingwire Vs Attorney General; Constitutional Petition No 04 of 2016** in which the exercise and extent of the powers of the Chief Justice under article 133 (1) (b) of the Constitution was challenged in relation to attachment of magistrates to the anticorruption division of the High Court. The petitioners agree with the decision and added that it is distinguishable from the facts of this petition. This is because the Chief Justice exercised the powers to streamline the court system and increase efficiency in the administration of justice. The exercise of the power did not in any way prejudice any individual but was helpful in decongestion of courts and

creating specialised courts with expertise and to that end, easing the administration of justice and increasing efficiency.

On the other hand, the petitioner's counsel submitted that the exercise of the powers in the case of the petitioner has veered into the realm of lawmaking with the effect of deprivation of individual liberties for inordinately long periods of time. The powers exercised by the Honourable Chief Justice under article 133 (1) (b) were exercised ultra vires and in breach of the legislative principle of presumption against deprivation of liberty and in further contravention of article 23 and article 12 (8) of the Constitution. It violated the doctrine of sovereignty and supremacy of Parliament.

Independence of the Judiciary.

The appellant's counsel submitted that articles 128 (1) and (2) of the Constitution underscores the independence of the Judiciary and to the effect that no person or authority shall interfere with the courts of judicature all judicial officers in the exercise of their judicial functions. Further in **Attorney General Vs Susan Kigula** and 417 others; Constitutional Appeal number 03 of 2006, it was emphasised that administration of justice is a function of the Judiciary under article 126 of the Constitution and the process starts from arraignment for trial of the accused person to his sentencing and constitutes administration of justice.

The petitioners counsel also submitted that by setting minimum and maximum sentences, the Chief Justice not only took on the role of the legislature but also indirectly interfered with the judicial power and independence of individual judges in the determination of sentences.

In the premises, the petitioners prayed that this court finds that minimum term sentences under the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice Number eight of 2013 in contravention of articles 28 (8) and (12), 79 (1) and 126 of the Constitution of the Republic of Uganda, 1995.

Issue five:

Whether the retrospective application of the Tigo decision contravenes articles 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution of the Republic of Uganda, 1995.

The petitioner's counsel relied on article 28 (12) for the proposition that except for contempt of court, "no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law." They contend that by the reasoning of the Supreme Court in **Tigo Stephen Vs Uganda** (supra) and subsequently, there had been no prescriptive definition of the penalty of "life imprisonment", then all persons convicted and sentenced to life imprisonment prior to the Tigo Stephen decision where unconstitutional convicted and served the unlawful sentences since the sentence was undefined under any Penal Statute according to the **Tigo Stephen** (supra) decision. The petitioners contend that this is an absurdity. Firstly, life imprisonment is the most unnatural punishment and there cannot be in reality a natural life in a very unnatural setting. Secondly the serious constitutional question is that in order that the definition of life imprisonment by the Supreme Court is in conformity with the Constitution of Uganda, it should not offend article 21 (1) which is the equal protection clause as well as article 23 (8) that commands courts to credit a convict sentenced to a custodial sentence with the period they spent on remand prior to their conviction and sentence.

The petitioners contend that to the extent that the Tigo decision renders life imprisonment an indeterminate sentence, a convict sentenced to life imprisonment by the Supreme Court in validation of section 86 (3) of the **Prisons Act,** unconstitutionally deprived prisoners of the benefit of the right conferred under article 23 (8) of the Constitution and also subjects convicts to unequal treatment before the law in contravention of article 21 (1) of the Constitution. The petitioners contend that both of the articles cited make no exceptions and to that end the treatment of convicts sentenced to life imprisonment segregates, it is unlawful and unconstitutional.

Further, to the extent that the Court of Appeal was interpreting an existing state provision, such interpretation and holding of the court has retroactive application and to that end, all convicts upon whom sentences without remission have been imposed have illegal sentences, including those whose sentences were commuted to "life without remission" in the **Kigula decision** especially to the extent that in the **Wamutabanewe decision** which was made after the **Kigula decision,** all such persons sentenced in the **Kigula decision** ought to be set free immediately because they have served more than twenty years in contravention of article 28 (8) of the Constitution.

Further, the petitioners contend that the retroactive application of the decision to existing sentences was settled in the Supreme Court decision of **Opolot Justine and another Vs Uganda; Criminal Appeal No 31 of 2014** that if judicial decision interprets a law, then it does no more than declare what the law has always been and that the court's declaration of what the law is must have a retrospective effect. It follows that the decision of the Supreme Court retroactively applied to the prejudice of convicts sentenced to life imprisonment prior to the **Tigo Stephen Vs Uganda** (decision) in contravention of the Legal principle against retroactive application of judicial decisions. The petitioners' counsel contended that the learned justices of the Supreme Court erred when they extended the principle of retroactivity to the **Tigo decision in Opolot** (supra) by reference to the decision in **Ssekawoya Blasio Vs Uganda; Criminal Appeal No 24 of 2014.** In that decision the Supreme Court held that the sentence of life imprisonment has always been in the Penal Code Act and the decision in **Tigo Stephen Vs Uganda** (supra) simply clarified what the sentence of life imprisonment meant under the statutory law. Petitioners' counsel contended that this was erroneous because what was at stake in **Tigo Stephen Vs Uganda** (supra) was not the existence or not of life imprisonment as a sentence but interpretation of section 47 (6) of the **Prisons Act** cap 304 of section 86 (3) or the **Prisons Act** 2006. The law in existence prescribed the time of life imprisonment to be deemed to be twenty years for purposes of remission. There was therefore a clear and unambiguous intention of legislature that was re-enacted in the new section 86 (3) of the **Prisons Act** 2006 after the

repeal of the **Prisons Act** Cap 304. The petitioners contend that what the court engaged in was to invalidate an existing definition of the sentence and introduce a new definition not an interpretation of the existing definition/prescription of the sentence.

Further the Supreme Court in July 2009 by correspondence addressed to the Commissioner General of Prisons adopted the opinion of the Solicitor General which advised that under the **Prisons Act,** life imprisonment means twenty years' imprisonment. To that extent, the Supreme Court did not interpret an existing definition, in order that retroactivity could apply but rather invalidated the existing definition and Legislated a new one in which case it cannot apply retroactively.

Further the petitioners contend that the retroactive application of the decision of the Supreme Court in **Tigo Stephen Vs Uganda** (supra) falls outside the ambit of the exceptions to retroactive application of judicial decisions and all convicts submitted to the retroactive application in the **Tigo Stephen** are serving unlawful and unconstitutional sentences. The petitioners rely on the decision of the United States Supreme Court in **Edwards v Vannoy 19 - 5807 United States reports** (May 17, 2021) where the held that "continuing to suggest that there may be cases in the future with retroactive application to the new rules or decisions possible... distorts the law, misleads judges and wastes the resources of defence counsel, prosecutors and courts." The court further held that "applying a new rule retroactively "seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

By this token, the petitioners submitted that Parliament having passed the Law Revision (Penalties in Criminal Matters) Miscellaneous Act, 2019 and section 4 thereof, does not in any way affect the Act complained of by the petitioners here for the reason that if such legislation were held to apply to the petitioners, that would be contrary to the legislative principle of presumption against retrospective effect of a statutory enactment and in contravention of article 92 of the Constitution. In the premises, the petitioners pray that this court finds in the affirmative on this issue and that

the retrospective application of the **Tigo Stephen Vs Uganda** (supra) decision contravenes article 28 (12) of the Constitution of the Republic of Uganda as replicated in section 4 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Act, 2019** and the petitioners, who were sentenced before the passing of the above decision under the law, are not casualties to the retrospective application of the said decision.

Issue six: Whether the petitioners are entitled to the remedies sought.

Counsel for the petitioner submitted that under article 137 (3) of the Constitution, the Constitutional Court and may make declarations may also grant redress where appropriate and in light of the submissions of the petitioners the petitioners pray for the remedies set out in the petition.

Submissions of the respondent in reply.

The respondent's counsel set out five issues for the submissions in reply.

Issue number 1.

Whether the Kigula decisions impos1t1on of life imprisonment without remission contravenes article 21, 126 (2) (a) and 128 (1) & (2) of the Constitution.

Respondent's counsel submitted that the sentence imposed without remission is lawful and constitutional. The Supreme Court in **Attorney General Vs Susan Kigula & 417 others; Constitutional Appeal No 3 of 2006** noted that "at the end of three years after the highest appellate court confirmed the sentence, and if the President shall not have exercised his prerogative one way or the other, the death sentence shall be deemed to be committed to life imprisonment without remission."

Counsel for the respondent pointed out that this petition 1s a disguised appeal against the decision of the Supreme Court sitting as the Constitutional Court of appeal. Article 132 (4) provides that the Supreme Court may while treating its own previous decisions as not binding, depart from previous decision when it appears right to do so; or other courts shall

be bound to follow the decision of the Supreme Court on questions of law. In the premises, the Constitutional Court is bound by the decision of the Supreme Court sitting as the Constitutional Court on appeal on the issue of life imprisonment without remission. Therefore, the respondents counsel submitted that the matter has already been settled.

Further, with reference to the imposition of sentences without remission, the respondents counsel submitted that this is not inconsistent with article 128 (1) & (2) of the Constitution.

Further the respondents counsel submitted that remission is a creature of statute and not the Constitution. This is found under section 84 of the **Prisons Act,** Act 17 of 2006. Further section 85 of the **Prisons Act** 2006 provides for loss of remission under certain circumstances. He submitted that the courts impose a sentence without remission for reason that they have the mandate to do so under article 126 of the Constitution even though Parliament wants to limit the power hence violating the doctrine of separation of powers. The respondents counsel relies on the **Uganda Revenue Authority Vs Rabbo Enterprises (U) limited & and another SCCA No 12 of 2004** where the issue before the court was whether the High Court had original jurisdiction to hear tax disputes. Honourable lady Justice Lillian Tibatemwa, JSC held that the High Court does not have original jurisdiction to hear tax matters and observed that article 139 (1) of the Constitution provides that the High Court exercises unlimited original jurisdiction subject to other provisions of the Constitution. One such provision envisaged in article 139 (1) is article 152 (3) of the Constitution which provides for the Tax Appeals Tribunals.

Further in **Carolyn Turyatemba & four others Vs Attorney General & another; Constitutional Petition No 15 of 2006,** the court while addressing the issue of discrimination defined for purposes of article 21 means to give;

> "different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, or religion, social or economic standing, political opinion or disability"

And the term "discrimination" has come to imply

> "a distinction, exclusion, restriction, or preference based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

The respondents counsel submitted that the alleged grounds of discrimination challenged by the petitioner do not fall within the meaning of discrimination as enshrined under article 21 of the Constitution. The imposition of the sentence of life imprisonment is not based on sex, race, colour, ethnic origin, birth, creed or religion, social or economic standing, political opinion or disability. It is based on the offence committed and the severity thereof. It cannot be said that there is discrimination because the offences committed are different offences and manner in which they are committed is also different.

Further, provisions on sentence are embedded to the effect that a person who is found guilty of a given offence shall be liable to imprisonment for a specified period of time. The laws which prescribe sentences give discretionary powers to the court to impose any sentence not exceeding the prescribed period of time. The Penal Laws also prescribed a maximum period beyond which the courts cannot sentence the convicted person. The respondents counsel referred to section 2 of the Trial on Indictments Act, cap 23 which provides that the court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass. In passing sentence, the judge takes into account any mitigating factors such as the character and antecedents of the accused and the gravity of defence et cetera. Based on these factors, the judge may decide that the accused person serves a sentence of twenty years without remission and the convict is bound to serve those years. Such a person is not entitled to remission at all.

Lastly, the respondents counsel submitted that remission 1s not a constitutional right but rather a discretionary/conditional grant which a

prisoner must earn and it can only be given after one has been sentenced by a court of law. It should be noted that not all prisoners earn remission. Some prisoners do, others do not due to the nature of their conduct while in prison and some of those who earn it can forfeit it under section 86 (4) of the **Prisons Act.** With regard to imprisonment for life, the law is very clear now. Section 4 (1) of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Act, 2019** defines life imprisonment or imprisonment for life to mean imprisonment for the natural life of the person without the possibility of being released. Further the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** also define it as imprisonment for the natural life of an offender.

Respondent's counsel submitted that a person sentenced to life imprisonment or imprisonment for life is therefore not entitled to remission. He submitted that it would be unconstitutional and contrary to the above for the Prison Authorities to alter life imprisonment under the guise of remission. In the premises, the respondents counsel submitted that the imposition of a sentence without remission is not inconsistent with articles 21 & 126 (2) of the Constitution.

Issue 2.

Whether the **Tigo decision** contravenes Article 21. 23 (1) (a) - (h), 23 (8), 23 (7), (8) and (12) of the Constitution.

This issue the respondents counsel submitted that the Supreme Court in **Tigo Stephen Vs Uganda; Criminal Appeal No 8 of 2009** noted that "life imprisonment means imprisonment for the natural life term of the convict, though the actual period of imprisonment may stand reduced on account of remissions earned." The respondents counsel contends that the decision does not contravene any article of the Constitution.

With regard to article 21 of the Constitution, the imposition of life imprisonment without remission does not validate the article because article 21 **(1)** states that every person is equal before the law and has the right to equal protection and benefits of the law. Further, article 21 (3) of the

Constitution defines discrimination as giving different treatment to different persons attributable mainly to their respective descriptions by sex, race, colour, ethnic origin, birth, creed or religion, social or economic standing, political opinion or disability. Guided by the definition, the imposition of the sentence of life imprisonment is not based on any of the personal descriptions under article 21 (3) of the Constitution. The respondent submitted that provisions on sentence are embedded within the various laws that create the offences. The provisions are to the effect that the person who is found guilty of a given offence shall be liable to imprisonment for a specified period of time. The laws prescribe sentences and give discretionary powers to the court to award any sentence not exceeding the prescribed sentence. Further, the penal laws also prescribed a maximum period beyond which the courts cannot sentence a convicted person. The respondents counsel reiterated submissions that under section 2 of the Trial on Indictments Act, the court may pass any lawful sentences combining any of the sentences which it is authorised by law to pass. In determining the appropriate sentence, the judge takes into account any mitigating factors such as character and antecedents of the accused person as well as the gravity of the offence. Based on these factors, the judge may decide that the accused person serves a sentence of twenty years and the convict is bound to serve those years. In the premises, the respondent contends that the **Tigo Stephen Vs Uganda** (supra) decision does not contravene any article of the Constitution.

In relation to article 23 (1) (a) - (h), 23 (8) of the Constitution, the respondents counsel submitted that the Supreme Court decision does not in any way contravene the article because a sentence of life imprisonment is provided for under the law and is a legitimate punishment for the commission of a crime. Further, decision in **Tigo Stephen** (supra) has now been clarified by the **Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Act, 2019** which clearly defines life imprisonment or imprisonment for life as imprisonment for the natural life of that person without the possibility of being released. It follows that section 86 (3) of the **Prisons Act.** 2006 which provided that for purposes of

calculating remission of sentence, imprisonment for life shall be deemed to be twenty years is no longer good law.

Further, the respondent's counsel submitted that article 23 (8) of the Constitution is inapplicable to life imprisonment because it only applies where imprisonment is for a specific term. Counsel highlighted the fact that the article applies to "a term of imprisonment" and not life imprisonment which is imprisonment for the natural life of the convict. He submitted that this applies to any fixed term of imprisonment.

It is provided that a person liable to life imprisonment may be sentenced for any short-term and any time he or she spent in lawful custody before completion of the trial may be considered. In determining the sentence, the judge takes into account any mitigating factors such as character and antecedents of the accused and the gravity of the offence. The judge may then decide that the accused person is liable to life imprisonment but may serve a lesser term. Further counsel maintains that a convict sentenced to life imprisonment is not prejudiced by loss of equality before the law because sentences are prescribed by law and are dependent on the offence committed and its gravity. The graver an offence the severer the degree of punishment. The court only passes a sentence that is authorised by law upon conclusion of the trial.

In the premises, the respondent's counsel submitted that the decision of the Supreme Court in **Tigo Stephen Vs Uganda** (supra) does not contravene article 23 (8) of the Constitution but clarified on the meaning of life imprisonment which was further clarified by the provisions of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Act, 2019.**

With regard to article 23 (1) (a) (h) of the Constitution, and in reply, the respondent's counsel submitted that an individual can be deprived of his personal liberty in execution of a sentence of court in terms of article 23 (1) (a) of the Constitution and therefore the right to personal liberty is a right from which there may be derogation. Counsel repeated the submission that

a sentence of life imprisonment also emanates from the Constitution under article 79 which grants Parliament the mandate to pass the laws. Parliament enacted section 4 (1) of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Act, 2019** and defines life imprisonment or imprisonment for life to mean imprisonment for the natural life of the person without the possibility of being released. Furthermore, the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** also defines imprisonment for life as imprisonment for the natural life of an offender. In the premises, the respondent contends that the act of permanently depriving someone of personal liberty does not validate article 23 (1) (a) (h) of the Constitution.

With regard to article 28 (7), (8) and (12) of the Constitution, the respondents counsel submitted that the decision in **Tigo Stephen** (supra) dos not contravene the said articles. With regard to article 28 (7) of the Constitution, the respondent submitted that the petitioners were charged and convicted for the offence of murder contrary to section 188 & 189 of the Penal Code Act in compliance with article 28 (7) of the Constitution. As far as article 28 (12) Constitution is concerned, the respondent submitted that the definition of the sentence of life imprisonment has always been clear and the Supreme Court in **Tigo Stephen Vs Uganda** (supra) simply clarified on the anomaly where a trial judge had imposed a sentence of imprisonment for life and later qualified the same to be twenty years' imprisonment. Nonetheless, the Supreme Court noted that the error did not make the sentence illegal for the reason that they were satisfied that the trial judge intended to impose a sentence of twenty years' imprisonment.

In the premises, the respondent submitted that the sentence of life imprisonment imposed prior to the Tigo case were legal sentences for the reason that the trial judges intended to impose the same.

Issue 3.

Whether the Supreme Court acted ultra is in interpreting and invalidating section 47 (6) of the **Prisons Act** now section 86 (3) of the **Prisons Act** 2006 in Tigo decision contravenes article 132 and 137 (1) of the Constitution.

The respondents counsel submitted that the Supreme Court did not invalidate the provisions of the **Prisons Act** or invalidate the provisions of section 47 (6) of the **Prisons Act.** The court only clarified that the **Prisons Act** and the rules made thereunder are for purposes of assisting the prison authorities in administering prisons and in particular sentences imposed by the courts. Further, the respondents counsel submitted that imprisonment for life which is the second gravest punishment next only to the death sentence is defined in section 4 (1) of the **Law Revision (Penalties in Criminal Matters) (Miscellaneous Amendments Act, 2019** and further the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** also defines life imprisonment in the sentence. Courts in several jurisdictions including Uganda have also confirmed that imprisonment for life means imprisonment for the natural life of an offender.

The respondent further relies on the decision of Justice Twinomujuni in **Susan Kigula and 417 others Vs Attorney General; Constitutional Petition No 6 of 2003.** That sentencing is a Judicial function and not a Legislative function. It is also not an Executive function and the exercise of the prerogative of mercy should only be done after judicial process on both conviction and sentence have been finalised. He further found that section 47 (6) of the **Prisons Act** had the effect of filtering the discretion of courts to pass a sentence of imprisonment which is greater than twenty years.

The respondent further submitted that in India, the Supreme Court also held in a series of cases that a sentence of imprisonment for life is not for any definite period and imprisonment for life was prima facie to be treated as imprisonment for the whole of the convict's natural life. They propounded the view in the case of **Gopal Vinayak Godse Vs the State of Maharashtra and others (1962) ISCJ 423, (1961) 39 AIR 1961 SC 600, (1962) MU crl 269.** In that case the convict was one of the conspirators in the assassination of

Mahatma Gandhi on January 30, 1948 and his brother Nathuram Godse. Gandhi was sentenced to death and executed. He was convicted in 1949 for his part in the assassination of Gandhi and sentenced to transportation (imprisonment for life). His remission of 2963 days was added, and the aggregate exceed the twenty years. He applied for habeas corpus on the ground of delay of justice of the sentence and contended that his further detention in jail was illegal and therefore he should be set at liberty. The Supreme Court held that a prisoner sentenced to life imprisonment was bound to serve the remainder of his life in prison unless the sentence was commuted or remitted by the appropriate authority. Further such a sentence could not be equated with the sentence for a fixed term. The rules framed under the **Prisons Act** entitled a prisoner to earn remissions, but such remissions were to be taken into account only towards the end of the term. The question of remission was within the province of the appropriate government authority. The respondent quoted extensively from the decision and submitted that the court pronounced itself to the effect that the remission under life sentence and held that unless the sentences are remitted or commuted, the prisoner is bound to serve for life in prison. The case was applied in several other decisions for the proposition that life imprisonment means imprisonment for life.

In the premises, the respondent's counsel submitted that the Supreme Court in **Tigo Stephen Vs Uganda** (supra) did not nullify or invalidate the provisions of section 47 (6) of the **Prisons Act** but rather clarified that life imprisonment means imprisonment for the natural lifetime of a convict without any possibility of being released and this is the correct position of the law which has now been clarified by section 4 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Act, 2019.** Further, the Supreme Court in **Tigo Stephen Vs Uganda** (supra) did not relegate the supremacy and will of Parliament of Uganda to the will of the Indian Courts and legislature but rather used case law from India and other jurisdictions as persuasive in interpreting the provisions of the **Prisons Act.** Further the decision did not render section 47 (6) now section 86 (3) of the **Prisons Act** in Tigo invalid but clarified the meaning of life imprisonment.

The Supreme Court in **Tigo Stephen Vs Uganda** (supra) neither infringed upon the constitutional doctrine of sovereignty and legislative supremacy of Parliament nor did it breach the doctrine of separation of powers by holding that life imprisonment means imprisonment for the natural lifetime of the convict.

Further, the respondent's counsel submitted that the Supreme Court did not interpret the provisions of the **Prisons Act** Vis-a-vis the Constitution to declare them unconstitutional since it was not exercising its appellate jurisdiction in constitutional appeals. In the decision, the Supreme Court did not cite or purport to interpret any provision of the Constitution. The Supreme Court only interpreted and applied the provisions of the **Prisons Act.**

Issue 4.

Whether the minimum and long-term sentences provide "the constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice Number eight of 2013 contravened articles 28 (8), (12). 79 (1). 128 (1) and (2) of the Constitution.

The respondents counsel submitted that the Sentencing Guidelines do not in any way contravene any provision of article 28 (8) & (12). 79 (1) and article 128 (1) of the Constitution. They are simply handmaidens in the administration of justice.

The respondents counsel submitted that the Chief Justice has powers under article 133 (1) (b) of the Constitution to issue orders and directions to courts necessary for proper and efficient administration of justice and the said guidelines were issued by the Chief Justice in line with those powers. That section 3 of the guidelines set down the objective/purpose which include the following:

- set out the purpose for which offenders may be sentenced or dealt with;

- to provide principles and guidelines to be applied by courts in sentencing;
- to provide sentence ranges and other means of dealing with offenders;
- provide a mechanism for considering the interests of victims of crime and the community when sentencing; and
- to provide a mechanism that would promote uniformity, consistency and transparency in sentencing.

The respondents counsel submitted that the Sentencing Guidelines do not provide sentences and do not interfere with the judicial discretion or independence. The duty of court is to evaluate all the evidence and circumstances in order to arrive not only to suitable but also a fair, just and lawful sentence. In the exercise of this duty, the guidelines provide guidance to the sentencing judicial officer on how to proceed while considering the sentence to impose. Counsel emphasised the Part III of the Sentencing Guidelines guides court on what to take into account when sentencing an offender.

Further, the respondent's counsel submitted that the purpose of the Sentencing Guidelines is to simplify the efficient administration of justice. It is not meant to prescribe sentences/punishments for offences but rather to provide principles and guidelines to be applied by courts in sentencing.

In the premises, the respondent's counsel submitted that the sentencing guidelines do not in any way contravene the provisions of article 28 (8) & (12), 79 (1) and 128 (1) of the Constitution.

Issue 5.

Whether the retrospective application of the Tigo decision contravenes articles 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution.

The petitioners contended that until the decision in **Tigo Stephen Vs Uganda** (supra) there was no prescriptive definition of the penalty of life imprisonment and all persons convicted prior to **Tigo Stephen** were

unconstitutionally convicted and served unlawful sentences. They relied on **Opolot Justine and another; Criminal Appeal No 31 of 2014** for the proposition that when the court interprets the law, it automatically has retrospective effect. In reply, the respondent submitted that the definition for the sentence of life imprisonment has always been clear and the Supreme Court in its decision in **Tigo Stephen Vs Uganda** simply clarified and out the anomaly where the trial judge had imposed a sentence of imprisonment for life and later qualified it to mean twenty years' imprisonment. Nonetheless, the Supreme Court noted that the error did not make the sentence illegal for the reason that they were satisfied that the learned trial judge intended to impose a sentence of twenty years' imprisonment. Further in **Ssekawoya Blasio Vs Uganda;** it was observed that the sentence of life imprisonment has always been in the Penal Code Act and the decision in the **Tigo Stephen Vs Uganda** (supra) simply clarified what it means. Lastly in 2019, the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act** came into force and section 4 thereof clarified the meaning of life imprisonment means imprisonment for the natural life of a person without the possibility of being released.

In the premises, the respondents counsel submitted that the interpretation of the sentence of "life imprisonment" has always been clear and the decision in the **Tigo** case does not have retrospective effect and does not violate any provisions of the Constitution pop.

Issue 5.

What remedies are available to the parties?

The respondent's counsel submitted that considering the submissions of the respondent, the petition does not raise any question or issue for interpretation by this court, is devoid of merit and does not meet the threshold and the benchmark for issuance of the remedies sought.

Rejoinder submissions of the petitioner's counsel.

In rejoinder, the petitioner's counsel submitted that the petition was a class petition brought by 569 inmates currently serving long-term sentences in Luzira prison. All prisoners have currently served over twenty years' imprisonment for various capital offences.

In rejoinder to the issue of whether the petition discloses any question as to interpretation of the Constitution, the petitioner relies on article 137 of the Constitution and submitted that the issues for resolution involved questions as to interpretation of the Constitution.

In rejoinder to issue one as to whether the **Kigula decisions** imposition of life imprisonment without remission contravenes article 21, 126, (2) (a) and 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995 and is therefore unconstitutional, the petitioner's counsel submitted that article 137 (3) (a) of the Constitution allows a petitioner to challenge an Act of Parliament or any other law on the ground of contravention of any provision of the Constitution. Counsel submitted that the term "law" includes case law such as the **Kigula decision** because it is part of the laws of Uganda in the hierarchy of laws. He contended that the **Kigula decision** imposed life imprisonment without remission in contravention of the cited provisions of the Constitution.

With regard to the submission of the respondent's counsel that the petition is a disguised appeal, the appellant's counsel argued that it is a misnomer to call it a disguised appeal because there cannot be an appeal against the decision of the Supreme Court. This court cannot entertain an appeal against the decision of the Supreme Court because the hierarchy of courts is clear. Further, on the submission that the court is bound by the **Kigula decision,** counsel submitted that there are exceptions to the common law principle of stare decisis like when a new Legal issues arises and where there is a change in circumstances and evidence that fundamental shifts the parameters of the debate/Legal issue under consideration. Counsel submitted that the question of remission is a new issue which was not adequately considered in the **Kigula case.** The issue is that the denial of remission to inmates sentenced to life imprisonment is inconsistent with

article 21 of the Constitution. Counsel reiterated submissions in support of the petition on the same issue.

On issues 2 and 3, the petitioners counsel reiterated the submissions in support of the petition and submitted inter alia that the **Tigo decision** was not a constitutional appeal but an ordinary appeal arising from criminal proceedings on appeal from the Court of Appeal. In such cases, the court has the mandate to make a reference to the Constitutional Court under article 137 (5) (a) of the Constitution because it does not sit as the constitutional appeal court but as an ordinary court.

On the issue of whether the retrospective application of the Tigo decision contravenes articles 28 (8) and (12), 21 (1), 23 8) and 92 of the Constitution of the Republic of Uganda, the appellants counsel largely reiterated earlier submissions which should be taken into account in the resolution of the issues. On issue five as to the constitutionality of the minimum and long-term sentences, the appellant likewise reiterated earlier submissions.

With regard to remedies, the petitioner's counsel prayed that the court be pleased to issue the following declarations:

a) The Kigula decisions imposition of life imprisonment without remission contravenes articles 21. 126 (2) (a) and 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995 and is therefore unconstitutional.
b) The Supreme Court acted ultra vires its powers in the Tigo decision when it interpreted and ultimately invalidated section 47 (6) now section 86 (3) of the **Prisons Act,** is contravening article 132 of the Constitution of the Republic of Uganda, 1995.
c) The constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice Number 8 of 2013) contravenes articles 28 (8) and (12), 79 (1), 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

d) The retrospective application of the Tigo decision contravenes articles 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution of the Republic of Uganda, 1995 and is therefore unconstitutional.

e) All long-term sentences in excess of twenty years were never intended to be life sentences, which is the strongest/gravest sentence after the death sentence and should be referred to the original trial court for mitigation and resentencing in order for them to be in tandem with article 28 (8) of the Constitution of the Republic of Uganda, 1995.

Consideration of the petition.

I have carefully considered the pet1t1oners petition, the submissions of counsel, the authorities cited and the law generally.

The petition was filed under the provisions of article 137 (3) and (4) of the Constitution of the Republic of Uganda 1995 for several declarations as set out at the beginning of this judgment. Because the petition also challenges the interpretation by courts of "life imprisonment or imprisonment for life" it also complains about the way it has affected remission under the **Prisons Act,** it generally challenges imprisonment of over 21 years as a direct consequence of the way "life imprisonment or imprisonment for life, has been interpreted and applied by the courts. In my judgment, it is necessary to consider a clear factual background to the issues raised in the petition to establish the effect of the decisions of the Supreme Court and to put in proper context the factual issue as to what the Supreme Court decided that forms the first limb of the petition and submissions as well as the second limb that challenge both the practice and the Sentencing Guidelines issued by the Chief Justice under article 133 of the Constitution. Declarations numbers 1, 2, 3 and 4 of the Petition deal with the first limb of the submissions and petition because it deals with the definition of life imprisonment and the treatment of remission under the **Prisons Act.** Secondly the second limb of the petition concerns the issuance of and the contents of the Sentencing Guidelines as well as the practice of court in sentencing persons charged with capital offences to terms of imprisonment

of over twenty years. This two limb dichotomy is clearly reflected in declarations. For the first limb, declarations 1 2, 3 and 4 are relevant and for ease of reference are that:

1. In invalidating section 47 (6) now section 86 (3) of the **Prisons Act.** the Supreme Court exceeded its jurisdiction and contravened the provisions of Article 132 of the Constitution.

2. The Supreme Court violated the constitutional doctrines of separation of powers and supremacy of Parliament when it infringed upon the lawmaking province of Parliament and substituted its own will for that of Parliament of Uganda when it invalidated section 47 (6) now 86 3) of the **Prisons Act** and substituted it with a new definition not prescribed by Parliament.

3. The result of the decision of the Supreme Court deprives persons convicted and sentenced to death of their non-derogable and constitutionally guaranteed rights to equal protection of the law and benefit of the period spent on remand before completions of trial and therefore (is) a contravention of Articles 21 (1) and 23 (8) of the Constitution.

4. The decision of the Supreme Court in the ultimate, deprives persons convicted and sentenced to life imprisonment, to their statutory right to remission under the **Prisons Act** and to that end, (is) a contravention of article 21 (1) of the Constitution.

The second limb of the petition is reflected in declarations ought in declarations 5, 6, 7 and 8 which are:

5. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No 8 2013 are unconstitutional to the extent that they create a Legal regime of "minimum sentences" not Legislated by Parliament and introduced "long-

term" sentences in excess of twenty years, not intended or Legislated by Parliament.

6. That "life imprisonment" or "imprisonment for life in Uganda has the meaning ascribed to it by the sovereign Parliament of Uganda under section 86 (2) of the **Prisons Act,** 2006, which statutory provision is valid law unless and until repealed, amended or suspended by Parliament or declared unconstitutional by a court of judicature.

7. All long-term sentences in excess of twenty (20) years were never intended to be life sentences, which is the second gravest sentence after the death sentence and should be referred to the original trial court for mitigation and resentencing in order that they are in tandem with article 28 (8) of the Constitution.

Last but not least the petitioners counsel in setting out the questions for interpretation, compressed them into 5 main questions and issue number 6 being the issue of remedies whose resolution is consequential to the resolution of the five questions for interpretation. Further issues 1, 2, and 3 cover the first limb of the petition I have categorized above while issues 4 and 5 cover the second limb of the petition and submissions of counsel. For purposes of analysis, questions numbers 1 - 3 are:

1. Whether the Kigula decision imposition of life imprisonment without remission contravenes article 21, 126 (2) (a) and article 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

2. Whether the Tigo decision contravenes articles 21, 23 (1) (a - h), 23 (8), 28 (7), 28 (8) and (12) of the Constitution of the Republic of Uganda, 1995.

3. Whether the Supreme Court acted ultra vires 1n interpreting and invalidating section 47 (6) of the **Prisons Act** - now section 86 (3) of

the **Prisons Act** in the Tigo decision contravening article 132 and 137 (1) of the Constitution of the Republic of Uganda, 1995.

Issue number one arises from the ruling of the Supreme Court that persons whose death sentences are commuted by effluxion of time, of a period of three years from the time the highest appellate court confirms the death sentence, and which sentences are, by that decision in **Attorney General Vs Susan Kigula** and others (supra), commuted to life imprisonment without remission. The question is whether this order contravenes articles 21, 126 (2) (a) and 128 (1) and (2) of the Constitution. This is contrasted with issue number 2 which deals with the effect of the decision of the Supreme Court in **Tigo Stephen Vs Uganda** where the Supreme Court defined "life imprisonment" as imprisonment for the remainder of the convict's life. These further lead immediately to consideration of issue number three as to whether the definition violates the deeming of life imprisonment to be twenty years under section 47 (6) of the **Prisons Act,** cap 306 (repealed) which is now re-enacted under section 86 (3) of the **Prisons Act,** 2006. It would be sufficient for purposes of this judgment to refer to the provisions of the **Prisons Act** deeming life imprisonment to be twenty years without having to cite the particular sections of the Act. What is important in the analysis of the issues is the fact as to what the court actually decided in **Attorney General Vs Susan Kigula** and 417 others (supra) as well as in **Tigo Stephen Vs Uganda** (supra) on the above matters and it is incumbent upon the court to review all these decisions and the subsequent decisions to put the issues in their proper context and to establish as a matter of fact whether the fact is as stated by the petitioner as far as the import of those decisions is concerned.

On the second limb, questions numbers 4 and 5, relate to the challenge to the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No 08 of 2013** insofar as it prescribes minimum sentences or "long term" sentences considered less severe than the death penalty in terms of periods of imprisonment. This merges with the fifth issue as to whether the definition in **Tigo Stephen Vs Uganda** (supra) has

retrospective application so that the deeming of life imprisonment to be twenty years is no longer applicable to those sentenced before the decision and that they have to serve for the remainder of their lives. Again the question is whether as a matter of fact, this is the effect of the decision and therefore it is incumbent upon this court to give a chronological and topical account of the post Kigula sentencing practices. For ease of reference again issues 4 and 5 are:

4. Whether the m1n1mum and long-term sentences provide "The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No 8 2013) in contravene Articles 28 (8) and (12), 79 (1), 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.

5. Whether the retrospective application of the Tigo decision contravenes Articles 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution of the Republic of Uganda, 1995.

Further it should be borne in mind that the question of whether the enactment into law of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Act, 2019** by the Parliament of Uganda on 21st of August 2019, has retrospective application in relation to the meaning of a life imprisonment sentence in contravention of Article 92 of the Constitution cannot be determined on the basis of issues 1, 2, 3, and 5 because those issues are concerned with the law before 2019. I will however address the reforms introduced later as changes were made to relevant existing laws on sentencing which impact the sentencing practices under consideration in the constitutional petition and these changes ought to be considered separately in their own right.

This petition deals with the ramifications of the post **Susan Kigula and 417 others Vs Attorney General; Constitutional Petition No. 6 of 2003** evolution of sentencing principles. The Petition had been decided by the Constitutional Court on 10th June 2005 and affirmed in **Attorney General Vs Susan Kigula and 417 others: Constitutional Appeal No. 03 of 2006** by the Supreme Court

of Uganda on 21st January, 2008 the crux of the decision being that the mandatory death penalty under the penal laws of Uganda were declared unconstitutional and were declared null and void.

The declaration that mandatory death penalties under the various penal laws was unconstitutional rendered all the death penalties for such offences as aggravated robbery and murder which hitherto had mandatory death sentences as the only sentence, into sections with discretionary death penalties to be imposed at the discretion of the trial judge.

In other words, the post **Attorney General Vs Susan Kigula and 417 others** (supra) era had to deal with the ramifications of the decision on existing sentences of death. Generally, the first ramification is that all persons who had been sentenced under a mandatory death penalty provision had their sentences nullified. They therefore had to be sentenced afresh after presenting any mitigating circumstances in the court with original jurisdiction namely the High Court of Uganda. Secondly, the court dealt with the problem of the death-row syndrome and held that where the Executive authority has had time to consider the prerogative of mercy after the highest appellate court had confirmed the death sentence against a convict, and the sentence has not been executed within three years from the time the highest appellate court confirms the sentence of death, the sentence will be deemed to be commuted to life imprisonment without remission.

It is also apparent that subsequent to **Attorney General Vs Susan Kigula and others** decision, the trial courts were faced with the problem of appropriate penalty to impose after the doing away of the mandatory death penalty thereby bringing into sharp focus the meaning of imprisonment for life or life imprisonment which has been held to be the second severest penalty after the death penalty. This problem is perceived as the issue of life imprisonment being deemed to be twenty years' imprisonment for purposes of remission under the **Prisons Act.** The matter not only confronted courts which had to deal with sentence which had been nullified but also sentences to be imposed in new trials that were conducted after the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 417 others** (supra).

”

Principles of interpretation of the Constitution

A constitution should firstly be construed on the basis of its own language. The effort in interpretation should be to ascertain the natural or ordinary meaning of a word or phrase that may be in issue. It should not first be construed on the basis of other materials. The Privy Council in **Minister of Home Affairs and another v Fisher and another [1979] 2 All E.R. 21** at 26 per Lord Wilberforce held that:

> ... The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second.

In **State v Makwanyane and Another [1995] 1 LRC 269** the South African Constitutional Court per Chaskalson P on the question of interpretation of Constitutions held:

> We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of state, including Parliament, the Executive, and the Courts as well as the Fundamental Rights of every person which must be respected in exercising such powers.

Amissah JP of the Court of Appeal of Botswana in **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** at page 632 underscored the importance of paying attention to the words and content of the constitution in light of its importance inter alia in defining powers, limits of powers and rights of citizens when he stated that:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between

> the people themselves. The Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. ... By nature, and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a Constitution of this nature on the same footing as any other legislation passed by a legislature which is self-established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving development and aspiration of its people.

With regard to interpreting provisions providing for fundamental rights and freedoms, the courts use a generous and purposive approach designed to give individuals the full benefit of their rights as enshrined in the constitution. In **Minister of Home Affairs and Another Vs Collins Macdonald Fisher and Another [1980] A.C. 319.**The Court noted that the bill of rights was influenced in many countries by the United Nations Charter on Human rights which call for a generous and purposive approach.

> "It was in turn influenced by the United Nations Universal declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of chapter 1. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to limitations contained in it, being limitations designed to ensure the enjoyment of the said rights and freedoms by every individual does not prejudice ... the public interest.'

In **The Queen vs. Big M Drug Mart [1986] LRC 332** at page 364 the Supreme Court held that in interpreting the charter on rights the courts should adopt a generous rather than a legalistic approach aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charters protection. This is echoed in several other judgments.

In **Dickason V University of Alberta, [1992] 2 S.C.R 1103** the Supreme Court of Canada held that fundamental rights and freedoms are construed liberally, generously and purposively to give the individuals the full benefit of those

rights while any limitation to the rights is given a strict and narrow construction.

In **Dow V Attorney General (1992) LRC 623,** at page 634 the following principles were set out for interpretation of fundamental rights and freedoms. That it is a well-known principle of construction that exceptions to rights contained in a Constitution are ordinarily to be given a strict and narrow rather than broad construction (page 634). Secondly, that rights and freedoms are subject to only two limitations of public interest and prejudice to rights and freedoms of others (page 636 Paragraphs e - f). Thirdly, that the part of the constitution which declares fundamental rights should be given a generous and purposive construction.

Case law Background to the Petition.

Before dealing with the questions that arise in this petition, it is necessary to give a coherent, logical and; where need be, a chronological account of the landmark decisions on the question relating to the meaning of life imprisonment or imprisonment for life, the subsequent issue of remission in practice by Prisons Authorities, where the convict has been sentenced to life imprisonment or where a death sentence is commuted to life imprisonment, the promulgation of the Sentencing Guidelines (supra) and the dilemmas and controversies, if any, faced by the courts in the post **Kigula** sentencing era.

I further wish to point out that this petition was filed on court record on 1eh October 2019 and the judicial decisions considered in the petition are those which preceded the filing of the petition and the enactment of the **Law Revision (Penalties in Criminal Matters) Miscellaneous Act, 2019.**

As noted above, the decision of the Constitutional Court in **Susan Kigula** & **417 others Vs Attorney General; Constitutional Petition Number 6 of 2003** was delivered by the Constitutional Court on 10 June 2005. In its decision, the Constitutional Court issued the following declarations:

1. The imposition of the death penalty does not constitute cruel, inhuman or degrading punishment in terms of articles 24 and 44 of the Constitution, and therefore the various provisions of the laws of Uganda prescribing the death sentence are not inconsistent with or in contravention of Articles 24, and 44 or any provisions of the Constitution.

2. The various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21. 22 (1), 24, 28, 44 (a) and 44 (c) of the Constitution and, therefore, are unconstitutional.

3. Implementing the carrying out of the death sentence by hanging is constitutional as it operationalizes Article 22 (1) of the Constitution. Therefore, Section 99 (1) of the Trial on Indictments Act is not unconstitutional or inconsistent with Articles 24 and 44 (a) of the Constitution.

4. A delay beyond three years after the death sentence has been confirmed by the highest appellate court is inordinate delay. Therefore, for those condemned prisoners who have been on death row for three years and above after their sentences had been confirmed by the highest appellate court, it would be unconstitutional to carry out the death sentence as it would be inconsistent with Articles 24 and 44 (a) of the Constitution.

The Constitutional Court issued orders that the petitioners whose appeal process is completed and the sentence of death has been confirmed by the Supreme Court. their redress will be put on hold for two years to enable the Executive to exercise its discretion under Article 121 of the Constitution. Article 121 (4) of the Constitution allows the President where, as commanded under article 121 (5), a person who has been sentenced to death and his sentence confirmed by the Supreme Court, the following powers to deal with the sentence:

(4) The President may, on the advice of the committee-

(a) grant to any person convicted of an offence a pardon either free or subject to lawful conditions;

(b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him or her for an offence;

(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or

(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

After the period of two years ordered, the convicts were free to return to court for redress. Secondly for petitioners whose appeals were still pending before an appellate court, they shall be afforded a hearing in mitigation of sentence, the court shall exercise its discretion whether or not to confirm the sentence. Lastly, in respect of those whose sentence of death will be confirmed, the discretion under Article 121 should be exercised within three years.

The Attorney General was aggrieved and appealed to the Supreme Court against the decision and the Supreme Court dismissed the appeal and issued the following modified orders.

We confirm the declarations made by the Constitutional Court and, we would modify the orders made by that court as follows: -

1. For those respondents who sentences were already confirmed by the highest court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without rem1ss1on.

2. For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only in mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.

3. Each party shall bear its own costs.

The Supreme Court delivered its decision on 21st of January 2008. Thereafter, several consequences ensued which include the remitting of files which are pending appeal to the High Court for mitigation of sentence because those files had at that time sentences of death under the mandatory death penalty. Obviously cases which were still under trial by the High Court were free to be considered as to whether the death penalty should be imposed or not by the trial judge. For those who are appealing against conviction, the appeal against conviction was stayed pending mitigation of sentence and for the passing of appropriate sentence.

The crucial ramification that touches on this petition is that for those who were sentenced to life imprisonment or imprisonment for life, the question became whether imprisonment for life was twenty years' imprisonment as deemed by the **Prisons Act** for purposes of remission of sentence. It should also be noted in the passing that section 47 (6) of the **Prisons Act,** cap 304 was reenacted after the passing of the **Prisons Act,** 2006 by section 86 (3) both of which sections provide that for purposes of calculating remission, a sentence of life imprisonment shall be deemed to be twenty years' imprisonment. Obviously another problem arose as to the order of the Constitutional Court as modified by the Supreme Court on appeal that those who sentences of death had been confirmed by the highest appellate court (Supreme Court) would have their sentences commuted to life imprisonment if they were not executed within three years. The commutation of the death penalty to life imprisonment was ordered to be without remission.

In the affidavit of Mpagi Godfrey in support of the petition sworn on 11 September 2019, there are some attachments of the evidence of what transpired after the decision of the Supreme Court. In a letter dated 12 March 2009, the Commissioner General of Prisons wrote to the Registrar of the Supreme Court of Uganda seeking clarification in the matter of the **Attorney General Vs Susan Kigula & 417 others** (supra) and particularly

ra1s1ng certain outstanding questions in light of the prov1s1ons of the **Prisons Act** which included section 86 (3) of the **Prisons Act,** 2006 that provides that for purposes of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment. The Commissioner wrote that when they apply remission to the twenty years, the inmate serves a period of 13 years in prison assuming he or she had not lost any remission. Particularly, the Commissioner General of Prisons drew attention to the **Prisons Rules, Statutory Instrument 313 - 6** and 96 (4) and (5) which provides that:

> 96 (4) Whenever a capital sentence is commuted to a sentence of life imprisonment or a sentence of imprisonment for a term of years, such sentence so commuted shall, for the purposes of the remission system be deemed to be, and shall be treated as, a sentence passed by a court.
>
> 96 (5) Whenever a capital sentences committed to a sentence of life imprisonment or to a sentence or imprisonment for a term of years, such sentence shall for the purposes of remission be deemed to have commenced at the date the sentence of death was passed.

The clarification sought by the Commissioner General was couched in the following words:

> Is the period of imprisonment for life without remission a period of twenty years?
>
> Does the order apply to all inmates on death row? Many inmates have already had their sentences confirmed by the highest appellate court. Do the three years in the order run from the date when the sentences were confirmed or the date the order was pronounced by the court?

Subsequently, Registrar of the Supreme Court wrote to the Attorney General and to Messieurs Katende, Sempebwa & company advocates drawing their attention to the letter of the Commissioner General dated 12 March 2009. Subsequently, the Solicitor General's letter addressed to the Registrar of the Supreme Court on the same subject of petition appeal number 03 of 2006 **Attorney General Vs Susan Kigula and 416 others.** He sought to answer the following questions:

1. Is the period of imprisonment for life without remission the period of twenty years?
2. Does the order apply to all inmates on death row?
3. Do the three years in the order run from the date when the sentences were confirmed or the date the order was pronounced by the court.

The Solicitor General wrote that the effect of the judgment and orders in the Constitutional Appeal Number 03 of 2006 is that for condemned prisoners whose sentences were confirmed by the Supreme Court but who have not been on the death row for three years, the Executive still has time to determine or consider their applications under article 121 within the same three years and those whose applications are rejected shall be handled. Two important aspects arise from this.

The first is that execution of the death penalty should be done within three years from the date the Supreme Court confirms a death sentence. Secondly the Executive should exercise its discretion within three years from the date the Supreme Court confirms a prisoner's death sentence. Further for prisoners convicted of capital offences and sentenced under the mandatory death provisions, but who have not had their sentences confirmed by the Supreme Court irrespective of the stage of the appeal, their cases had to be remitted to the High Court for them to be heard only on mitigation of sentence in the High Court which may pass such sentence as it deems fit under the law. Further those sentenced to death have the right to appeal up to the Supreme Court.

The Solicitor General was also of the opinion that for condemned prisoners whose death sentences were confirmed by the Supreme Court and have been on death row for more than three years from the time of confirmation of their sentences by the highest appellate court, they cannot be hanged and sentences are deemed to have been commuted to life imprisonment without remission.

Further as to the meaning of life imprisonment, the Solicitor General relied on section 86 (3) of the **Prisons Act,** and stated that life imprisonment

means twenty years' imprisonment. As to when the life imprisonment sentence commences, he relied on rule 96 (5) of the Prisons Rules (supra) and stated that the time begins to run from the date of the initial sentencing by the High Court.

Lastly on the meaning of service of life imprisonment without remission, The Solicitor General clarified that the sentence of life imprisonment without remission only applied to those persons sentenced to death whose sentences had automatically been commuted to life imprisonment after the lapse of three years upon the sentence being confirmed by the highest appellate court. Further all prisoners on death row who had served the twenty years from the time they were sentenced to suffer death by the High Court should be released. For future capital cases brought for trial before the trial judge, upon conviction of the accused, the trial judge is at liberty to exercise his discretion as to whether to sentence the person to a death or not.

Thereafter in a letter dated 7th of July 2009, the Registrar of the Supreme Court wrote to the Commissioner General of Prisons on the subject of the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 416 others** (supra) advising the Prisons Authorities to follow the advice of the Solicitor General. She wrote as follows:

> I refer to your letter ref ADM/PRS 195/262/018 12 March, 2009. I have been instructed by their Lordships who were on the panel that determined the appeal, to advise you to follow the opinion of the Solicitor General, set out in his letter to me ref. CA/03/06 dated 11th May 2009; a copy of which is attached.

Mr. Godfrey MPAGI complained about the effect of the **Tigo Stephen Vs Attorney General** decision in that it had the effect that the convicts who were sentenced to life imprisonment are longer eligible for release and would spend the rest of their natural life in prison and that this is unnatural. According to him this is torture and it subjects inmates to cruel and inhumane treatment by psychological torture in the circumstances. From the list of petitioners attached to the petition, 182 prisoners had been sentenced to imprisonment for life. It is however not indicated whether any

of these sentences were commuted sentences. Further, Mr. MPAGI inter alia complained about the retrospective effect of the decision.

It should be noted that three years after the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 417 others** (supra), the Supreme Court decided the appeal of **Tigo Stephen in Tigo Stephen Vs Uganda; Supreme Court Criminal Appeal Number 08 of 2009 [2011] UGSC 7.** The decision was rendered on the 10th of May 2011. The Supreme Court heard an appeal from the decision of the Court of Appeal confirming the sentence of life imprisonment imposed by the High Court against the appellant who had been convicted of the offence of defilement contrary to section 127 (1) (section 129 (11)) of the revised provisions of the Penal Code Act. The Supreme Court considered the definition of life imprisonment having regard to the provisions of section 47 (6) of the **Prisons Act** which provided that for purposes of calculating remission, a sentence of imprisonment for life shall be deemed to be twenty years' imprisonment. The court noted that the sentence of life imprisonment was the most severe sentence after the death penalty. I would also highlight the fact that this was a criminal case appeal and not an appeal from the decision of the Constitutional Court. After considering several precedents from around the world, the Supreme Court held as follows:

> We hold that life imprisonment means imprisonment for the natural life term of the convict, though the actual period of imprisonment may stand reduced on account of remissions earned.
>
> *We note that in many cases in Uganda, courts have imposed specific terms of imprisonment beyond twenty years instead of imposing fife imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than fife imprisonment.* {Emphasis mine)

In the passage quoted above, the court found that the next penalty that was most severe in degree after the death sentence is imprisonment for life or life imprisonment. Secondly, they found that the actual period of imprisonment for life may stand reduced on account of remissions earned thereby recognising the application of the repealed section 47 (6) of the

Prisons Act, cap 304 which is now reenacted in section 86 (3) of the **Prisons Act,** 2006. In order words the **Tigo Steven v Uganda** (supra) does not debar Prison authorities from applying remission to life imprisonment sentences at all.

The decision did not specifically address the issue of convicts who had been sentenced to death under the mandatory death penalty provision which had been nullified in the **Kigula** decision. Particularly, it does not deal with persons whose sentences were deemed commuted to life imprisonment after their sentences of death were confirmed by the highest appellate court. In **Tigo Stephen Vs Uganda,** the facts are that the appellant had been convicted by the High Court for defilement under section 129 (11) of the Penal Code Act which section prescribed a discretionary death penalty. The definition of life imprisonment in **Tigo Stephen** did not specifically address those convicts whose sentences were commuted to life imprisonment without remission after the sentence of death had been confirmed by the highest appellate court and three years thereafter. The only plausible explanation for this scenario is found in the holding of the Supreme Court **Tigo Stephen Vs Uganda** (supra) that the period of life imprisonment may stand reduced on account of remissions earned. From these facts it can be concluded that the Supreme Court had introduced a distinction between persons who are sentenced to life imprisonment and persons whose death sentence is commuted to life imprisonment. Those sentenced to life imprisonment enjoy remission while a convict whose penalty is deemed commuted from a death sentence to life imprisonment does not enjoy remission. This does not and cannot apply to a person whose sentence of death is commuted by the President in the exercise of his prerogative under article 121 of the Constitution. Specifically, in **Attorney General Vs Susan Kigula and others** (supra) the Supreme Court held as follows:

> At the end of the period of three years after the highest appellate court confirmed the sentence, and if the President shall not have exercised his prerogative one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission.

Accordingly, the distinction between persons who are sentenced by the trial court to life imprisonment and sentences confirmed as distinguished from those persons whose sentences are commuted from a sentence of death after the confirmation by the highest appellate court is an important distinction which should be kept in mind when considering the precedents and the petitioners petition. The two situations have been treated differently by the Supreme Court. One deals with a sentence of a court and another deals with commutation of sentence to a less severe penalty. The subsequent judicial precedents follow this trend. The commutation of a death sentence by the President is not affected.

The issue of whether any court has jurisdiction to make an order for a convict to serve a sentence of imprisonment without remission only subsequently emerged and was addressed by the Court of Appeal in **Okello Alfred, Odong Bosco, Deen Sam Oyugi, Okello Tom, Opie James and Odoch Charles v Uganda; Criminal Appeal Number 028 of 2016 [2017] UGCA 77,** the Court of Appeal addressed its mind to a sentence of 45 years' imprisonment without remission imposed by the High Court. Part of the appeal was against sentence for being illegal, harsh and manifestly excessive in the circumstances. The Court of Appeal held that each of the appellants were sentenced to 45 years' imprisonment without remission and that remission is a statutory right, provided for under section 47 of the **Prisons Act** and as such it cannot be taken away by court. This decision was issued on 7th November 2017. The implication of the decision is that the High Court cannot sentence someone to imprisonment of a fixed term of imprisonment with an order that it will be without remission. Similarly, in **Tigo Stephen v Uganda,** a sentence of life imprisonment can stand reduced on account of remissions earned. Clearly the order to serve a commuted sentence of death to life imprisonment without earning remission in **Attorney General Vs Susan Kigula and others** (supra) was not followed as authority.

Possibly not cited to the Court of Appeal at that time, was another then recently decided appeal that had been decided by the Supreme Court on 20th September 2017. This was in **Okello Geoffrey Vs Uganda; Supreme Court**

Criminal Appeal No 34 of 2014 [2017] UGSC 37 where one of the grounds of appeal was that the learned justices of the Court of Appeal erred in law when they upheld an illegal sentence imposed on the appellant by the trial judge. The appellant had been indicted for the offence of aggravated defilement contrary to section 129 (3), (4) (c) of the Penal Code Act and was convicted and sentenced to 22 years' imprisonment by the High Court and the Court of Appeal upheld the conviction and sentence. It was argued that a custodial sentence of over twenty years' imprisonment was illegal since the maximum custodial sentence was twenty years' imprisonment. In considering this ground of appeal, the Supreme Court made reference to section 47 (6) of the **Prisons Act** which is now section 86 (3) of the **Prisons Act** which deems imprisonment for life to be twenty years' imprisonment. With reference to the decision of the court in **Tigo Stephen Vs Uganda** (supra) the court in terms of severity of punishment held that:

> ... in our penal laws a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.

They noted inter alia that

> However, following the case of **Attorney General Vs Susan Kigula,** Constitutional Appeal Number 03 of 2005, which declared a mandatory death sentence to be unconstitutional though it remains the maximum sentence for capital offences, courts have not found it necessary to pass death sentences on convicts. Courts have instead opted to pass sentences of terms of imprisonment of well above twenty years in respect of offences which formerly attracted a mandatory death sentence....
>
> We are of the view that sentences of more than twenty years' imprisonment for capital offences cannot be said to be illegal because they are less than the maximum sentence which is death. Courts have power to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law. Article 28 (8) of the Constitution provides that "no penalty shall be imposed for a criminal offence that is severer in degree description than the maximum that could have been imposed for that offence at the time when it was committed". The maximum sentence for the offence of aggravated defilement is death.

If counsel for the appellant's argument was to be accepted, all custodial sentences would not exceed twenty years' imprisonment. And with remission for good behaviour under the **Prisons Act,** convicts for capital offences who are not sentenced to death serve a sentence of only 13 years' imprisonment. This, in our view, would be inconsistent with the proper administration of justice under Article 126 (1) of the Constitution which requires courts to administer judicial power in conformity with the law and with the values, norms and aspirations of the people.

This is not to say, however, that the irrational situation presented by section 86 (3) of the Prisons Act which deems life imprisonment to be twenty years' imprisonment should be left to remain in our statute books. We think Parliament should as a matter of urgency amend this law or bring ti in conformity with the new trend of sentencing.

We agree with learned counsel for the respondent that the sentence of 22 years' imprisonment passed by the trial court on the appellant is not illegal since it is less than the death sentence which is the maximum sentence provided for the offence of aggravated defilement. (Emphasis mine)

It can be discerned from the above holding that there is a problem and a disconnection between the holding in the previous decisions reviewed to the effect that life imprisonment is the most severe penalty after the death penalty where the **Prisons Act** deems it to be twenty years' imprisonment and administers it accordingly for purposes of remission. The absurd situation foreseen by the Supreme Court in **Tigo Stephen Vs Uganda** is to the effect that fixed terms of imprisonment should not be taken to be more severe than imprisonment for life came back to haunt the court. The above notwithstanding, the Supreme Court was clearly alive to the situation where a person sentenced to life imprisonment may end up serving about 13 years' imprisonment upon earning remissions if life imprisonment is deemed to be twenty years' imprisonment as stipulated in the **Prisons Act.** 2006. A sentence of over twenty years' imprisonment would automatically be more severe in degree than a sentence of life imprisonment if section 83 (6) of the **Prisons Act.** 2006 was to be applied to it.

The decision in **Attorney General v Susan Kigula and others** can rightly be confined to persons whose death penalties are deemed to be commuted to

life imprisonment after three years of confirmation of sentence of death by the Supreme Court while **Tigo Stephen v Uganda** permits earning of remission for a convict sentenced to life imprisonment.

Subsequently, in **Ssekawoya Blasio Vs Uganda Supreme Court Criminal Appeal Number 24 of 2013 [2018] UGSC 6 (9th April 2018)** the Supreme Court laboured to make a distinction between persons whose sentences were commuted from the death sentence and those who were sentenced to life imprisonment. They held inter alia as follows:

> "We have declined to delve into the applicability otherwise of Tigo on the appellant because this court in Tigo was not dealing with a post Kigula murder convict as it is in the present appeal. This court in Tigo was dealing with the issue of a vague sentence imposed on a person convicted of defilement. The trial judge had imposed a sentence of life imprisonment yet she had qualified it to twenty years. In the present appeal, there is no such qualification. Rather we are dealing with what the trial judge had in mind when he sentenced the appellant to life imprisonment in the post Kigula era. Be that as it may, we note that Tigo is important in our resolution of this appeal because it reflects the magnitude the sentence of imprisonment for life has gained in the post Kigula era. We find that the pronouncements made in Tigo on the significance of a sentence of imprisonment for life reflects the law on what a life imprisonment sentence means in the post Kigula era.

The Supreme Court went on to hold that in terms of severity of punishment in the penal system, a sentence of life imprisonment comes next to the death sentence which is still enforceable under the penal laws. They found that the decision in **Tigo Stephen Vs Uganda** (supra) only clarified on the meaning of a sentence of life imprisonment or imprisonment for life. It also clarified what the sentence of imprisonment for life meant in the post Kigula sentencing regime for persons convicted of murder but were spared the maximum sentence of death provided for under the Penal Code Act. Relevant to the petitioner's petition is the holding of the Supreme Court as follows:

> Persons convicted of murder and sentenced to imprisonment for life (meaning for the remainder of their lives) as a result of this court's decision in Kigula should

be distinguished from persons convicted of manslaughter and sentenced to imprisonment for life, who could benefit from remission provisions under our section 86 (3) of the **Prisons Act,** which provides that "for the purposes of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years." Parliament never intended these provisions to be applicable to persons convicted of murder for there was only one mandatory sentence after conviction: death. It is also important to note that the remission provisions under our **Prisons Act** concurrently existed with the mandatory death sentence provisions in the Penal Code Act in the pre-Kigula era.

We have already noted that following the Kigula decision, imprisonment for life became and remains the second most severe sentence a person convicted of murder can be sentenced to, if he or she is not sentenced to death. We are therefore not convinced with the appellant's argument that convicts of murder should be treated in a similar manner as those convicted of manslaughter by getting the same sentence when they are sentenced to life imprisonment, which, according to the appellant is twenty years.

Before we take leave of this matter, we wish to note that it would be an absurdity if a person convicted of murder was allowed to benefit under the provisions of remission in respect of the life sentence and another person convicted of murder and sentenced to death would not. Clearly, this was never the intention the legislature had in mind when it passed the provision under the **Prisons Act,** which the appellant would benefit from by equating his sentence of life imprisonment to twenty years.

The decision in **Ssekawoya Blasio v Uganda** (supra) was delivered by the Supreme Court on 9 April 2018. It therefore had the benefit of all the other decisions inclusive of the decision in **Attorney General Vs Susan Kigula and others** (supra). With the greatest respect to decision of the Supreme Court which is binding on the Court of Appeal, the question is whether in the circumstances it is binding on the Constitutional Court and we should let the matter rest unless overturned by the Supreme Court. By the decision the Supreme Court added another category of persons sentenced to life imprisonment for murder as persons who should not earn remission.

The question of whether the courts have jurisdiction to bar the earning of remission under section 86 (3) of the Prisons Act or any other provision was not considered and had not been challenged for being unconstitutional as it has now been.

The above notwithstanding, I wish to observe that after the above decision, persons convicted of murder have been sentenced to less than twenty years' imprisonment rendering the **Ssekawoya Blasio v Uganda** (supra) precedent inconclusive as a direction to the lower courts to sentence persons charged with murder to sentences which are above that envisaged as the maximum sentences for cases of manslaughter. While the Supreme Court sought to make a distinction between offences which hitherto attracted a mandatory death penalty and offences which carry a discretionary death penalty or specifically, the offence of manslaughter which could attract a penalty of up to life imprisonment, that distinction is based on an understanding of what the legislature could have intended under the express provisions of the statute. This is because the mandatory death penalty existed side by side with life imprisonment sentences for other offences where the death penalty was not mandatory. It should also be emphasized that for offences which always had a discretionary death penalty such as defilement under section 129, of the Penal Code Act where a convict is liable to suffer death, section 124 where a convict convicted of the offence of rape is liable to suffer death and a convict of kidnapping with intent to murder is also liable to suffer death, convicts may be sentenced to life imprisonment or a lesser term.

In **Opoya v Uganda (1967) EA 752,** the appellants had been convicted on charges of aggravated robbery and the trial judge held that he was compelled by the relevant section to sentence them to death. Section 273 (2) of the Penal Code had the relevant material words: "shall be liable on conviction to suffer death". Sir Clement DE Lestang, V. P who delivered the judgment of the East African Court of Appeal said at page 754 that:

> It seems beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express

> the stated penalty which may be imposed at the discretion of the court. In order words they are not mandatory but provide a maximum sentence only and while liability existed the court might not see fit to impose it. ...
>
> ... Consequently construing s. 273 (2) in the ordinary meaning of the words used therein free from authority we would have no hesitation in holding that the sentence of death which it prescribes is discretionary and not mandatory....

The East African Court of Appeal held that the material words give discretionary power on the High Court whether to impose the maximum penalty or not. In other words, and by analogy, even before the decision in **Attorney General Vs Susan Kigula and others** (supra) there were and still are several other offences as stated above which attracted a discretionary maximum penalty of death and therefore persons convicted of those offences which always had a discretionary maximum penalty of death could be sentenced to the existing penalty of life imprisonment or imprisonment for life which sentence would be administered under the **Prisons Act.** The issue is that by the decision in **Attorney General Vs Susan Kigula and others,** the death penalty provisions which were mandatory to be imposed became discretionary and the death penalty could be imposed at the discretion of the trial judge. It follows that the attempt to introduce another stiffer penalty called life imprisonment now specifically added another category of convicts who would serve without remission any sentence of life imprisonment for offences with had previously carried a mandatory death penalty.

It can be discerned that in **Ssekawoya Blasio v Uganda** (supra) the Supreme Court of Uganda considered a situation where a person convicted of manslaughter could be sentenced to life imprisonment or imprisonment for life which is the next penalty to the death penalty in severity and the issue was whether a convict of murder who is spared the death penalty should be sentenced to the same terms. It is clear that the court desired a heavier penalty of life imprisonment for convicts of murder than one imposed for manslaughter cases. This desire is however not borne out by the judicial precedents from the Supreme Court. In **Kamya Abdullah and 4 Others v**

Uganda; Supreme Court Criminal Appeal No. 24 of 2015 [2018] UGSC 12 (26th April 2018), which is a later decision of the Supreme Court, the appellants had been sentenced to 40 years in the High Court for murder which involved mob justice. The Court of Appeal upheld the conviction on appeal but reduced the sentence to 30 years' imprisonment. On further appeal to the Supreme Court against sentence, the sentence was further reduced to 18 years' imprisonment. The fact that the murder was committed during a mob justice assault was found to mitigate the sentence. The Supreme Court held:

> "Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.

In other words, absurdities can occur where mitigation of sentence for a convict convicted of murder or aggravated robbery can lead to imposition of a sentence of less than twenty years, similar to manslaughter and the distinction of the Supreme Court in **Ssekawoya Blasio v Uganda** (supra) can become blurred or inapplicable. In practice the discretionary death penalty has been held to confer sentencing discretion on the trial judge which cannot be interfered with except on traditional grounds such as failure to take into account a relevant material factor or illegality or where the sentence is harsh or excessive or so low as to amount to an injustice (see **Ogalo s/o Owoura v R (1954) 21 EACA 270). In Ssekitoleko Yudah Vs Uganda and 2 Others SCCA No. 33 of 2014 [2017] UGSC 40** decided on 6th April 2014, the Supreme Court noted that an appropriate sentence is a matter for the sentencing discretion of the sentencing judge. To what extent can a sentencing discretion be used in offences which used to attract a mandatory death penalty? It is a notorious fact of which this court can take judicial notice and the practice has revealed that where plea bargain efforts have been successful less than 18 years' imprisonment have been imposed for offences which used to attract the mandatory death penalty. The question therefore is whether the Supreme Court decisions do affect discretionary powers of the trial courts contrary to the concept of independence of the

Judiciary under article 128 (1) and (2) of the Constitution. Further the petitioners herein are serving sentences ranging from sentences of life imprisonment deemed to be the severest penalty after the death penalty to specified fixed term sentences ranging from 73 years at the higher end to 21 years imprisonment at the lower end thereby demonstrating a wide latitude that is hard to rationalize on the principle of proportionality with the gravest offence attracting the severest form of penalty and the lesser offences in terms of aggravation attracting comparatively lighter terms of imprisonment.

As noted in **Tigo Stephen Vs Uganda** (supra) the expression "life imprisonment" or "imprisonment for life" are used interchangeably and mean the same thing. Secondly the penalty is not defined in the Penal Code Act. I want to start with the proposition of the petitioners that the term life imprisonment or imprisonment for life is not defined. Section 2 of the Penal Code Act which is the definition section does not define life imprisonment. It follows that recourse is to be had to the general rule of construction provided for under section 1 of the Penal Code Act, which provides that:

> 1. General rule of construction.
>
> This Code shall be interpreted in accordance with the principles of Legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

Under the English Criminal law, the meaning attaching to a sentence of life imprisonment was set out by the Court of Criminal Appeal of England in **R v Foy [1962] 2 All ER 245.** Lord Parker CJ, Ashworth and Hinchcliffe JJ heard the appeal and Lord Parker CJ who delivered the judgment of court held that:

> Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentence of life imprisonment remains on them until they die.

As noted above, there are no different meanings attached to the phrase "life imprisonment" or "imprisonment for life. In the Penal Code Act. there is only one kind of punishment which means life imprisonment or imprisonment for life as defined. In **Tigo Stephen Vs Uganda,** the Supreme Court did not depart from the English law to which the section 1 of the Penal Code Act commands recourse, wherever the expression is not defined (See section 1 of the Penal Code Act). It follows that it would change the meaning to posit that life imprisonment for manslaughter could have a different meaning or effect than life imprisonment for the offence of murder which previously carried a mandatory death penalty. The provisions of the **Prisons Act.** 2006 which applied to imprisonment terms remain the same and makes no distinctions in the effect of the terms "imprisonment for life" or "life imprisonment for offences of manslaughter, kidnapping with intent to murder, defilement or murder where convicts are liable to suffer death and the courts have the discretionary power whether to sentence a convict of the said offences to death, life imprisonment or a lesser fixed term. The definition of life imprisonment in **Tigo Stephen** did not affect the Executive authority to apply remission as part of administration of the sentence and to that extent the petitioner's petition has no merit on terms of any adverse effect of the decision on the petitioners' constitutional rights. It is the subsequent decisions however which have to be considered more critically.

In the Supreme Court decision in **Wamutabanewe Jamiru v Uganda; Criminal Appeal Number 74 of 2007 [2018] UGSC 8 (12TH April 2018),** the appellant had been convicted and sentenced to death and his sentence was reduced to 35 years' imprisonment without remission by the Court of Appeal. He appealed to the Supreme Court on one ground of appeal that the learned justices of the Court of Appeal erred in law when they imposed an illegal sentence on the appellant. The court emphasised its decision in **Tigo Stephen Vs Uganda** (supra) where it held that the prison authorities administer prisons and in particular sentences imposed by the courts. That the **Prisons Act** does not prescribe sentences to be imposed for defined offences. The sentences are contained in the Penal Code and other Penal Statutes and the powers of the courts are contained in the Magistrates

Courts Act and the Trial on Indictment Act and other Acts prescribing jurisdiction of courts in sentencing. The Supreme Court rejected the submission that life imprisonment means a twenty years' imprisonment. They found that remission is a function of the penal institution which administers a sentence, a convict has been sentenced to, and the power is exercised in tandem with the sentence imposed by the court. The Supreme Court held that:

> We note that the maximum penalty for the offence of murder, which the appellant was convicted of, is death and that the sentence he is appealing is less severe than the death penalty he had earlier been handed. Nevertheless, given that remission is a function of the penal institution which has to exercise it in accordance with the **Prisons Act,** we find it illogical for any court, let alone the Court of Appeal in the instant matter, to ordain that the appellant shall serve his sentence without remission.
>
> *Respectfully this is a fallacy because the provision of penal remission is none of the penalties avatfable to court to hand down. Whtie we found no reason to fault the 35years' imprisonment as a sentence per se, we agree with the appellant that the court erred when it included the sanction that the appellant was entitled to no remission. He is not to be denied remission where it is applicable.* (Emphasis mine)

By this decision, the Supreme Court noted in effect that the court did not have jurisdiction to bar the application of the Prisons Act on matters of earning remissions by prisoners.

The question then is; when is a person serving a sentence of life imprisonment or imprisonment for life not entitled to remission? Clearly the answer lies in the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 417 others** (supra) as guided by the Solicitor General in the letter to the Registrar of the Supreme Court. In other words, the state of the precedents indicated that it applies to those whose sentences of death have been commuted to life imprisonment under the circumstances stated in **Attorney General Vs Susan Kigula and 417 others** (supra). In Wamutabanewe Jamiru Vs Uganda, the appellant had been sentenced to death and his sentence was subsequently reduced on appeal to 35 years'

imprisonment without rem1ss1on. On further appeal, the Supreme Court held that the court has no power to make an order that a sentence should be served without remission.

Last but not least the Supreme Court in **Magezi Gad v Uganda; Supreme Court Criminal Appeal No 17 of 2014 [2017] UGSC 35 (17th May 2017)** held that a life imprisonment sentence is an indeterminate sentence. In that appeal the issue was whether a Judge who sentences a convict to life imprisonment should take into account the period the convict spent on remand prior to his or her conviction in terms of Article 23 (8) of the Constitution. For ease of reference article 23 (8) of the Constitution provides that:

> "Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

Obviously a term of imprisonment has been interpreted to mean a fixed term of imprisonment whereas life imprisonment is a subjective term in practice because from the perspective of the convict, the span of life that the convict will enjoy cannot be determined with scientific precision. It would be arbitrary to look at the life expectancy of the country as a whole. Section 86 (3) of the **Prisons Act,** 2006 actually deals with the laws of probabilities because a prisoner can be sentenced at the age of 18 years or at the age of 65 years and even if life expectancy was taken to be an average of 50 years, the court still has jurisdiction to sentence a person aged 60 years to life imprisonment. At a conceptual level, the holding in **Gad Magezi Vs Uganda** (supra) reinforces the holding of the Supreme Court in **Tigo Stephen Vs Uganda** (supra) that a sentence of life imprisonment endures for the remainder of the convict's life, which is an indeterminable period of time. In other words, it depends on the life expectancy or lifespan of the convict. Theoretically, a person sentenced at the age of 25 years may serve more years than a person sentenced at the age of 50 years. The **Prisons Act,** section 86 (3) thereof only deems life imprisonment to be twenty years'

imprisonment for purposes of calculating remission. The practical result of the deeming of the law of life imprisonment to be twenty years' imprisonment is that all persons who are sentenced to life imprisonment serve twenty years' imprisonment less any remissions earned except for those on commuted sentences of death under the order in **Attorney General Vs Susan Kigula and Others.**

Legislative history of remission for life imprisonment sentences.

The legislative history of the remission saga can be traced. In 1909 the Uganda Protectorate had the **Prisons Act** cap 140 Laws of the Uganda Protectorate found in the revised edition laws of 1935 which in 1938 introduced section 91 which amended the existing section 31 and provided that long term convicted criminal prisoners, by industry and good conduct may, after completion of six months' imprisonment earn by a system of marks, remission of a quarter of the remaining period of the sentences. This was amended to read as follows:

> 91. Convicted prisoners sentenced to imprisonment whether by one sentence or by consecutive sentence for periods exceeding one month may, by industry and good conduct, by a system of marks, earn remission of 1/6 of the remaining period of the sentence.

On the other hand, it was provided in section 94 as far as is relevant to the matter before the court as follows:

> 94. The sentences of a prisoner sentenced to imprisonment for life shall be specially considered at the end of 15 years, with a view to the release of such prisoner, and the Governor shall give such directions in the matter as he shall think fit.

The above provisions of section 92 were not carried forward to the **Prisons Act,** cap 313 after independence of Uganda and as shown in the revised laws of the independent Uganda 1964 revised Laws, section 49 had been amended so that it made provision for earning remission of sentences of life imprisonment and particularly section 49 (7) of the **Prisons Act** provided that:

(7) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment.

This provision was further carried forward into **Prisons Act** cap 304 of the revised edition of the laws of Uganda 2000 after changes had been made to provisions on remission in terms of the deeming of the duration of life imprisonment. This is because in 1970, Parliament amended the **Prisons Act,** by enacting the **Prisons (Amendment) Act, 1970** and in section 1 thereof provided that:

1. The **Prisons Act** is hereby amended by substituting the word "sixty" for the word "twenty" occurring in subsection (7) of section 49 thereof

Thereafter life imprisonment was deemed to be a period of sixty years' imprisonment for purposes of calculating remission. Hardly two years later, this amendment was changed by Decree 28 of 1971 by the **Prisons (Amendment) Decree** which was a decree enacted to amend the **Prisons Act.** The **Prisons (Amendment) Decree** read as follows:

1. The **Prisons Act** is hereby amended by substituting the expression "twenty years" for the expression "sixty years" occurring in subsection (7) of section 49 thereof.
2. The amendment made by this Decree shall have effect in relation to a sentence imposed before this Decree came into force as it applies to a sentence imposed after it comes into force.

Legislature attempted to have the beneficial reduction of the deemed period of life imprisonment to apply retrospectively. Subsequently, the laws of Uganda retained the deemed twenty years' imprisonment provision for purposes of calculating remission for sentences of life imprisonment up to the enactment of amendments to the Penal Code in 2019.

From the precedents, the following facts and conclusions need to be borne in mind.

- The Constitutional Court of Uganda in **Susan Kigula and 417 others Vs Attorney General** (supra) declared that the various provisions of the laws of Uganda which prescribed the mandatory death sentence are

void to the extent of the mandatory nature of the offence but retained the death penalty so that those provisions which hitherto had mandatory death penalty provisions became provisions giving the trial court discretionary powers as to whether to impose the death penalty.

- A declaration that all the laws of Uganda which prescribed a mandatory death sentence were unconstitutional sections and this had the effect of nullifying all sentences of death passed pursuant to the mandatory provisions of the nullified sections of the law after 1995. This holding was affirmed by the Supreme Court in **Attorney General Vs Susan Kigula and 417 others.** In other words, it is only for convicts who were sentenced under discretionary powers of the court where the laws prescribing the sentence and the penalty then and now give the sentencing court discretionary powers whether to impose the death penalty whereupon that discretionary powers were used to sentence the convict to death. If there is any convict in this category, that would be the only sentence that remained valid pursuant to the nullification of the mandatory provisions of the laws prescribing the death sentence as the only sentence. This calls to mind that the opinion of the Solicitor General that persons whose sentence had been confirmed by the highest appellate court were those whose sentences were commuted to life imprisonment after three years of confirmation of sentence. The Supreme Court could only confirm a sentence of death, if it had discretionary powers whether to impose the death penalty or not and that is the essence of the ruling of the Constitutional Court. It follows that all persons who had been sentenced under a mandatory death penalty provision were entitled to have their sentence considered afresh except those who were sentenced before the Constitution was promulgated on 8 October 1995. As to whether any person was sentenced to death under a discretionary power of the High Court is a question of fact that needs to be interrogated by checking the prison records or the court records. Otherwise for all other cases, where convicts had been

sentenced under a mandatory death penalty prov1s1on, they were entitled to have their sentences reconsidered for the exercise by a trial court of discretionary powers whether to retain the death sentence or sentence the convict to a lesser sentence.

- Secondly, a delay of the three years after the death sentence has been confirmed by the highest appellate court is inordinate delay so that those condemned prisoners on the death-row whose execution is delayed for more than three years cannot be executed. Most importantly, of the convicts whose appeal process had been completed and sentence of death confirmed by the Supreme Court any further progress in the case was put on hold for a period of two years to enable the President exercise discretion under the prerogative of mercy powers founded on article 121 of the Constitution. The question whether any convict, being one of the Petitioners in **Susan Kigula and 417 others vs Attorney General** (supra) had been sentenced to death under a discretionary power requires the fact to be established in light of those who fell in the category of those who were sentenced under a mandatory death penalty provision whose sentences were null and void and who were required to be sentenced afresh.
- The persons whose appeals had not been completed were entitled to be heard in mitigation of sentence. Clearly, anybody sentenced to death under a mandatory death penalty provision was entitled to be heard in mitigation of sentence because such a sentence was nullified.
- It follows that, only those who had an opportunity to present mitigating factors before a judge on the question of what appropriate punishment should be imposed on them and were subsequently sentenced to death could be considered as the persons whose appeal process ended up in the Supreme Court on the question of sentence and the Supreme Court confirmed the sentence.
- Further in **Attorney General Vs Susan Kigula and 417 others** (supra) the Supreme Court held that the respondents whose sentences were already confirmed by the highest appellate court and their petitions

for mercy under article 121 of the Constitution were pending should have their petitions processed and determined within three years from the date of confirmation of the sentence. Thereafter, the sentence shall be deemed commuted to imprisonment for life without rem1ss1on.

- It is material whether there was anybody who never got an opportunity for mitigation of sentence and whose sentence was confirmed by the highest appellate court. The ruling makes that very improbable because anybody who had been sentenced under a mandatory death penalty provision whose sentence was nullified was given an opportunity to appear before a trial court to reconsider the sentence afresh. However, the question of which of petitioners were affected is a question of fact that can be determined 1n the consideration of the petition.
- Subsequently, a controversy arose as to the meaning of life imprisonment which was held to be imprisonment for the natural life of the convict, though the actual period may be reduced on account of remissions earned.
- Subsequently the Supreme Court in criminal appeals against sentence found that the sentence of imprisonment for life was problematic. Particularly in **Ssekawoya Blasio v Uganda** (supra) the Supreme Court observed that it was absurd for a person convicted of murder to be allowed to benefit from the provisions of remissions in the **Prisons Act** as this was never the intention of Parliament. This concern arose from equating the sentence of life imprisonment to be twenty years for purposes of remission under the **Prisons Act.** They emphasised that convicts of murder should not get the same treatment as persons convicted of manslaughter who are also sentenced to life imprisonment. They found that it was an absurdity and irrational for a person convicted of murder to get out after being sentenced to life imprisonment within a period of about 13 years' imprisonment.

- On the other hand, the Supreme Court has held that remission is a right under the **Prisons Act** which is applied independently of the exercise of the judicial function of sentencing by courts of judicature. In other words, remission is an Executive function carried out by the Prisons Authorities and the President and therefore the period of twenty years deemed for purposes of remission cannot be considered in sentencing a convict to life imprisonment.
- Further, remission has been held to be a right of the prisoners who have been convicted and sentenced to a term of imprisonment and the right cannot be excluded by the court.The question that remained was whether imprisonment without remission was permissible where there has been a commutation of the death penalty to life imprisonment.
- Further I have observed that convicts who were convicted for the offences of murder, aggravated defilement and aggravated robbery have been sentenced to less than twenty years' imprisonment and the distinction between life imprisonment for the offence of manslaughter and life imprisonment for the offence of murder and aggravated defilement in terms of the right to remission is problematic. Moreover, courts are enjoined under article 126 of the Constitution to promote reconciliation and under this theme judicial notice has been taken of the facts that plea bargains have resulted in sentences of less than 18 years' imprisonment for offences which hitherto carried a mandatory death penalty.
- Last but not least, offences carrying a discretionary death penalty have always had the alternative of imprisonment for life or a lesser penalty.
- The Supreme Court has clarified that life imprisonment is next in severity to the death penalty. It follows that the deeming of life imprisonment to be twenty years' imprisonment under the **Prisons Act,** has created an absurdity which has been pointed out by the Supreme Court that sentences of twenty years and above have been

imposed making the deeming of life imprisonment to be twenty years irrational and fit for parliamentary intervention for legislative reform.

- Further the Solicitor General gave an opinion that persons whose sentences had been commuted to life imprisonment after three years of their sentences being confirmed by the highest appellate court, would be released within twenty years reckoned from the time when they were first initially sentenced by the High Court (when they were sentenced to death). It is on the basis of this state of affairs that the petitioners contend that the **Prisons Act** was amended so that they do not have a right to come out of prison with the definition of the sentence of life imprisonment which is meant to endure for the rest of their lives making the provisions of remission redundant.
- There was concern that a prisoner sentenced to life imprisonment who earns remission earns up to a maximum of 1/3 of the sentence and may come out after 13 years' imprisonment.
- Sentences of over twenty years' imprisonment have been held to be lawful because they are less than the maximum of death but in **Tigo Stephen v Uganda** the Supreme Court warned that fixed term sentences of more than twenty years should not be taken to be more severe than life imprisonment which is next in severity to the death penalty.

It is with the above background in mind that I can now consider the issues arising from the petition.

Issue 1

1. **Whether the Kigula decision imposition of life imprisonment without remission contravenes article 21, 126 (2), (a) and article 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995.**

The question raised from the answer to the petition and the submissions of the Attorney General is whether this court can reverse a decision of the Supreme Court in appeal from the decision of the Constitutional Court.

I have carefully considered the matter and clearly the order of the Supreme Court was consequential to the petition. The Constitutional Court had held that a delay after the death sentence has been confirmed by the highest appellate court is an inordinate delay if it is a delay of three years and beyond. Secondly, the Constitutional Court deferred the redress of persons whose sentences had been confirmed by the Supreme Court on hold for two years to enable the Executive exercise its prerogative of mercy under article 121 of the Constitution. Subsequently, the Supreme Court on an appeal from the decision of the Constitutional Court, dismissed the appeal of the Attorney General and made modified consequential orders which included an order that after the three years have elapsed and no decision has been made by the Executive under article 121 of the Constitution, the death sentence shall be deemed commuted to imprisonment for life without remission. This order to serve without remission was an original order that did not arise from the issues for trial before the Constitutional Court. It was an order in execution of sentence which can be considered as raising a controversy as to whether it breached the doctrine of separation of powers. The holding that the death penalty is commuted to life imprisonment is strictly not a sentence of the Supreme Court but a reprieve or the commutation of sentence deemed by law arising from the holding that after three years of confirmation of the death sentence by the Supreme Court (the highest appellate court), it would be unconstitutional to execute the death sentence. The Supreme Court's jurisdiction was to declare the effect of that decision that it was unconstitutional to execute a convict falling in the category explained above. In addition, this decision took on another meaning and effect when in **Tigo Stephen Vs Uganda** the supreme court defined life imprisonment to mean imprisonment for the remainder of a convict's life and this raised a new issue as to whether persons sentenced to life imprisonment could not earn remission by virtue of that decision and it is this aspect that is clearly an original issue.

The issue of whether courts have jurisdiction to make any order barring the earning of remission by any prisoner has never been a question for determination by the Constitutional Court or the Supreme Court on appeal

from a decision of the Constitutional Court. Further it has never been a question as to interpretation of the Constitution under article 137 (1) of the Constitution and is an original action in that respect.

In other words, the death penalty could no longer be applied and the only next penalty which is the most severe penalty after the death penalty is life imprisonment. It was therefore consequential to the finding of unconstitutionality of the execution of the death sentence after three years of confirmation of the sentence by the highest appellate court that the court made an order that the sentences are deemed to be commuted to life sentences. The only issue is whether the court could lawfully make an order that the life sentences or imprisonment for life would be without remission. The narrower question is therefore the question of whether the learned justices of the Supreme Court had jurisdiction to make an order that the life imprisonment sentence which was a commuted sentence from the death sentence had to be served without remission in light further of the decision in **Tigo Stephen Vs Uganda.** The Supreme Court in other appeals from the Court of Appeal held that remission is a right that cannot be taken away by courts (See **Wamutabanewe Jamiru Vs Uganda** (supra)). The question therefore needs to be resolved with finality.

The question as to whether the Supreme Court had jurisdiction to order that a sentence of life imprisonment would be served without remission has been argued in light of the provisions for nondiscrimination and equality before the law under article 21 of the Constitution of the Republic of Uganda. This question was not a question for interpretation of the Constitution before and therefore only arose in the implementation of the declarations of the Constitutional Court and can be considered as a fresh question as to interpretation under article 137 (1) of the Constitution of the Republic of Uganda. The questions can therefore be determined by this court as an original question. Further, the cause of action arose after the decision. I would overrule the objection of the Attorney General to the effect that the petitioners were bringing in the guise of a fresh petition, an appeal against the decision of the Supreme Court in its appellate jurisdiction from a

decision of the Constitutional Court. The petitioners are not challenging the order that after three years, execution of the death sentence is unconstitutional. In fact, the petitioners rely on this order of the Constitutional Court upheld and affirmed by the Supreme Court. Secondly, the petitioners are not challenging the order of commutation of the death sentence to life imprisonment. They only challenge the order that it should be without remission. This order never came out of an appeal from the Constitutional Court. I would therefore handle it on the merits as several other points arise which the petitioners contend are in contravention of the Constitution and these issues arose after the order in terms of its effect on the petitioners.

The headnote of Article 21 of the Constitution gives an indicator of the purpose of the article 21 as an article that deals with the subject of equality and freedom from discrimination. Article 21 of the Constitution provides that:

> **21. Equality and freedom from discrimination.**
>
> (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
>
> (2) Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
>
> (3) For the purposes of this Article, "discriminate" means to give different treatment 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.
>
> (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

(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.

Article 21 (1) of the Constitution declares equality of all persons before the law and under the law in all spheres of political, economic, social and cultural life and guarantees equal protection of the law. Additionally, article 21 outlawed discrimination on the grounds enumerated in article 21 (2) and (3) of the Constitution. Any violation of the right to equal protection of. the law or the right of freedom from discrimination is considered on the basis of law. In **Hon. Justice (Rtd) Dr. Yorokamu Bamwine v Attorney General Constitutional Petition No. 15 of 2021** this court considered a petition where the concept of equality before and under the law and freedom from discrimination were examined and the court cited with approval several persuasive authorities from the Canadian Supreme Court. I would again refer to these precedents. In **Andrews v Law Society of British Columbia [1989] 1 S.C.R. 143** Section 15 (1) of the Canadian Charter of Rights and Freedoms was the subject of interpretation by the Supreme Court and as far as relevant provides that:

> 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 object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

What should be emphasized is the equal protection clause and outlawry of discrimination on the basis of the personal characteristics enumerated in the charter. In that decision, Mr. Andrews, a British subject permanently

resident in Canada met all the criteria for admission to the British Columbia bar except that of Canadian citizenship and his action challenged his exclusion as discriminatory and a violation of his right to equal protection of the law enshrined under section 15 (1) of the Canadian Charter. McIntyre J held at pages 163 and 164 considered 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....
>
> 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 frequently produce serious inequality.

At page 165:

> 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. 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.

The judgment in **Andrews v Law Society** (supra) is persuasive authority for the proposition that equality or freedom from discrimination has to be examined as a consequence of a law. Section 15 of the Canadian Charter like its counterpart in Article 21 of the Ugandan Constitution are both concerned with equality before and under the law and it is necessary to consider what that law is in context. Secondly freedom from discrimination does not provide for equality in a general or abstract sense but equality as conceptualized in a variety of contexts and the context has to be established. The concept of equality before and under the law is concerned with the application of the law 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 on others. Why should A of the same group be treated discriminatorily by denial of a social good such as right to earn remission when B who comes under the same classification enjoy the right to earn remission? The Court is concerned with the innumerable variety of personal characteristics, merits, capacities and entitlements when considering the concept as equality in certain contexts cannot be applied.

Further in **Nancy Law Vs Canada (Minister of Employment and Migration) [1999] 1 S.C.R 497** where Iacobacci J at page 524 held that the analysis of whether there was discrimination should be based on the following criteria namely:

> ... 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 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, 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 bys. 15 (1).

Therefore, the petitioners ought to prove on the balance of probabilities or on a civil standard of proof, that the law places a differential treatment between him or her and others in purpose or in effect. That the differential treatment is based 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 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.

I have carefully considered the question of whether the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 417 others** (supra) is discriminatory. Following the criteria, it is clear that in the above decision, the convicts whose sentences had been confirmed by the highest appellate court and sentences subsequently deemed to be commuted to life imprisonment, had their sentences commuted to an existing lawful sentence of life imprisonment. Similarly, persons who are sentenced to life imprisonment are sentenced to the same sentence within the definition of life imprisonment or imprisonment for life as held in **Tigo Stephen Vs Uganda** (supra). By holding that the persons whose sentences are commuted to life imprisonment would serve it without remission, the Supreme Court introduced a distinction that treats convicts sentenced to death whose sentences are commuted to life imprisonment differently from convicts who were straightaway sentenced to life imprisonment.

The term law as under Article 28 (12) in terms of the definition of an offence and the prescription of the penalty as well as the term under article 28 (8) in terms of imposition of a penalty by law have been considered by the

European Court of Human Rights in establishing the meaning and scope of article 7 of the European Convention of Human Rights. Article 7 of the European Convention provides for "no punishment without law".

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.

In **S.W. v. The United Kingdom (Application No 20166/92)** the case was referred to the European Court by the European Commission of Human Rights and concerns the conviction of the applicant of the offence of marital rape against the common law proposition which had been overturned that a husband cannot be guilty of rape on his wife and that upon the marital contract, a wife had consented to sexual intercourse by her husband which she cannot retract and therefore cannot be guilty of rape. The House of Lords in **RVs R** had held after several decades that a husband can under the law prescribing the offence of rape be convicted of rape of his wife in light of, inter alia, the change in the status of women over time.The question inter alia was whether the judicial precedents constituted law within the meaning of article 7 of the European Convention and the court held inter alia:

> ... The Court thus indicated that when speaking of "law" Article 7 (art.7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (paragraph 35).
>
> 36. However clearly drafted a legal prov1s1on may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adoption to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through

judicial lawmaking is a well-entrenched and necessary part of legal tradition. Article 7 (art.7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

I am persuaded by the proposition in the above Judgment of the European Court of Human Rights that in the development of law, judicial elucidation and clarification forms part of the law. In the premises, I am persuaded that the first criteria that there is a law which can be considered as having discriminatory effect or purpose is fulfilled. The first criteria that the law or the holding stating that there would be no earning of remissions by convicts in cases where the death penalty is deemed commuted to life imprisonment places a differential treatment between persons whose sentences have been deemed commuted to life imprisonment and persons who are sentenced to life imprisonment.

The second criterion is whether the distinction is based on a personal characteristic of the petitioner as one of the characteristics enumerated under article 21 (3) of the Constitution in that the prisoner was discriminated against on any of the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Clearly, there is a differential social standing as between a person who was previously sentenced to death and a person who is socially and originally sentenced to life imprisonment in the trial process. The discrimination is therefore based on personal status in that one category is sentenced to life imprisonment and another category has a sentence commuted from a death sentence to life imprisonment. The second criterion is therefore fulfilled. The question would be whether such distinction is justifiable given that those who enjoy no remission were initially sentenced to death unlike their counter parts who were originally sentenced to life imprisonment.

The third criterion is whether the discriminatory treatment has a negative impact on the claimant or petitioner in purpose and effect. The impact of the sentence has already been indicated by the Supreme Court in that a person

who is sentenced to serve life imprisonment may enjoy remission when for instance they are sentenced upon being found guilty and convicted of the offence of manslaughter. On the other hand, a person whose sentence is only commuted from a higher penalty of death to life imprisonment does not enjoy similar treatment and is condemned to die in prison. The written law does not differentiate between different kinds and qualities of the sentence of "life imprisonment" in terms of when imposing it on the basis of the nature and kind of offence for which it is imposed.

The affidavit in support of the petition clearly indicates that the persons who fall under this category of "life imprisonment" are traumatised by the fact that they will never get out of prison and therefore as a matter of fact, the sentence affects them adversely and in a negative way. They do not have the incentive for good behavior that is generated by the hope of earning remission for good conduct. This is in comparison to a sentence of life imprisonment under which a convict may earn remission.

It is established that following the decision in **Attorney General Vs Susan Kigula and 417 others** (supra), the sentences of those convicts whose sentence was confirmed by the Supreme Court and three years later after confirmation, where their sentences are not yet executed, are deemed by law to be commuted to life imprisonment with an additional order that the life imprisonment sentence would be served without remission. Such convicts therefore did not enjoy equal protection of the law as far as the sentence of life imprisonment is concerned. This is because the court on its own motion ordered that they would serve the sentence of life imprisonment without remission. Life imprisonment is a sentence that is prescribed by law. There is no sentence of life imprisonment with qualifications. On the other in **Tigo Stephen Vs Uganda** (supra) it is clearly stipulated that life imprisonment means imprisonment for the remainder of the convict's life though the actual period of imprisonment may stand reduced on account of remissions earned. In other words, it was up to the Prisons Authorities to apply the provisions of the **Prisons Act** and particularly section 86 (3) thereof which provides that for purposes of

calculating remission, a sentence of life imprisonment shall be deemed to be twenty years' imprisonment. The Supreme Court had also made it clear that the administration of a sentence falls within the province of the Executive under the **Prisons Act** while sentencing is a judicial act that falls under the relevant laws which confer jurisdiction on courts in adjudication of cases such as the Magistrates Act and the Trial on Indictment Act. This petition concerns capital offences and therefore section 2 of the Trial on Indictments Act (TIA)is relevant in that it provides that:

> 2. Sentencing powers of the High Court.
>
> (1) The High Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.
>
> (2) When a person is convicted at one trial of one or two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently.

Under section 2 (1) of the (TIA) the court can only pass any lawful sentence as authorised by law. By holding that the sentence of life imprisonment shall be without remission, the effect of the court order is to avoid the application of section 47 (6) of the **Prisons Act,** cap 304 (repealed) as re-enacted in section 86 (3) of the **Prisons Act,** 2006 because of the absurd result it generates. The Supreme Court made this apparent in **Ssekawoya Blasio v Uganda** (supra). Before concluding question number 1 I will also have to first determine questions number 2, question number 3 and question No 4.

In question 2, the question is whether the **Tigo decision** contravenes articles 21, 23 (1) (a) - (h), 23 (8), 28 (7), 28 (8) and (12) of the Constitution of the Republic of Uganda, 1995. The order of the Supreme Court for the sentence of life imprisonment to be served without remission can be examined under the said provisions as well. Further on issue number 1, the petitioners submitted on the contravention of article 126 (2) (a) which when read

together with article 21 provides for the same thing from the perspective of the administration of justice or the exercise of judicial power.

Article 126 (2) (a) provides that "justice shall be done to all irrespective of their social or economic status". Similarly article 21 (2) of the Constitution outlawed discrimination on the ground of social or economic status. Article 126 (2) (a) does not require further elucidation because it clearly reinforces article 21 of the Constitution and is considered from the perspective of the duty of the court to uphold article 21 of the Constitution which I have considered above. It is therefore unnecessary to consider it again from the perspective of the duty to uphold the rights to equal protection of the law irrespective of the social or economic status of the convicts. It is sufficient to find that the law treats persons whose death sentences have been commuted to life imprisonment sentences differently and with an adverse effect from persons sentenced to life imprisonment and who may earn rem1ss1on.

Further article 128 (1) and (2) of the Constitution of the Republic of Uganda deals with the independence of the Judiciary and provides as follows:

> (1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.
>
> (2) No person or authority shall interfere with the courts all judicial officers in the exercise of their judicial functions.

I shall have time to consider the question of whether the decision of the Supreme Court in making an order of serving of the Life imprisonment sentence without remission, interferes with the independence of the Judiciary or judicial officers in terms of the exercise of judicial discretion in sentencing in considering issue 2. I would therefore defer the consideration of article 128 (1) and (2) of the Constitution and would first consider articles 28 (8) and (12) of the Constitution as to whether the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 416 others** as well as in **Tigo Stephen Vs Uganda** contravenes the principle of Legality of sentences under those provisions of the Constitution, which if held in the affirmative does

away with the need to make a finding on any alleged discrimination claim or breach of the independence of the judicial officers in the exercise of judicial discretion.

Going up back to the contextual issue, the mandatory death penalty was nullified by the Constitutional Court in its decision dated 10th June 2005. This was immediately known to the petitioners who are prisoners of the state and are resident and under the control of Uganda Prisons. The **Prisons Act** 2006 was eventually enacted by Parliament and the date of commencement of the Act is stated as 14th July 2006 about a year later particularly after the decision of the Constitutional Court on 10th June 2005. The preamble to the **Prisons Act** 2006 reads as follows:

> An Act to repeal and replace the **Prisons Act,** Cap. 304 in order to bring it in line with the Constitution, to establish the Prisons Authority and the Prisons Council; to bring Local Administration Prisons under the Uganda Prisons Service; to bring the Act in line with effective and humane modern penal policy and universally accepted international standards; and to provide for other matters connected with or incidental to the foregoing.

The **Prisons Act,** 2006 was an Act intended inter alia to bring the law into conformity with the Constitution of the Republic of Uganda, secondly to bring the Act into conformity with effective humane penal policy and international standards.

The above notwithstanding, the Supreme Court delivered its decision on 21st of January, 2008 in **Attorney General Vs Susan Kigula and 417 others; Constitutional Appeal Number 03 of 2006** affirming the decision of the Constitutional Court. I can therefore say that, because the Attorney General is a party, and the prisons authorities were aware of the decision of the Constitutional Court in **Susan Kigula and 417 others Vs Attorney General,** Parliament was aware of the nullification of the mandatory provisions of the penal laws of Uganda which prescribed the mandatory death penalty and that the death penalty was now a discretionary penalty which may be imposed at the discretion of the trial judge before enactment of the **Prisons Act** 2006.

Further, that persons sentenced for offences which previously had mandatory death penalty sentences, could be sentenced to terms of imprisonment which included life imprisonment sentences. I can therefore conclude that Parliament was aware that the mandatory nature of sentences for certain capital offences had been nullified and that the judges had discretionary powers whether to impose a death sentence or a lesser sentence such as imprisonment for life or another fixed term of imprisonment.

Under section 84 of the **Prisons Act** 2006, the legislature clearly conferred a right of earning remission to any convict sentenced to a term of imprisonment as follows:

> 84. Remission of part of sentence of certain prisoners
>
> (1) A convicted prisoner sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences.
>
> (2) For the purpose of giving effect to subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he or she would be entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission.

Particularly section 84 (2) provides that each prisoner shall be credited with the full amount of remission which he or she would be entitled to at the end of his or her sentence or sentences if he or she has not lost or forfeited such remission. Loss of remission is found under section 85 of the **Prisons Act** 2006 which provides as follows:

> 85. Loss of remission
>
> A prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period spent in hospital through his or her own fault or while malingering, or while undergoing confinement as a punishment in a separate cell.

The **Prisons Act,** which is an Act of Parliament, therefore provides that a prisoner may lose remission as a result of punishment for an offence

against prison discipline and on grounds of time spent in hospital while malingering or while undergoing confinement as a punishment in a separate cell. It does not provide for loss or forfeiture of remission on account of a court order. Loss of remission is incurred as a punishment against prison discipline. The Commissioner General has discretionary power to restore forfeited remission in whole or in part under section 86 (2) of the **Prisons Act.** Secondly, the Commissioner General may recommend to the Minister responsible for justice to advise the President under article 121 (4) (d) to grant further remission on special grounds to a prisoner. In other words, the grounds for loss of remission by a prisoner sentenced to or serving a term of imprisonment is specifically provided for by legislature. An order of the court denying the prisoner remission is not enabled by the **Prisons Act** or the Trial on Indictment Act. Last but not least, section 86 (3) of the **Prisons Act** provides for remission in the following words:

> 86. Grounds for grant of further remission by the President
>
> (3) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment.

Sections 84 (1) under section 86 (3) of the **Prisons Act,** have to be read together. Section 84 (1) grants the right to remission to any prisoner who is sentenced to a term of imprisonment and it is clear that that provision does not apply to persons sentenced to death. Remission is clearly managed by the Prison Authorities and is under the control of the Executive arm of Government and not the Judiciary. Secondly section 86 (3) only deals with the remission for cases of persons serving a sentence of imprisonment for life. Because imprisonment for life is an indeterminate sentence, the law deems it to be twenty years' imprisonment for purposes of calculating remission which is a right under section 84 (1) of the **Prisons Act,** 2006. In the case of persons convicted before the passing of the **Prisons Act,** the former **Prisons Act,** cap 304 had the same provisions and it is sufficient to refer only to the **Prisons Act** for purposes of remission as there has been

no change in the law. A prisoner loses rem1ss1on as determined under section 85 of the **Prisons Act** which provides that:

> 85. Loss of remission
>
> A prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period spent in hospital through his or her own fault or while malingering, or while undergoing confinement as a punishment in a separate cell.

The law itself does not discriminate between categories of prisoners but only enforces the sentence. It would be immaterial whether a person sentenced to life imprisonment had been convicted of murder or manslaughter or defilement or of kidnapping with intent to murder. Persons who are sentenced under a discretionary death penalty provision to life imprisonment are sometimes sentenced to life imprisonment even before the decision of the Constitutional Court in **Susan Kigula and 417 others Vs Attorney General** (supra).

In **Wamutabanewe Jamiru Vs Uganda** (supra), the Supreme Court held that remission is a function of the penal institution which has to exercise it in accordance with the **Prisons Act.** They found it illogical for any court, let alone the Court of Appeal, to ordain that the appellant shall serve his sentence without remission. Particularly the Supreme Court held:

> "respectfully this is a fallacy because the provisions of penal remission is none of the penalties available to court to hand down."

From that decision, it can be concluded that remission or no rem1ss1on cannot be a part of the sentence which is imposed according to the law conferring jurisdiction on the court sentencing the convict. The decision which was delivered on 12th April 2018 was delivered after **Tigo Stephen Vs Uganda** which decision was delivered in 2011. In **Tigo Stephen Vs Uganda,** the Supreme Court held that life imprisonment comes next to the death penalty in terms of severity of penalties under the penal laws of Uganda. This only ties it up with the decision that it is for the remainder of the life of the convict.

In practical terms, a sentence of life imprisonment is indeterminate because a person sentenced at the age of 70 years may have 10 more years to live but nobody can determine that. Similarly, a person sentenced at the age of 45 years may only live for another five years or may live for another 50 years. It is only the **Prisons Act,** which deems it to be twenty years for purposes of remission and as the Supreme Court has determined, that is not the definition of the sentence of life imprisonment but administration of the sentence by the Executive.

Further we need to examine the decision of the Supreme Court that life imprisonment is the severest penalty next to the death penalty. This is coupled with the holding that life imprisonment lasts for the remainder of the convict's life. However, remission has from time immemorial been applied to sentences of life imprisonment because clearly in **Tigo Stephen Vs Uganda** (supra), it was held that the practice of calculating remission is a practice in administering the sentence and does not define the sentence.

In **Ssekawoya Blasio v Uganda** (supra), it is clear that the Supreme Court was concerned about the absurdities introduced by the deeming of life imprisonment to be twenty years' imprisonment and the sentences of life imprisonment of convicts who would have attracted a death sentence under the nullified mandatory death penalty provisions. The practical result of such a deeming of life imprisonment to be twenty years' imprisonment is that a prisoner sentenced to imprisonment would earn a remission under section 86 (3) of the **Prisons Act** and therefore would be able to be released after serving about 13 years' imprisonment. The Supreme Court recommended to Parliament as a matter of urgency to look into the problem (of low penalty) and rectify the problem. Obviously, from that perspective, it was not desirable for persons who had been sentenced to death and their sentences commuted to life imprisonment to walk out of prison after earning remission when their sentences are deemed to be twenty years' imprisonment. Alternatively, it was not desirable for convicts of murder who were sentenced to serve life imprisonment to be released after about 13 years in prison.

The situation has presented very difficult questions. In the first place, persons sentenced to life imprisonment by the trial court or on appeal have no problem because the sentence commences at the time of conviction. On the other hand, a person sentenced to death and whose sentence is commuted by the deeming it to be unconstitutional after 3 years upon confirmation of sentence by the Supreme Court can assert under the Prison Regulations that the life imprisonment sentence is deemed to have commenced at the date of his conviction and initial sentence to death. In other words, a sentence is served from the time it is pronounced by a court of law. Specifically, reference can be made to the provisions for sentencing in capital offences. Section 106 of the Trial on Indictment Act provides that a sentence commences on the date it is confirmed.

> 106. Warrant in case of sentence of imprisonment.
>
> (1) A warrant under the hand of the judge by whom any person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Uganda, shall be issued by the judge, and shall be full authority to the officer in charge of that prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
>
> (2) Subject to the express provisions of this or any other law to the contrary, every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced.
>
> (3) Where on appeal an appellate court makes an order which has the effect of requiring a person to commence or resume a sentence of imprisonment, any time during which that person has been at liberty, whether on bail or otherwise, after the sentence was first passed upon him or her shall not count as part of the sentence, which shall be deemed to commence or, if that person has already served part of the sentence to be resumed, on the day on which that person is first received into prison after the making of the order.

A sentence of imprisonment commences from the date 1t 1s pronounced under section 106 (2) and even on appeal, it is deemed to commence on the date it was first pronounced by the original trial court except that any period the convict was released on bail pending appeal would be excluded. It follows that where the pronouncement of the sentence is a pronouncement

of a death sentence, the question 1s whether the commutation of the sentence makes the sentence one deemed to have commenced on the date it was pronounced and this is resolved by the Prisons Regulations. The word "commutation" is defined by **Osborn's Concise Law Dictionary, 11th Edition** to mean:

> The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the Executive authority in which the pardoning power resides.

In other words, during the execution of the sentence or implementation of the sentence, the sentence can be reduced into a less severe one. That 1s lesser sentence can only commence from the date the sentence was pronounced because it reduces the sentence initially pronounced. In the case of a sentence of death, commuted to life imprisonment, this means that the prison authorities will execute the sentence as if it is a sentence of life imprisonment from the date of sentence when the convict had initially been sentenced to death. This brings into focus the controversy of the indeterminate nature of a sentence of life imprisonment as held in **Gad Magezi v Uganda** for purposes of calculating the period a prisoner spends in lawful custody before his trial or conviction as commanded by article 23 (8) of the Constitution.

The counsels of both parties argued about the retrospective application of the law with regard to the effect of the decision of the Supreme Court in **Tigo Stephen Vs Uganda** effect that life imprisonment means imprisonment for the remainder of the convict's life. I have already clarified above that life imprisonment does not per se take out the right to remission of part of the sentence. Secondly, there is a specific category of prisoners whose sentences were commuted to life imprisonment under the **Attorney General Vs Susan Kigula and 416 others** (supra) decision. The number of persons affected by this decision is unknown because the Supreme Court could only have confirmed the sentence after the High Court exercised sentencing discretion. How many people were sentenced to death after the **Susan Kigula** decision? The petition does not indicate that any petitioner had been

sentenced to death after exercise of the courts discretion whether to impose the death sentence or not and that the sentence was confirmed by the Supreme Court and subsequently after three years was commuted to life imprisonment. For this purpose, the opinion of the Solicitor General in interpretation of the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 416 others** (supra) is misleading because it talks about a category of prisoners whose sentences had been confirmed by the highest appellate court. The Supreme Court can only confirm a sentence pursuant to an appeal from the exercise of discretion by the High Court, affirmed by the Court of Appeal and finally confirmed by the Supreme Court. A mandatory sentence gives court no discretionary power and in the absence of an acquittal, or setting aside the sentence, the sentence cannot be altered on appeal. Article 22 (1) of the Constitution provides that:

> (1) No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

The Constitutional Court held in **Susan Kigula and 417 others Vs Attorney General** (supra) that the mandatory death penalty provisions contravene the article 22 (1) of the Constitution insofar as it takes away the sentencing discretion of the High Court on whether to impose the death penalty or not. It follows that for a sentence to be confirmed by the highest appellate court, the trial court should have first exercised sentencing discretion whereupon the sentence of death is upheld by the Court of Appeal and confirmed by the Supreme Court. Where the convict does not appeal, the file can be sent to the Supreme Court for confirmation of sentence only. It is in that context that it is my judgment that the interpretation of the decision of the Supreme Court in **Attorney General Vs Susan Kigula and 416 others** (supra) by the Solicitor General was erroneous to the extent that it seems to include persons who had been sentenced under a mandatory death penalty provision whose sentences had been confirmed by the Supreme Court. It only covers persons who had been sentenced under a discretion death

penalty provision and the discretion had been used to sentence the convict to death.

The statistics attached against the names of the petitioners demonstrates that 182 convicts had been sentenced to imprisonment for life or the life imprisonment. Secondly, 3 convicts had been sentenced to between 70 to 75 years' imprisonment. Thirdly, 24 convicts had been sentenced to between 60 to 68 years' imprisonment. 46 people had been sentenced to between 50 - 58 years' imprisonment. 105 people had been sentenced to between 40 - 49 years' imprisonment. 104 people had been sentenced to between 30 - 39 years' imprisonment and 96 convicts had been sentenced to between 21 - 29 years' imprisonment. There is no information about any person sentenced under a discretionary power to death, and the sentence upheld by the Court of Appeal and confirmed by the Supreme Court whereupon three years later, that sentence was deemed commuted under the **Attorney General Vs Susan Kigula and 416 others** law to life imprisonment.

In the premises, while different categories of prisoners on life imprisonment sentences can be held to be treated differently in a discriminatory way, the second question would be whether this is justified. There is no need to deal with the question of justification under article 21 of the Constitution, because the petitioners also argued that the order of the Supreme Court that the commutation to life imprisonment of a death penalty shall be served without remission encroached on the legislative powers of Parliament contrary to the doctrine of separation of powers and that Supreme Court lacks jurisdiction to issue the order. In considering article 28 (12) and (8) of the Constitution, I would also be able to consider the independence of the Judiciary, the doctrine of separation of powers as well as the principle of legality before winding up on the issues in this petition.

Starting with article 28 (8) and (12) of the Constitution, the two articles provide as follows:

28.Rights to a fair hearing.

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been important for that offence at the time when it was committed.

(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

I wish to state from the outset that article 28 of the Constitution enshrines the principles of fundamental justice under the heading of fair hearing. It follows therefore that all the principles under article 28 of the Constitution of the Republic of Uganda cannot be derogated from because they are entrenched by article 44 (c) of the Constitution which provides that:

44.Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms -

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing; ...

The principles under article 28 (8) of the Constitution and article 28 (12) of the Constitution cannot be derogated from as stated in article 44 (c) above.

Having found that the earning of remissions is managed by the Commissioner General of Prisons with further powers of the President to pardon or commute sentence to a lesser sentence, it is an exercise of Executive authority and as held by the Supreme Court in **Tigo Stephen Vs Uganda.** Additionally, it is a scheme legislated by Parliament and it follows that the barring, in terms of the application, to a particular category of convicts of the commuted sentenced of life imprisonment in **Attorney General Vs Susan Kigula and 417 others** (supra) encroached on the legislative territory of Parliament. This is because it bars the application of section 86 (3) of the **Prisons Act,** 2006 to a defined category of convicts whose sentences of death are deemed commuted to sentences of life

imprison after three years of confirmation of the death sentence by the Highest Appellate court under article 22 (1) of the Constitution. As demonstrated above, the **Prisons Act** clearly provides that persons sentenced to a penalty of imprisonment are entitled to earn remission. By holding that they shall not be entitled to earn remission, the Supreme Court did not comply with the law and acted in breach of article 126 (2) of the Constitution which provides that:

> "In adjudicating cases of both a civil and criminal nature, the court shall, *subject to the law,* apply the following principles - (a) justice shall be done to all irrespective of their social or economic status;" (Emphasis mine).

The enforcement of orders against the petitioners in **Attorney General Vs Susan Kigula and 416 others** had to be done according to the law. It was not material that they had been sentenced to death and the sentence deemed commuted to life imprisonment because the existing penalty of life imprisonment is a statutory penalty. The existing penalty of life imprisonment did not have any qualification and is a prescribed penalty in terms of article 28 (12) of the Constitution. Further loss of remission is managed under the **Prisons Act.** Secondly, as held in **Tigo Stephen Vs Uganda** (supra), it was up to the prisons authorities to administer the sentence of life imprisonment. By making an addition that the deemed commuted life imprisonment sentences would be served without earning remission, the Supreme Court barred the application of section 86 (3) of the **Prisons Act** to a particular category of convicts in breach of the law that justice shall be is administered subject to law.

Secondly, I will deal with the petitioners' submissions that the determination that the petitioners in **Attorney General Vs Susan Kigula and others** would have sentences deemed to be commuted to life imprisonment served without earning remission interfered with legislative powers under article 79 of the Constitution of the Republic of Uganda. This is because, Parliament had enacted section 86 (3) of the **Prisons Act,** 2006, after the nullification of the mandatory provisions of the penal provisions of laws of Uganda which had commanded that any convict of an offence under those

provisions shall suffer death. The **Prisons Act,** 2006 was enacted after the nullification of the mandatory death penalty provisions in the penal laws of Uganda. Further, it followed that the courts have discretionary power to sentence a convict to death or another lesser penalty. If they sentence a convict to life imprisonment, that convict is entitled to earn remission. Where the penalty is commuted to life imprisonment by the President in the exercise of powers under article 121 of the Constitution, that prisoner would still be entitled to earn remission.

Article 79 of the Constitution of the Republic of Uganda provides for the functions of Parliament in the following words:

> 79. Functions of Parliament.
>
> (1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.
>
> (2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provision is having Uganda except under the authority conferred by an Act of Parliament.
>
> (3) ...

Clearly, section 86 (3) of the **Prisons Act** is applicable to all terms of imprisonment unless amended by Parliament or declared unconstitutional by the Constitutional Court and upheld by the Supreme Court. In the circumstances and as subsequently demonstrated in the decisions of the **Tigo Stephen Vs Uganda** (supra), as well as **Ssekawoya Blasio v Uganda** (supra), certain points must be emphasised. In **Tigo Stephen Vs Uganda,** the Supreme Court was alive to the separation of judicial functions from administrative and Executive functions. Remission was held to be a function of the Executive administered by the penal institution known as the Prisons Authority. Secondly adjudication in imposing the sentence of life imprisonment was a function of the Judiciary and therefore enabled by laws which provide for the penalty of life imprisonment. A sentence under the enabling law ought not to mention the earning of remission which is

enforcement of sentence to be managed by the executive and as counseled by the Supreme Court in **Tigo Stephen Vs Uganda. In Ssekawoya Blasio v Uganda** (supra), the Supreme Court set out the absurdities of managing life imprisonment of prisoners who are convicts of the offence of murder and noted that Parliament should as a matter of urgency, reform the law. This was stated as the problem of those convicts earning remission and getting out after serving about 13 years' imprisonment. This is recognition by the Supreme Court that the state of the law was undesirable in the administration of justice. In the absence of striking out section 86 (3) of the **Prisons Act,** 2006, the court was helpless to deal with the remission provisions of section 86 (3) of the **Prisons Act** and had to wait for legislative reform as recommended by the Court. Having recommended legislative reform as a way out, the hands of the court were tied and It could not impose a sentence in anticipation of the expected reformed law. It follows that the order that the deemed life imprisonment would be served without remission violates the principle of separation of powers for barring the application of existing law in the management of sentences. Moreover, the barring operated only to a specific category and the section applied to other categories of convicts who were sentenced to life imprisonment.

Article 79 of the Constitution (supra) has to be read in conjunction with the principle of sovereignty under article 1 of the Constitution of the Republic of Uganda which provides that:

> 1. Sovereignty of the people.
>
> (1) All power belongs to the people who exercise their sovereignty 1n accordance with this Constitution.
>
> (2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.
>
> (3) All power and authority of government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.
>
> (4) The people shall express their will and consent on who shall govern them and how they shall be governed, through regular, free and fair elections of their representatives or through referenda.

Putting article 1 in context, once the people have elected their representatives, they consented how they shall be governed and who shall govern them through electing representatives who inter alia promulgate laws under article 79 of the Constitution. Because all power and authority derived from the people and the Constitution, it is imperative that the court does not encroach on the lawmaking authority of Parliament unless it is delegated except to interpret or strike out a law. The principle of separation of powers in the context of keeping with one's powers and no assuming or interfering with powers in other arms was enunciated by the Supreme Court of Zimbabwe in **Smith vs Mutasa and Another [1990] LRC 87.** The Supreme Court of Zimbabwe held that Parliament though supreme in the legislative field assigned by the Constitution cannot go beyond constitutional limits and the field of adjudication belongs to the courts. The Supreme Court of Zimbabwe cited with approval the Chief Justice of India in **Special Reference No. 1 of 1964 (1965) 1 SCR 413 at 445T (AIR (1965) (Vol 52) page 745 SC)** where Gajendragadkar CJ of the Supreme Court of India said that:

> "...if the legislature steps beyond legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by the courts of India
>
> ... just as the legislature are conferred legislative authority and their functions are normally confined to legislative functions, and functions and authority of the Executive lie in the domain of Executive authority, so jurisdiction and authority of judicature in this country lie within the domain of adjudication ..."

The Supreme Court of Zimbabwe held that question of whether there has been any excess of power can be determined by the Judiciary which has powers to declare any act which is ultra vires void. The exercise of the function of adjudication by the Judiciary as separate from exercise of Executive and Legislative functions was one of the grounds for nullification of the mandatory provisions of the penal provisions prescribing death as the only sentence upon conviction in **Attorney General Vs Susan Kigula** and

others. Particularly the Supreme Court agreed that the Legislature interfered with the sentencing discretion of judges whether to impose the death penalty or not in breach of the Constitution. The Supreme Court held:

> Furthermore, the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution.
>
> We do not agree with learned counsel for the Attorney General that because Parliament has the power to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the laws passed by Parliament must be consistent with the Constitution as provided for in article 2 (2) of the Constitution.
>
> *Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the .Judiciary Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constlfution. We also agree with Prof Sempebwa, for the respondents, that the power given to the court under article 22 (1) does not stop at confirmation of conviction. The court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that the court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution.*
>
> We are of the view that they learned Justices of the Constitutional Court properly addressed this matter and came to the right conclusion. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore void to the extent of that inconsistency. Such a mandatory sentence can only be regarded as a maximum sentence. (Emphasis mine)

In the circumstances, the question of the law prescribing remission 1s a Legislative Act which cannot be rendered inoperative unless power to do so is enabled by the law. This is reflected in the subsequent decisions of the Court of Appeal in **Okello Alfred and Others v Uganda** (supra) where the court held that remission is a right which cannot be taken away by the court.

(See also **Wamutabanewe Jamiru v Uganda** (supra)). The sum total of the authorities is that the court cannot interfere with the Executive function of management of the sentence whether it be managed by way of application of remission of sentence or denial thereof under an Act of Parliament. The practice of remission does not interfere with sentence and is an Executive function. Interference with section 86 (3) of the **Prisons Act,** contravened articles 79, article 1, article and article 126 (2) of the Constitution and is null and void because the court acted without jurisdiction. It went against the principle on which it nullified the mandatory death penalty provisions; that of separation of powers between the Legislature, the Executive and the Judiciary. Since the court did not give any legal basis to bar the application of section 86 (3) of the **Prisons Act,** I do not have to find that the order to serve the deemed life imprisonment without remission discriminated against petitioners on life imprisonment in comparison to other prisoners serving life imprisonment sentences imposed by courts or that the discrimination was justified on the ground that it was imposed without jurisdiction.

Issue number one as to whether the **Kigula** decision in making an order for the serving of life imprisonment without remission contravenes article 21, 126 (2) (a) and article 128 (1) and (2) of the Constitution of the Republic of Uganda, 1995, this issue is only partially answered in the affirmative in relation to the issue of separation of powers. Specifically, articles 21 and 126 (2) (a) of the Constitution could not have been contravened because the decision dealt with the specific category of convicts who were sentenced to death and sentence confirmed by the Supreme Court where after, after three years the sentences deemed to be committed to life imprisonment. Separate the issue remission of in terms of the barring of the earning of remission to this category of convicts on the ground of separation of powers found that the order that it would be served without remission encroached on legislative powers. Secondly in terms of article 126 (2) (a) this merely reinforces the duty of court to administer justice without any discrimination. Further, the regard to the alleged breach of article 128 (1), it is clear that the article deals with the independence of the judiciary in the exercise of judicial

power. It provides that in the exercise of judicial power, the court shall be independent and shall not be subject to the control or direction of any person or authority. The decision in **Tigo** did not in any way impair independence of the judiciary or of any court in the exercise of judicial power. Secondly the decision in **Susan Kigula** did not in any way impair the exercise of judicial power or the independence of the court and did not subject to the court to the control or direction of any person or authority because the sentence of life imprisonment still be imposed and the question of remission is a manner of enforcement of the sentence and not sentencing powers. Further with regard to article 128 (2), of the Constitution, it is provided that no person or authority shall interfere with the courts judicial officers in the exercise of their judicial functions. There was no breach of article 128 (2) by the decision in Susan Kigula because courts were free to impose the death penalty or life imprisonment without any interference of any kind. The definition of life imprisonment is a definition of the law which does not impair the imposition of life imprisonment sentence or any lesser penalty.

With regard to issue number two as to whether the **Tigo Stephen versus Uganda** decision contravenes article 21, 23, (1) (a - h), 23 (8), 28 (7), 28 (8) and (12) of the Constitution of the Republic of Uganda 1995, the definition of life imprisonment or imprisonment for life as being imprisonment for the remainder of the lifespan of the convict does not contravene article 21, 23, (1) (a - h), 23 (8), 28 (7), 28 (8) and (12) of the Constitution of the Republic of Uganda 1995. Is because a sentence of life imprisonment is properly defined as always had the same meaning under the Penal Code Act. It is the same meaning attached to the word or expression under English law as commanded by the general rule of interpretation by section 1 of the Penal Code Act. Further the lifespan of the convict is an indeterminate matter the subject therefore, holding in **Gad Magezi v Uganda** (supra) has to be considered together with the jurisdictional issue. The expression "life imprisonment" or "imprisonment for life" has the same meaning in Uganda, England as well as in the Republic of Cyprus. By the executive for managing the sentence for purposes of early release of prisoners or by Legislature

passing and enacting section 86 (3) of the **Prisons Act,** 2006 which deemed life imprisonment to be twenty years' imprisonment only for purposes of calculating remission does not define the prescribe the penalty for the offence. The above notwithstanding, the question of whether the sentence of life imprisonment was vague can be considered on its own under a separate issue.

I will further consider the alleged breach of article 28 (8) and (12) of the Constitution below.

With regard to issue number 3 as to whether the Supreme Court acted ultra vires in interpreting and invalidating sections 47 (6) of the **Prisons Act** - now section 86 (3) of the **Prisons Act,** in the **Tigo decision,** contravening articles 132 and 137 (1) of the Constitution of the Republic of Uganda, 1995, I have considered the question extensively. Article 132 deals with the jurisdiction of the Supreme Court. The Supreme Court gave a consequential order pursuant to an appeal from the decision of the Constitutional Court. Secondly article 137 deals with the jurisdiction of the constitutional court. I find the argument that the Supreme Court acted ultra vires in interpreting the meaning of life imprisonment strange because in **Tigo Stephen Vs Uganda,** the Supreme Court acted as the Highest Appellate court in criminal matters. Secondly the Supreme Court did not as a matter of invalidate section 47 (6) as repealed and replaced by section 86 (3) of the **Prisons Act.** They held that:

> We hold that life imprisonment means imprisonment for the natural life of the convict, though the actual period of imprisonment may stand reduced on account of the remissions earned.

In the premises, issue number 3 is answered in the negative.

With regard to article 28 (8), and (12) of the Constitution, the European Court of Human Rights has clearly set out the principles enshrined in article 7 of the European Convention On Human Rights which principles are also enshrined in article 28 (8) and (12) of the Constitution of the Republic of Uganda.

The general principles for interpretation of article 7 of the European Convention on Human Rights are relevant to the principles for interpretation of article 28 (8) and (12) of the Constitution of the Republic of Uganda and are set out in the case of **S.W Vs the United Kingdom** (supra) where it was held inter alia that:

> The guarantee enshrined in Article 7 (art, 7), which is an essential element of the rule of law, occupies a prominent place in the Conventional system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art.15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (para 34).
>
> 35. Accordingly, as the Court held in... Article 7 (art,7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define the crime and prescribe a penalty *(nu/tum crimen, nu/la poena sine lege)* and the principal that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the court added that this requirement is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions would make him criminally liable....

The Ugandan Constitution under article 28 (8) provides that no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed. From this analogy, in **Godfrey Okello Godfrey v Uganda Supreme Court Criminal Appeal No 34 of 2014 [2017] UGSC 37,** the Supreme Court held that the sentence of life imprisonment comes next to the death sentence which is still enforceable under the penal laws. Secondly, they held that sentences of more than twenty years' imprisonment for capital offences cannot be said to be illegal because they are less severe than the maximum sentence which is death. Further that courts have power to pass appropriate sentences as long as they do not

exceed the maximum sentences provided by law. In this regard the Court relied on article 28 (8) of the Constitution and held that a sentence of 22 years' imprisonment passed by the trial court against the appellant was not illegal because it was less than the death sentence. Similarly, in **Ssekawoya Blasio v Uganda** (supra) the Supreme Court while emphasising that life imprisonment was the next penalty in severity to the death penalty, also held that prisoners convicted of murder should not benefit from the provisions on remission. In other words, they found that the practice of remission under section 86 (3) of the **Prisons Act,** ought not to apply to convicts found guilty of murder because this was not the intention of legislature when enacting the provisions on remissions. This approach conflicts in some measure with the fact that the discretionary death penalty has been in Ugandan statute books even before the decision of the Constitutional Court in **Susan Kigula and 417 others Vs Attorney General** (supra). Secondly it is also conflicts, in some measure, with the practice of the courts to sentence persons found guilty of murder to less than twenty years' imprisonment. Thirdly it is hard to reconcile with the fact that, with the plea bargain procedure which has taken root in Uganda, persons charged with murder or aggravated robbery have been sentenced to less than 18 years' imprisonment. Most importantly, the question is whether the interpretation of the law to the extent that life imprisonment should be served without remission violates article 28 (8) of the Constitution.

The concept of a "penalty" was considered by the European Court of Human Rights in **Del Rio Prada v Spain: (Application Number 42750/09).** The court held that to render the protection offered by Article 7 of the European Convention on Human Rights effective, the court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of article 7 of the Convention. They found that the first test is whether the measure in question is imposed following conviction for a criminal offence. Secondly other factors to be taken into account may be the nature and purpose of the measure, its characterisation under the law and procedure involved in

making and implementing the measure as well as its severity. In paragraph 83 held that:

> Both the European Commission of Human Rights and the Court in the case law have drawn a distinction between a measure that constitutes in substance the "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of the measure relate to the remission of sentence or a change in the regime for early release, this does not form part of the "penalty" within the meaning of Article 7.... In *Uttley,* for example, the court found that the changes made to the rules on early release after the applicant's conviction had not been "imposed" on him but were part of the general regime applicable to prisoners and, far from being punitive, the nature and purpose of the "measure" were to permit early release, so they could not be regarded as inherently "severe". The court according found that the application to the applicant of the new regime for early release was not part of the "penalty" imposed on him....
>
> 85. However, the court has also acknowledged that in practice a distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear cut...
>
> 88. The court would emphasise that the term "imposed", used in the second sentence of Article 7, cannot be interpreted as excluding from the scope of that provision all measures introduced after the pronouncement of the sentence. It reiterates in this connection that it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusionary...
>
> 89.In light of the foregoing, the Court does not rule out the possibility that the measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in article 7(1) of the Convention. Otherwise, States would be free - by amending the law or interpreting the established regulations, for example - to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed. In such conditions Article 7 (1) would be

> deprived of any useful effect for convicted persons, the scope of whole sentence was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of Article 7 (1) ...

The above holding clearly espouses several important principles which are relevant in interpreting article 28 (8) of the Constitution and in considering whether article 28 (8) of the Constitution of the Republic of Uganda has been violated. The first principle inter alia is whether the measure of refusal of remission relates to enforcement of sentence and does not form part of the penalty. In the circumstances of this petition, the sentence of life imprisonment had been deemed to be twenty years under the current section 86 (3) of the **Prisons Act,** 2006 and that is why the Solicitor General was of the opinion that the persons who did not earn any remission would get out after a period of twenty years' imprisonment. This may appear to be at cross purposes with the definition of life imprisonment. However, the Supreme Court of Uganda initially laid the matter to rest in **Tigo Stephen Vs Uganda** by holding that the period of life imprisonment may be reduced on account of remissions earned. The matter was then reopened in **Ssekawoya Blasio v Uganda** when the court held that remission should not apply to persons convicted of murder in comparison to those sentenced to life imprisonment for the offence of manslaughter. So the question is whether the order that the deemed commutation of the death penalty to a sentence of life imprisonment became a penalty imposed by the Supreme Court by ordering that the life imprisonment would be served without remission, which law was not foreseeable before. It should be noted that the order deemed that the death penalty was commuted to life imprisonment after three years upon confirmation of sentence by the highest appellate court and therefore was not the initial imposition of the death sentence. Secondly it could not have amounted to redefinition of the sentence of death or its modification. The only question being whether it redefined or modified the known penalty of life imprisonment. I have noted that as far as definition is concerned the Supreme Court did not modify the law or redefine imprisonment for life. The narrower question is whether the order of life

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imprisonment redefined or modified the penalty of life imprisonment to the prisoner's detriment.

While the remission is part of the measures adopted in execution of the sentence by the prisons authorities and is not a penalty, refusal of remission by a court as part of the sentence imposes a heavier burden on a convict while ordinarily a convict sentenced to life imprisonment enjoys remission under section 86 (3) of the **Prisons Act.** The difficulty with the approach in the petitioner's petition is that the definition of life imprisonment is the established definition and means imprisonment for the remainder of the convict's life. However, this does not stop deeming it to be twenty years' imprisonment given the imponderables of life expectancy of any individual and therefore since a term of imprisonment has facility for a convict sentenced thereto to earn remissions, the period of twenty years' imprisonment is the manner of management of the sentence by the Executive. It follows therefore that the definition of life imprisonment does not change merely because it is deemed to be twenty years' imprisonment. The deeming of life imprisonment to be twenty years does not amount to a redefinition of the offence because of the separation of roles between imposition of a sentence by Judiciary and enforcement of the sentence by the Executive. Remission is a manner of enforcement of sentence and the deemed twenty years is for purposes of management of the sentence.

The judicial precedents demonstrate that there has always been a separation of roles between the institution responsible for imposition of the sentence and the institution responsible for the management or execution of the sentence. This dichotomy was applied by the Supreme Court in **Tigo Stephen Vs Uganda** (supra). The separation of roles between the Judiciary and the Executive was also applied by the European Court of Human Rights while interpreting article 7 of the European Convention on Human Rights in **Kafkaris v Cyprus [2008] ECHR 2906/04.**

In **Kafkaris v Cyprus [2008] ECHR 2906/04,** the brief facts were that the applicant was found guilty of three counts of premeditated murder committed on 10 July 1987. The prosecution invited the court to examine the

meaning of life imprisonment under the Criminal Code and in particular to clarify whether it entailed imprisonment of the convict for the rest of his life or just for a period of twenty years as provided by the Prison (General) Regulation of 1981 and the Prison (General) (Amending) Regulations of 1987. The Assize court held that the term "life imprisonment" used in the Criminal Code meant imprisonment for the remainder of the life of the convict. In light of that holding, the court deemed it unnecessary to examine whether the sentences imposed would run concurrently or consecutively for all the three counts. When the applicant was admitted to prison to serve his sentence, he was given written notice by the prison authorities that the date set for his release was 16th of July 2002. The applicant appealed against his conviction and the Supreme Court dismissed the appeal and upheld the conviction. On 3rd May 1996 The Prison Law of 1996 was enacted repealing and replacing the Prison Discipline Law and by letter dated the March 16, 1998, the applicant applied for pardon or suspension of the remainder of the sentence. On 30th of April 1998, the Attorney General refused his request. Subsequently the applicant was not released on 2 November 2002. On 8 January 2004 the applicant submitted a habeas corpus application to the Supreme Court challenging the lawfulness of his detention and it was held that article 7 of the European Convention applies only to the sentence that is imposed and not to the manner of serving the sentence. Secondly, article 7 does not prohibit a retrospective change in the law or in practice concerning the release or conditional release from prison of a prisoner. The court found that granting the habeas corpus would tantamount to review of the sentence that had been imposed by the trial court. In February 24th 2004, the applicant lodged an appeal with the Supreme Court challenging the interpretation of the term "life imprisonment" made by the trial court. The court considered the prison regulations which included The Prison (General) Regulation 96 (c) which dealt with calculation of remission for life prisoners in the following words:

> Where the imprisonment is for life or where a sentence of death is commuted to imprisonment for life, remission of the sentence shall be calculated as if the imprisonment is for twenty years."

Subsequently the law was amended by the Prison (General) (Amending) Regulations of 1987 and Regulation 2 thereof defined life imprisonment to mean in the words of the regulation, "imprisonment for life" *means imprisonment for twenty years.* In 1996, the Prison of 1996 was enacted repealing and replacing the Prison Discipline Law. It provided inter alia under section 9 that;

> (1) No prisoner who is serving a sentence of imprisonment may be discharged from prison until he has served his sentence in accordance with the provisions of this law except in the case provided for by article 53 (4) of the Constitution of the Republic or any other law in force.

Further section 12 of the Prison of 1996 provided that with the exceptions of prisoners serving a life sentence, a sentence can be remitted if the prisoner demonstrates good conduct and industry.

The applicant argued that the unforeseeable prolongation of his term of imprisonment as a result of the repeal of the regulations and further the retroactive application of the new legislative provisions violated article 7 of the convention. It was argued for the Government that article 7 did not relate to changes in how a sentence which was passed by the court was executed as opposed to changes in the substantive penalty prescribed for the offence itself. The European Court of Human Rights set out the general principles enshrined in article 7 as follows:

> The guarantee enshrined in article 7 which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection and is underlined by the fact that there can be no derogation from its provisions. It should be construed and applied, as follows from its object and purpose in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Article 7 embodies in general terms the principle that only the law can define a crime and prescribe a penalty. It prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences. It also lays down the principle that the criminal law must not be extensively construed to an accused's detriment for instance by analogy. The reference to "law" in

article 7 which is the very same concept as that to which the convention refers elsewhere when using the term. It is a concept which comprises statute law as well as case law. The court had always understood the term "law" in its "substantive" sense not in its "formal" sense. It therefore includes both enactments of lower rank than statutes and unwritten law. The law is the provision in force as interpreted by competent courts. Further it implies qualitative requirements including those of accessibility and foreseeability. The qualitative requirements must be satisfied as regards both the definition of an offence and the penalty of the offence in question. An individual must know from the wording of the relevant provision, if need be, with the assistance of the court's interpretation what acts and omission will make him criminally liable and what penalty would be imposed for the act committed or the omission. The law may be clarified and elucidated through judicial precedents. There is a distinction between a measure that constitutes in substance "penalty" and a matter that concerns the "execution" or "enforcement" of the "penalty".

In paragraph 146 the court held as follows:

> 146.Although at the time the applicant committed the offence it was clearly provided by the Criminal Code that the offence of premeditated murder carried the penalty of life imprisonment, it is equally clear that at that time both the Executive and the administrative authorities were working on the premise that this penalty was tantamount to twenty years' imprisonment. The prison authorities were applying the Prisons Regulations, made on the basis of the Prison Discipline Law (cap 286), under which all prisoners, including life prisoners, were eligible for remission of sentence on the ground of good conduct and industry. For these purposes, Regulation 2 defined life imprisonment as meaning imprisonment of twenty years. As admitted by the Government, this was understood at the time by the Executive and administrative authorities, including the prison service, as imposing a maximum period of twenty years to be served by any person who had been sentenced to life imprisonment. The prison authorities were therefore assessing the remission of life sentences of prisoners on the basis of twenty years' imprisonment. This also transpires from the letter sent by the then Attorney General of the Republic to the President at the time....

147. On 5 February 1998 the Nicosia Assize Court, in its sentencing judgment in the case of *the Republic of Cyprus v Andreas Costa Aristodemou, alias Yiouroukkis,* clearly stated that life imprisonment under the Criminal Code was for the remainder of the biological existence of the convicted person and not for twenty years. Subsequently, on 10 March 1989, the Limassol Assize Court, when passing sentence on the applicant, relied on the findings of the Nicosia Assize Court in the above case. It accordingly sentenced the applicant to "life imprisonment" for the remainder of his life. In spite of this, when the applicant was admitted to prison to serve his sentence, he was given written notice by the prison authorities with a conditional release date, the remission of his life sentence having been assessed on the basis that it amounted to imprisonment for twenty years. It was not until 9 October 1992 in the case of *Hadj/savvas v the Republic of Cyprus* that the Regulations were declared unconstitutional and *ultra v1res* by the Supreme Court. They were eventually repealed on 3 May 1996.

148. In view of the above, while the Court accepts the Government's argument that the purpose of the Regulations concerned the execution of the penalty, it is clear that, in reality, the understanding and the application of these Regulations at the material time went beyond this. The distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent. The first clarification by a domestic court in this respect was given in... Furthermore, the court noted that in both the case of *Yiouroukkis* and that of the applicant, the prosecution was inclined to take the view that the life imprisonment was limited to a period of twenty years.

149. At the same time, however, the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Penal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment.

The court found that there was no heavier penalty imposed on the applicant than when he was sentenced. The distinction with the matter before this court is that there was no legislative intervention as in the case of **Kafkaris vs Cyprus** (supra). Secondly I have found that the court order to serve life imprisonment without remission was an order that violates the constitutional doctrine of separation of powers between the Judiciary, the Legislature and the Executive as it bars the application of the provisions of section 86 (3) of the Prisons Act, an Act of Parliament, to prisoners whose

sentences of death are deemed to be commuted to life imprisonment in violation of the prison regulations and the law. It also restricts the prerogative of mercy invested in the President of Uganda under article 121 of the Constitution to remit all or some of the penalty or to commute the sentence to a lighter one under the law.

I am further persuaded by the principles set out by the European Court of Human Rights in the interpretation of article 7 of the European Convention of Human Rights which article has the equivalent in article 28 (8) and (12) of the Ugandan Constitution. The principle is that the manner of enforcement of a sentence is within the policy of the Executive and Legislature provided that the policy does not in practice tantamount to a heavier penalty than the one imposed by the court at sentencing. In Uganda this principle has been advanced by the Supreme Court of Uganda in **Tigo Stephen v Uganda** (supra) by holding that life imprisonment is imprisonment for the remainder of the convict's life but the sentence of life imprisonment may stand reduced on account of earning remissions. Further that section 47 (6) of the **Prisons Act.** cap 304 (repealed and replaced by section 86 (3) of the **Prisons Act.** 2006 which deems a sentence of life imprisonment to be twenty years does not redefine the sentence when they said:

> The provisions of Section 47 (6) of the **Prisons Act** have sometimes been cited as authority for holding that imprisonment for life in Uganda means a sentence of imprisonment for twenty years. However, there is no basis for so holding. The **Prisons Act** and Rules made there under are meant to assist the Prison authorities in administering prisons and in particular sentences imposed by the Courts.

The Supreme Court held that imprisonment for life was deemed twenty years only for purposes of calculating remission and this did not change the definition of the sentence of life imprisonment to mean imprisonment for the life span of a convict though the actual period may be reduced on account of remissions earned. The decision recognized that remissions falls under the province of the prison authorities who are part of the Executive.

It follows that in **Attorney General v Susan Kigula and 417 others,** the court acted without jurisdiction and encroached on the legislative functions of legislature by blocking application of section 47 (6) of the **Prisons Act** cap 304 (repealed) now section 86 (3) of the **Prisons Act** 2006 selectively to a specified group in **Attorney General v Susan Kigula and others** (supra) of prisoners whose sentences of death are deemed to have been commuted to life imprisonment without having found the law to be unconstitutional or ultra vires and declaring it a nullity. Had this been legislative action or the Executive applying a different standard of more years, it would not have violated the principle that no heavier penalty shall be passed on a convict than that prescribed by law at the time the offence was committed and at the time of imposition of sentence. Simply put, the sentence passed was for the remainder of the convict's life and the manner of its execution did not fall within the province of adjudication or sentencing powers of court but related to the province of enforcement which fell under the Executive and under a law enacted by Legislature. I respectfully agree with and I am persuaded by the Judgment in **Kafkaris v Cyprus** as good law and therefore the holding that the death sentences referred to in **Attorney General Vs Susan Kigula and others** which are deemed commuted to sentences of life imprisonment pursuant to commutation of the death sentence would be served without remission is technically a measure in execution and does not change the nature of the sentence of life imprisonment which was defined as imprisonment for the remainder of the convict's life by the highest appellate court.

With regard to retrospective application of the law the European Court of Human Rights (Grand Chamber) in **Kafkaris v Cyprus** held that:

> 150. The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of "quality of law". In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances,

the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of art 7 of the Convention in this respect.

151. However, as regards the fact that as a consequence of the change in the prison law, the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the "penalty" imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier "penalty" than that imposed by the trial court. In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the Member States in determining their own criminal policy. Accordingly, there has not been a violation of art 7 of the Convention in this regard.

152. In conclusion, the Court finds that there has been a violation of art 7 of the Convention with regard to the quality of the law applicable at the material time. It further finds that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence.

Before taking leave of the matter, it is clear that in Uganda, and in the cases reviewed in this petition, the Supreme Court was grappling with the perceived problem of what to do with persons who had been sentenced to death who were not executed within three years thereby rendering any execution of the death sentence thereafter a cruel and inhuman punishment in violation of article 24 of the Constitution of the Republic of Uganda. Article 24 outlaws cruel and inhuman treatment and punishments and entrenches the right in article 44 of the Constitution as a right from which no derogation is permitted. Further, life imprisonment was not the foreseeable sentence for the category of persons in **Attorney General v Susan Kigula and others** because it is presumed that such category had been sentenced to the maximum penalty of death. The narrow issue arises from sentences which were deemed commuted from the death sentence to sentences of life imprisonment. The convicts whose sentences had been deemed commuted

to life imprisonment could not complain about the commuted sentences on the ground that it was not foreseeable since they were relieved of the maximum penalty. The manner of execution of the life imprisonment sentence is within the mandate of the legislature which enacted the laws and the Executive which implements the law. Convicts sentenced to death which sentences are deemed commuted to life imprisonment by effluxion of time will serve the sentence in the manner prescribed by the law and policy in place for sentences of life imprisonment.

There are, among the petitioners, prisoners serving original life sentences which had been imposed by the court and not a commuted sentence to a lesser sentence of life imprisonment and these prisoners would have to serve the sentence as prescribed by the law and under the policy in place.

Further the retrospective application of regulations imposed on the manner of enforcement of life sentences would not violate article 28 (8) or (12) of the Constitution if they do not impose a heavier penalty than that imposed by court and the measure is a means of enforcing the sentence of court. In the circumstances, no regulations had been passed at the time of the facts presented in this petition.

That notwithstanding, the law was subsequently amended in 2019 and the law and policy for the manner of enforcement of prisoners on life imprisonment sentences was amended under the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019.** The President assented to the law on the 4th of November 2019. Section 4 thereof provides that:

> 4. Treatment of life imprisonment or imprisonment for life in any enactment.
>
> (1) For purposes of any enactment prescribing life imprisonment or imprisonment for life, life imprisonment or imprisonment for life means imprisonment for the natural life of a person without the possibility of being released.
>
> (2) Notwithstanding subsection (1), a person liable to imprisonment for life or life imprisonment may be sentenced for any shorter term of imprisonment not exceeding fifty years.

(3) When sentencing a person under subsections (1) and (2), Court may order the minimum term of imprisonment a person liable to imprisonment for life or life imprisonment may serve before he or she may be considered for parole or the imprisonment of such a person may be reduced on account of remissions earned.

While section 4 (1) does not change the meaning of the expression "life imprisonment" or "imprisonment for life", at the time of imposition of sentence or deeming it commuted to imprisonment for life, it introduces a subtle change by providing that it means imprisonment for the natural life of the person without the possibility of being released. By stating that the imprisonment is "without the possibility of being released, the law amends section 86 (3) of the **Prisons Act** which deals with enforcement of existing sentences of life imprisonment and renders provisions for earning of remission in respect of convicts sentenced to life imprisonment redundant. Section 86 (3) of the **Prisons Act,** is no longer good law. The question is whether it introduces a heavier penalty or a penalty that is severer in degree or description than the maximum penalty that could have been imposed in terms of article 28 (8) of the Constitution. First of all, for the offences which are dealt with in this petition, the maximum penalty is a sentence of death. Upon commutation of sentence, the convict is deemed to have been sentenced to life imprisonment.

Life imprisonment has consistently been held to be next in severity to the death penalty. It cannot therefore be severer in degree or description than the maximum penalty which is death. Further, under article 28 (12), it is provided that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law. The sentence of death is prescribed even though the mandatory penalty was nullified. Secondly, the penalty of life imprisonment is a statutory penalty which is specifically prescribed. Because it is considered less severe than the death penalty, it is one of the penalties that may be imposed for capital offences which originally before the decision of the Constitutional Court in **Susan Kigula and 417 others versus Attorney General** (supra) carried mandatory penalties of death. The question is

whether the sentence of life imprisonment as vague or unclear going to the issue of the quality of the law at the time of imposition of sentence.

Further in **Kafkaris v Cyprus** (supra), the redefinition of the penalty of "life imprisonment" was defined in the Criminal Code of Cyprus as imprisonment for the remainder of the convict's life, and further twenty years were deemed to be that period for purposes of calculating remission under the Prisons Discipline Law. Upon amendment of the Prison laws to the effect that a convict sentenced to life imprisonment would not get out of prison till death, the amendment was held not to be in violation of article 7 of the European Convention on Human Rights merely because the Prisons Discipline law initially defined life imprisonment as deemed to be twenty years for purposes of remission before and subsequently, they redefined life imprisonment to mean imprisonment for the remainder of the life of the prisoner bringing it to be consistent with the Criminal Code. It was found that no heavier penalty had been imposed by the redefinition of the law than when the sentence was first imposed. Particularly the court had defined life imprisonment to mean imprisonment for the remainder of the convict's life.

That is the situation in this petition. Technically, no heavier penalty has been imposed than the one envisaged by the law. However, the European court found that the law was vague and an accused person could not tell the meaning of life imprisonment before the law was amended. Notwithstanding, the redefinition under the Prisons law, did not affect the meaning of the expression "life imprisonment" under the Penal Laws of Uganda. As noted, above, the definition for purposes of remission did not redefine the meaning of "life imprisonment". The definition of "life imprisonment" remains the same under English law which is imported by section 1 of the Penal Code Act. The practice of the early release of prisoners such as by allowing for the earning of remission has always been the preserve of the Executive. Secondly, matters relating to enforcement of the law can have retrospective application provided no severer penalty is imposed by the measures taken in enforcement of a sentence of court. Because the meaning of "life imprisonment" seems not to have changed, the

court cannot turn around and find that the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** has now redefined the meaning and effect of a term of "life imprisonment" or "imprisonment for life. The sentences imposed by the court or those deemed to be commuted to life imprisonment or commuted by the President to life imprisonment under article 121 of the Constitution seem at first glance to carry the same meaning but this is not the end of the inquiry and further analysis of the reformed law is necessary.

I would agree with the petitioner's counsel that the purpose of remission is to instill discipline and give hope to persons sentenced to life imprisonment and also enhance prison programs geared towards reformation. Article 217 of the Constitution enables Parliament to make laws providing for the organisation, administration and functions of the Uganda Prisons Service. Section 5 of the **Prisons Act** 2006 was enacted and gives the functions of the service as:

> 5. Functions of the Service
>
> The functions of the Service shall be-
>
> (a) to ensure that every person detained legally in a prison is kept in humane, safe custody, produced in court when required until lawfully discharged or removed from prison;
>
> (b) to facilitate the social rehabilitation and reformation of prisoners through specific training and educational programmes;
>
> (c) to facilitate the re-integration of prisoners into their communities;
>
> (d) to ensure performance by prisoners of work reasonably necessary for the effective management of prisons;
>
> (e) to perform such other functions as the Minister, after consultation with the Prisons Authority, may from time to time assign to the Service.

The function of Prisons Authorities of facilitating the social rehabilitation and reformation of prisoners through specific training and educational programs as well as the function to facilitate the reintegration of prisoners

into communities, is not possible if the section 4 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** definition of life imprisonment or imprisonment for life is to be applied to the letter. The section saddles two major functions of the Prisons Authorities in relation to enforcement of a sentence of "life imprisonment" or "imprisonment for life" and subjects the convicts sentenced thereto to despair and loss of hope in ever being released from prison. Why would they be shut out without the possibility of being released?

I have carefully analysed the provisions of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** and find that in terms of the redefinition of the sentence of life imprisonment. the sentence is not only problematic but also redefined the sentence of "life imprisonment" at the point of imposition of sentence and not just enforcement.

Under section 4 (1) and (2) of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** it provided that for purposes of any enactment prescribing life imprisonment or imprisonment for life, life imprisonment or imprisonment for life means imprisonment for the natural life of the person without the possibility of being released. The expression "without the possibility of being released" is problematic and was not part of the definition in **Tigo Stephen Vs Uganda.** This is because subsequently under section 4 (2) of the Act, it is provided that notwithstanding subsection (1), a person liable to imprisonment for life or life imprisonment may be sentenced for any shorter term of imprisonment not exceeding 50 years.

The law gives options to court to impose lesser sentences than life imprisonment. Sentences not exceeding 50 years. This means that life imprisonment amounts to a sentence of 50 years' imprisonment or more. Yet previously the **Prisons Act** allowed a life sentence to be deemed to be twenty years for purposes of remission. Therefore, a person sentenced to imprisonment for life could earn remission as held in **Tigo Stephen Vs Uganda.** To conceive of life imprisonment to be a term of 50 years or above

or whether the prisoner would never get out was not envisaged or foreseeable. Before independence of Uganda from British Colonial rule in 1962, a convict sentenced to life imprisonment could be considered for release after serving 15 years. Such a convict could be released on terms considered by the Governor. Section 94 of the **Prisons Act** cap 140 (repealed) provided that:

> 94. The sentence of a prisoner sentenced to imprisonment for life shall be specially considered at the end of fifteen years with a view to the release of such prisoner, and the Governor shall give such directions in the matter as he shall think fit.

The above law was subsequently amended by other Acts of Parliament. The **Prisons Act** cap 313 1964 Laws of Uganda brought the law to the modern times and provided under section 49 (7) that for purposes of calculating remission a sentence of life imprisonment is deemed to be twenty years' imprisonment. This survived under the **Prisons Act** Cap 304 and later the **Prisons Act,** 2006.

If sections 4 (1) and (2) of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019,** are interpreted in context. the issue of commutation of sentence should also be taken into account. Section 7 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** provides that:

> 7. Commuting of sentences of death.
>
> (1) A sentence of death confirmed by the Supreme Court may be carried out within three years of its confirmation.
>
> (2) Where a sentence of death confirmed by the Supreme Court is not carried out within three years, the sentence shall be deemed to have been commuted to imprisonment for life.
>
> (3) Where a death sentence is commuted to imprisonment for life, the convicted person shall be liable to imprisonment for fifty years.

Under section 7 (2) where a sentence of death is confirmed by the Supreme Court and is not carried out within three years, the sentence shall be

deemed to be commuted to imprisonment for life. Further under section 7 (3), a person whose death sentence is commuted to imprisonment for life shall be liable to imprisonment for 50 years. It follows that the word "liable" means that the person does not have to serve the 50 years' imprisonment. Secondly, it resurrects the controversy as to whether the period the person spent in pre-trial detention before his or her conviction ought to be taken into account in determining the period of years to be served to fulfil article 23 (8) of the Constitution. Thirdly, the question of whether a convict under the deemed 50 years should earn remission remained open. Last but not least, section 7 contradicts section 4 (1) which redefines any penalty of life imprisonment under any enactment to mean imprisonment for the natural life of the person without the possibility of being released. Further, where life imprisonment is a sentence of the court and not a commuted sentence, it will tend to be more severe in degree than a commuted sentence of death to life imprisonment. Additionally, because under section 4 (2), the person liable to imprisonment for life or life imprisonment may be sentenced for any shorter term of imprisonment not exceeding 50 years, it presupposes the exercise of sentencing discretion before imposition or not of the sentence of "life imprisonment" as defined under section 4 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019.** It is envisaged that a convict is sentenced after the exercise of sentencing discretion as to whether to sentence the convict to a term of imprisonment not exceeding 50 years. It follows that it is not intended to have retrospective effect because it goes beyond prescribing the manner of enforcement of the sentence of "life imprisonment" but introduces a redefinition of the penalty of "life imprisonment". In terms of enforcement therefore, it is necessary to determine the period that the convict who had been sentenced before the enactment of the law should now serve. For the above reasons, section 4 of the law cannot be held to redefine the existing sentences of life imprisonment, by the time the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** came into force as this would introduce a severer measure than the one imposed by court in effect. To do so will introduce an unknown and severe consequences that

are heavier than the one imposed by the court before the law came into force or even at the time the offence was committed.

Initially, the Solicitor General had suggested a period of 20 years' imprisonment from the date of conviction and sentence to death by the High Court for sentences deemed commuted to life imprisonment. Certainly persons sentenced to life imprisonment have been released before.The law creates a new class of convicts sentenced to life imprisonment after the sentence of court before enactment of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019.**

Firstly, to hold that the law should apply to convicts sentenced before 2020 or specifically when the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 20191** came into force would contravene the spirit and intention of article 92 of the Constitution which provides that:

> 92. Restriction on retrospective legislation.
>
> Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.

While the former law under section 86 (3) of the **Prisons Act** seems not to contravene article 28 (8) of the Constitution, in purpose and in effect, the new law in the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** if applied to persons already sentenced to life imprisonment prior to the enactment of the law would adversely affect them. In **The Queen V Big M Drug Mart Ltd and Others [1986] LRC** (Const) page 332 at page 356 by the Supreme Court of Canada Dickson J held that purpose and effect are relevant in determining constitutionality as follows:

> In my view, both purpose and effect are relevant in determining constitutionality; an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislations object and thus, its validity.

In my judgment, the effect of **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** on existing judgments and sentences which had been passed before the law was even ever conceived of, imposes a heavier penalty on the sentenced prisoners than at the time when they were sentenced. I would find that in relation to persons serving a sentence of life imprisonment, it is clearly provided that they would not be released which is not what was envisaged in the pre independence and post-independent Uganda eras when they were sentenced in violation of article 92 and article 28 (8) of the Constitution of the Republic of Uganda. There is a presumption that Acts of Parliament would apply to facts and circumstances in future and not to past facts and circumstances. According to **Maxwell on the Interpretation of Statutes** page 205:

> Every statute it has been said which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty... in respect of transactions or considerations already past must be presumed out of respect to legislature not to have retrospective operation....

The Interpretation Act cap 3 Laws of Uganda enacts the law in relation to statutory instruments and provides in section 17 (3) thereof that nothing in this section shall be deemed to empower the making of a statutory instrument so as to make a person liable to any penalty in respect to any act committed before the date on which the instrument was published in the gazette. Further sections 13 (2) (c) and (d) provide demonstrate that a statute cannot take away rights that have accrued or affect existing liabilities or punishments. It provides that:

> 13. Effect of repeal.
>
> (1) Where this Act or any other Act repeals and reenacts, with or without modification, any provision of a former Act, references in any other enactment to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so reenacted.
>
> (2) Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

(3) Upon the expiry of any Act, this section shall apply as if the Act had been repealed.

Section 13 of the Interpretation Act codifies the common law that retrospective legislation cannot be construed so as to impose a burden retrospectively and this common law is consistent with Article 28 (8) and (12) of the Constitution. In **Re Athlumney Ex Parte Wilson, (1898) 2 QB 547,** Lord Wright at pages 552 to 553 held said that:

> Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, or otherwise than as regards matter of procedure...

In **Re School Board Election for the Parish of Pulborough (1894) 1 QB 725,** it was stated by Lopes L.J. at 737 that:

> It is a well-established principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment. Every statute it has been said, which takes away or impairs vested rights acquired under existing laws or creates a new

obligation, or imposes a new duty, or attaches a new disability in respect of transaction already past, must be presumed to be intended not to have retrospective effect.

In the premises, to avoid violation or infringement or article 28 (8) of the Constitution, and particularly the part thereof that deals with life imprisonment sentences, the new law, namely the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** can only be construed in respect to the petitioners, to apply prospectively and not retrospectively. In the very least, the law as to expressly state that its provisions shall have retrospective effect which is not the case in the instant matter.

Question 4.

Whether the m1n1mum sentences provided under the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal notice Number 08 of 2013 contravenes articles 28 (8) and (12), 79 (1), 128 (1) and (2) Constitution of the Republic of Uganda, 1995.

I understand the petitioners question in issue 4 to be that the power to make laws under article 79 (1) the Constitution of the Republic of Uganda was violated or breached by the issuance of the Sentencing Guidelines (supra). The petitioner's counsel argued that under article 133 (1) (b) of the Constitution Chief Justice may issue orders and directions to the courts necessary for the proper and efficient administration of justice. Counsel submitted that article 133 (1) of the Constitution only empowers the Chief Justice to issue directions and orders necessary for proper and efficient administration of justice but it does not empower the office to legislate. The complaint of the petitioners is that the guidelines introduced "minimum sentences" and sentences in excess of 20 years. Particularly it is defined that short-term imprisonment means imprisonment of about 15 years or below. A mid-term imprisonment ranges between 15 to 29 years while long term imprisonment ranges between 30 to 45 years' imprisonment. In capital offences, it is recommended that imprisonment should be above 30 years' imprisonment. The petitioners contended that the mandate of the Chief

Justice is restricted to the issuance of guidelines and directions for better administration of justice and not the imposition of "hard law". They contend that the expression "minimum sentences" are not provided for in the Penal Code Act, which law was enacted by Parliament and therefore how the sentences are described or embodied is the preserve of Parliament. Secondly that the sentencing guidelines ushered in unconstitutionally long sentences. Particularly the petitioners complain about guideline 19 and Part 1 of the Schedule that in capital offences, sentences are supposed to be above 20 years. They contend that life imprisonment is 20 years under the **Prisons Act** and it is the severest penalty after the death penalty. In the premises, they also contend that the guidelines offend the doctrine of separation of powers and violated the principle of independence of the judiciary enshrined under articles 128 (1) and (2) of the Constitution of the Republic of Uganda.

I have carefully considered the Sentencing Guidelines and the submissions of counsel for and against the proposition that they were issued in violation of the cited provisions of the Constitution of the Republic of Uganda. Guideline 1 provides that the general aim of sentencing is to achieve one or a combination of the following objectives namely:

a) restoring the rights of victims of the offence;
b) protecting society against the convict;
c) balancing the interests of the community justice;
d) rehabilitation of the convict; or
e) integrating the offender back in the community.

It was further provided that it is desirable that there be consistency 1n sentencing in similar offences committed under similar circumstances and that the graver the circumstances under which an offence is committed, the stiffer the penalty ought to be. The sentences were clearly meant to deal with the post **Kigula** sentencing era upon the nullification of the mandatory penal provisions prescribing the death penalty as the only punishment for convicts of certain capital offences such as murder and aggravated robbery. It follows that the sentencing guidelines are what they purport to be, mere

guidelines. The guidelines do not impair the discretion of trial judges to impose appropriate sentences as enabled by the law.

Nevertheless, the impact of the sentences has been felt because the suggested a range of sentences which have been imposed by the High Court and appealed against and considered at an appellate level. The sentencing guidelines, cannot be held not to be law or anything done under the authority of law falling outside the ambit of article 137 of the Constitution. This is because article 137 (3) (a) provides inter alia that a person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission of any person or authority is inconsistent with or in contravention of a provision of the Constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

The sentencing guidelines were issued by the Chief Justice under article 133 (1) (b) which provides that the Chief Justice may issue orders and directions to the courts necessary for the proper and efficient administration of justice. Clearly the guidelines were meant to be directions of guiding principles in sentencing in the post **Kigula** sentencing era and are being challenged on the ground of any inconsistency suggested because the effect and impact of the guidelines is to approve a range of sentences which the petitioners consider to be unconstitutional. It is therefore properly before this court for consideration as to whether the guidelines propose to judges or judicial officers ranges of sentences which would infringe any principles in the articles of the Constitution under consideration in this petition such as the principle that only Parliament can enact a law under article 79 of the Constitution.

Going back to the sentences, the sentencing Guidelines provide very detailed circumstances to be considered while at the hearing on the question of appropriate sentence after a convict has been found guilty of commission of a capital offence. Particularly it should be mentioned that before the **Kigula** cases, a person charged with commission of a capital offence upon been found guilty shall suffer death under the mandatory

provisions of the penal laws and there was no requirement to hear the convict in mitigation of sentence. Upon nullification of the mandatory death penalty provisions under the Penal Code Act, or any other enactment, it became absolutely necessary to have a hearing to determine appropriate sentence. The Sentencing Guidelines therefore fulfil the crucial role of giving the relevant factors for consideration with regard to sentencing. The guidelines for instance counsel that the death penalty should be reserved for the rarest of the rare cases and set out material factors to take into account in imposing sentence.

Having noted that, the petitioners' grievance concerns the categorisation of the sentencing in terms of the long-term category of imprisonment which starts at 35 years with a sentencing range of between 30 to 45 years. It is written that the starting point is 30 years from which point the judicial officer may go above or below within the range of 30 to 45 years. Secondly as far as the medium-term category of imprisonment is concerned, it was categorised as a sentence range of between 25 to 35 years and under that category, the starting point is 30 years and the sentencing range is between 25 to 35 years. Thirdly there is the category of the short term imprisonment which ranges from 20 years to 30 years and refers to sentences ranging from 20 to 30 years with the starting point of 25 years wherein the Judge may sentence a convict to above 25 years or below 25 years' imprisonment.

Obviously, the sentencing guidelines recognise one important principle in its classification of "life imprisonment". It gives guidelines on life imprisonment and provides that imprisonment for life is the second gravest punishment next to the death penalty. It further defines it as imprisonment for the natural lifetime of a convict and may be imposed as a sentence where the circumstances of the case fall short of the circumstances considered for imposition of the death sentence.

The sentencing guidelines obviously were meant to guide judges in holding sentencing hearings after the doing away of the mandatory death penalty from the statute books. The crux of the dispute seems to be the cross purposes the guidelines have with the conception that life imprisonment is

the most severe penalty next to the death penalty where the death penalty is the severest penalty in the law or the maximum penalty envisaged by the law. It follows that the intermediate position between a life imprisonment sentence and a sentence of death does not exist in law. Whereas section 86 (3) of the **Prisons Act,** provides that for purposes of calculating remission life imprisonment means imprisonment for 20 years, there is apparently a conflict in the effect of the sentencing guidelines on the law. Where life imprisonment is deemed for purposes of remission to be 20 years' imprisonment, then lesser custodial sentences have to be less than the life imprisonment sentence in purpose and in effect. Because imprisonment of more than 20 years' imprisonment would suggest that it is less than life imprisonment because of the definition of life imprisonment in **Tigo Stephen Vs Uganda** and presupposes that the deeming of life imprisonment to be 20 years' imprisonment will never be applied by the Prisons Authorities.

If **Tigo Stephen versus Uganda** is to be applied so that life imprisonment sentence is open to earning remission, then the Prison Authorities would apply a period of 20 years' imprisonment as the meaning of life imprisonment for purposes of calculating remission. This would lead to the absurd result of a convict of life imprisonment being released from custody after serving a period of about 14 years' imprisonment if there was no loss of remission. That means that sentences of between 30 to 45 years' imprisonment would be severer in its impact on possible early release measures than the life imprisonment sentence. Further it is Parliament which enacted the **Prisons Act** and the various provisions deeming life imprisonment to be imprisonment for 20 years for purposes of remission only. If a prisoner has been sentenced to 45 years' imprisonment, it follows that remission would be applied to the quantum of the 45 years' imprisonment which would end up being higher than a life imprisonment sentence that is deemed to be 20 years' imprisonment for purposes of remission of sentence. Obviously, the sentencing guidelines conflict with the **Prisons Act** and for purposes of the current sentences, with the **Prisons Act** section 86 (3) thereof.

The sentencing practice would therefore lead to obvious disorganisation in the management of sentences imposed by the High Court in capital cases. The Supreme Court referred to this problem as an absurdity and an irrational problem in its decision in **Ssekawoya Blasio Vs Uganda.** The decision was issued on 9th April 2018. They noted that it would be absurd for a convict sentenced to a capital offence of murder to be deemed to have been sentenced to a period of 20 years' imprisonment. as the appellant contended when the lesser offence of manslaughter still attracts a maximum sentence of life imprisonment. As noted above, several other offences are defined in the Penal Code Act where the penalty for persons found guilty is that they are liable to be sentenced to death. These included the offence of defilement, rape and kidnapping with intent to murder. In other words, the court has discretion to sentence a convict who is liable to suffer death to a sentence of life imprisonment or to a lesser term of a custodial imprisonment sentence. If manslaughter was taken to be such an instance, the maximum sentence therefore is life imprisonment. The lesser term of imprisonment would have to be less than 20 years' imprisonment because of the deeming of life imprisonment to be 20 years' imprisonment for purposes of remission otherwise the law would lead to an absurd result. In any such case the Penal Code Act prescribed the maximum penalty possible.

In such circumstances. it seems that the state of the law left the death penalty as the only severe penalty. The court suggested that sentence for murder of life imprisonment should be served without remission. In **Wamutabanewe Jamiru v Uganda;** the appellant had been sentenced to death under the mandatory provisions which were subsequently nullified. Upon resentencing, he was sentenced to 35 years' imprisonment by the Court of April without remission. The Supreme Court held that the court could not ordain that the sentence should be served without remission and alluded to the dichotomy between imposition of sentence and the management of sentence which is between the functions of the Judiciary in the adjudication and the functions of the Executive in administering of the sentence. Its decision was issued on 12th April 2018.

Finally, the Penal Code Act does not in any place prescribe any other sentence above 20 years' imprisonment. It provides for custodial sentences up to a period of 18 years' imprisonment from which one goes higher to life imprisonment and then further to a death sentence. Article 28 (12) is very clear that the sentence has to be prescribed by law. The word prescribed by law means prescribed by Parliament unless it is enabled by the Act to be prescribed through subsidiary legislation. A sentence that violates the Penal Code Act, which also violates the **Prisons Act** in terms of section 86 (3) obviously violates article 28 (12) of the Constitution of the Republic of Uganda which provides that: "Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

79 (1) of the Constitution provides that Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda. However, in article 79 (2), the Constitution forbids any person from making any provision having the force of law in Uganda except under authority conferred by an Act of Parliament.

I accept the petitioner's submission that the sentencing guidelines insofar as they advise the passing of sentences which are not under the Penal Code Act, violate article 28 (12) of the Constitution and purport to fill a perceived lacuna in the law after the nullification of mandatory death penalty provisions under the laws of Uganda in the meantime before any legislative reform or intervention. The absurd situation of having no appropriate penalty where the death penalty is not imposed for capital offences ought to have been addressed by Parliament and not by the Chief Justice or in various judicial decisions. The Chief Justice issued the directions to provide guidance in a difficult situation. This was inter alia for the good governance of the country and to ensure that the public is protected from dangerous criminals. The Supreme Court noted in **Ssekawoya Blasio vs Uganda** that judges were not imposing the maximum penalty of death. The majority of cases were on imposition of custodial sentences which were not expressly prescribed by any laws in Uganda. There is no law in the statute books of

Uganda, for instance, prescribing a penalty of 70 years' imprisonment. In fact, the perceived lacuna was addressed by the Supreme Court in **Okello Geoffrey versus Uganda; Supreme Court Criminal Appeal No 34 of 2014** (supra) that a sentence of 22 years' imprisonment passed by the trial court was not illegal since it was less than the death sentence which is the maximum sentence for the offence of aggravated defilement. Further the court sought to administer justice in the name of and in the interest of the people under article 126 of the Constitution in imposing a higher than twenty years' imprisonment term. Clearly, it was perceived that a sentence of 22 years' imprisonment and above was less than the death penalty which was the maximum penalty for certain offences. These offences include murder, aggravated robbery, and aggravated defilement. Until the decision in **Susan Kigula,** these offences carried a mandatory penalty of death. After Kigula the law prescribing the punishment for the offences which used to carry mandatory death penalties, became offences where the convict is liable to suffer death and the High Court has discretionary powers whether to impose the death penalty or a term of imprisonment. Needless to say, other offences such as kidnapping with intent to murder always carried a discretionary death penalty.

It follows that the either a convict is sentenced to death, to imprisonment for life which is next in severity to the death penalty or in the third category, to a custodial sentence of imprisonment for a number of years that is lesser in the period to be served than life imprisonment.

The proposition that a custodial sentence is less than the maximum penalty of death has generated a diversity of sentences ranging, in relation to the petitioners, from sentences of 21 years' imprisonment up to a sentence of 73 years' imprisonment. Of the petitioners to this petition, three of them had been sentenced to 70 years and above. Further, several were sentenced to between 60 years and 69 years' imprisonment. Several other categories were sentenced between 50 years to 59 years' imprisonment. Generally, most of the petitioners were sentenced severally to between 21 years' imprisonment and 73 years' imprisonment and others were sentenced to

life imprisonment (182 of the petitioners). A wide latitude of custodial sentences generates the following absurdities.

If the sentences are commuted to life imprisonment and rem1ss1on is applied to it, the person might end up serving slightly over 13 years' imprisonment before being released. Secondly, a custodial sentence would end up being more severe than life imprisonment sentences. It calls into disrepute the notion that life imprisonment sentences are the severest penalties next in severity to the death penalty. This is against the fact of the legislature deeming of life imprisonment to mean 20 years' imprisonment for purposes of remission. Further the legislature has provided that all persons sentenced to custodial sentences are entitled to earn remission. Obviously, if life imprisonment is to be served without earning remission, a prisoner is expected to leave out his or her lifespan behind bars.

I have carefully considered the provisions of the Penal Code Act and have come to the conclusion that the highest custodial sentence that is prescribed is the for attempted defilement under section 129 (2) of the Penal Code Act which prescribes a sentence of up to 18 years' imprisonment (not exceeding 18 years' imprisonment). The sentences which are on the higher side of fixed terms of custodial sentences are between a maximum of 14 to a maximum of 16 years' imprisonment for defined offences. To name but a few of these sentences, section 245 of the Penal Code Act, prescribes imprisonment of up to 15 years for a convict under that section. For the stealing of cattle under section 264, imprisonment on conviction is up to 15 years' imprisonment. For habitual dealing in slaves, imprisonment under section 250 of the Penal Code Act, is up to 15 years' imprisonment.

There are sentences of up to 14 years' imprisonment which are prescribed under the Penal Code Act. These includes section 83 on the incitement to violence, section 128 of the Penal Code Act for indecent assaults, section 130 for defilement of idiots or imbeciles, section 141 of the Penal Code Act which deals with attempts to procure abortion, section 147 of the Penal Code Act, which deals with indecent assaults on boys under 18 years imprisonment, section 208 of the Penal Code Act, which deals with

conspiracy to murder, section 220 of the Penal Code Act which prescribes the offence of attempting to injure with explosive substances, section 221 of the Penal Code Act which deals with maliciously administering poison with intent to harm, section 271 of the Penal Code Act which deals with stealing by agents.

There are several other offences which are triable by the magistrate's courts. For offences triable by the High Court, the prescribed penalty is up to a maximum of the death penalty. Next to the death penalty is life imprisonment and thereafter the less severe penalties which are custodial penalties.

The is no prescription in the Penal Code Act, prescribing a penalty of up to 21 years' imprisonment or between 21 years' imprisonment and 45 years' imprisonment. The style adopted by the legislature is to prescribe the maximum penalty for each defined offence in terms of custodial punishments under the Penal Code Act. In the absence of such a prescription of the range of possible penalties, the court would move under a notion that because a custodial sentence is less than the maximum penalty of death, it is a lawful sentence as held by the courts. However, that notion has been tested and has generated diverse sentences ranging from about 15 years' imprisonment up to 73 years' imprisonment for offences which carry a maximum of the death penalty. These range of sentences have been imposed by construing the law analogously to the effect that an imprisonment term is less severe than the maximum penalty of death.

The law has now enabled imprisonment of up to 50 years' imprisonment under the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019**. What then happens to the 60 years' imprisonment, the 55 years and up to 70 years' imprisonment presented by the petitioners which are existing sentences that are being served? Clearly the best option is for Parliament to prescribe the penalty and the word "law" under article 28 (12) should mean a law enacted by Parliament under article 79 (1) of the Constitution. Otherwise it will depend on the individual judges' subject to the right of appeal, of course, on the question of sentence. The evidence

shows from such a wide diversity of sentences that the matter should not be left to the judiciary but to Parliament.

In **Del Rio Prada v Spain,** (supra) the European Court of Human Rights in interpreting article 7 of the European Convention on Human Rights, were addressed by third party interveners in the name of the International Commission of Jurists and their opinion is set out in paragraph 75 as follows:

> 75.The International Commission of Jurists pointed out that the principle of no punishment without law enshrined in Article 7 of the convention and in other international agreements was an essential component of the rule of law. it submitted that, in conformity with the principle, and with the aim and purpose of Article 7 prohibiting any arbitrariness in the application of the law, the autonomous concepts of "law" and "penalty" must be interpreted sufficiently broadly to preclude the surreptitious retroactive application of the criminal law or a penalty to the detriment of the convicted person. It argued that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity. The International Commission of Jurists submitted that with certain legal provisions classified at domestic level as rules governing criminal procedure or the execution of sentences had serious, unforeseeable effects it is detrimental to individual rights, and were by nature comparable or equivalent to a criminal law or a penalty with retroactive effect. For this reason, the prohibition of retroactivity should apply to such provisions.

Some petitioners were sentenced to between 50 years to 70 years and could not have envisaged the sentence of that magnitude that was not specified in any statute book. They could envisage life imprisonment. the sentence of death or any other custodial penalty by way of a term of years or a maximum of years that is prescribed. The matter was at large hence the wide latitude of sentences that are reflected in this petition between 21 years' imprisonment up to 73 years' imprisonment. This operated to the detriment

of the convicts and though the appellate courts have tried to apply the principle of consistency, it has opened up a lot of sentences for review. With a clear statutory provision, there would be no such issue and therefore it is my humble judgment that the sentencing guidelines are very useful for the principles but insofar as they suggested a range of sentences which cannot be established, they were ultra vires the powers of the Chief Justice under article 133 of the Constitution of the Republic of Uganda. Otherwise I would have to hold that the judicial precedents which prescribe severally up to 73 years' imprisonment are the new "law" within the principle under article 28 (12) of the Constitution which provides that the penalty shall be prescribed by law. Who prescribes the penalty by law? This should not be implied but should be expressly provided for by giving the court such discretionary powers. The principle of legality enshrined in article 28 (12) of the Constitution should therefore be held to mean that the law should be prescribed by Parliament or under delegated legislation specifically giving authority to prescribe penalties of the magnitude mentioned above.

According to **Del Rio Prada Vs Spain** (supra) 78 thereof:

> 78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage ... It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty *(nut/um crimen, nu/la poena sine lege.).* While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused detriment, for instance by analogy.
>
> 79. It follows that offences under the relevant penalties must be clearly defined by law. This requirement is satisfied when the individual can know from the wording of the relevant provision, if need be with the assistance of court's interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account...

According to Prof Susana Sanz - Caballero in **the Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights; The European Journal of**

International Law Vol. 28 No. 3 pages 788 - 789 the scope of Article 7 (1) of the ECHR is that:

> Article 7 includes two central principles - namely, a criminal conviction should only be based on a norm which existed at the time the incriminating act or omission took place *(nut/um crimen sine /ege)* and no heavier penalty may be imposed than the penalty applicable at the time the offence was committed *(nu/la poena sine /ege).* But article 7 implicitly includes a third principle that was identified by the ECtHR through its case law - namely, the authority applying criminal law should not interpret it extensively to the defendant's detriment, for instance, by analogy in *ma/am partem.* Accordingly, an offence must be clearly defined by law. Article 7 establishes that only the law can define a crime and prescribe a penalty. It offers essential safeguards against arbitrary prosecution, conviction and punishment. It is one of the few provisions of the ECHR that cannot be an object of exceptions or of a derogatory regime in the case of war or internal disturbances. In other words, it is one of the human rights that are embedded solidly within the Convention. It is one of the provisions that guarantee that the principle of legality will be respected, The ECtHR underlines that the guarantee enshrined in Article 7 is an essential element of the rule of law. It should be construed and applied as follows its object and purpose, in such a way as to provide effective safeguards against arbitrariness. While it especially prohibits enlarging the scope of existing offences to include acts that were previously not criminal offences, it also establishes the principle that criminal law must not be extensively construed to the accused's detriment - for instance, by analogy.

The above quotation encapsulates the principles under article 28 (8) and (12) of the Constitution of Uganda. In my judgment. the judicial precedents in as much as they may be considered "law" fall short of the standard prescribed by article 28 (12) of the Constitution in that there is no provision that prescribes punishments of over twenty years' imprisonment and the judicial precedents imposing such a law or practice are contained in several judgments. While the sentencing guidelines did not preclude higher or lower sentences, they encouraged the passing of sentences which have no basis in the statute books. In the premises, it is my finding that the sentencing guidelines in purpose and in the effect, violate the principle enshrined in article 28 (12) of the Constitution from which there may be no derogation under article 44 (c) of the Constitution as it touches on the principle of fair

hearing. Secondly, the law should be construed in such a way as to preserve the interests of the accused and any limitation thereto should be strictly construed. It should not be construed analogously to the convict's disadvantage. The underlying norm is that there should be no punishment without law. The Constitution in article 28 (8) and (12) safeguards convicts against arbitrary prosecution, conviction and punishment and is a principle of fair trial from which no derogation is permitted under article 44 of the Constitution.

Applying those principles, the provision of the Sentencing Guidelines which to the extent that it suggests a range of possible sentences which are not expressly prescribed in the Penal Code Act before its amendment by the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019,** are null and void and should not be followed as to do so would result in a sentence imposed in breach or contravention of articles 28 (8) and (12) of the Constitution.

Question 5.

Whether the retrospective application of the **Tigo Decision** contravenes article 28 (8) and (12), 21 (1), 23 (8) and 92 of the Constitution of the Republic of Uganda, 1995.

I have already determined that any measure which amounts to the implementation or enforcement of a sentence of the court was within the mandate of the Executive insofar as the measure does not amount to a penalty which imposes a heavier burden on the convict than the one imposed by the court, and such a measure would not contravene article 28 (8) of the Constitution. In the circumstances, the applicable law provided for life imprisonment sentences and the definition in **Tigo Stephen Vs Uganda** did not change the definition of the sentence of life imprisonment. Further the Supreme Court did not bar the application of the provisions for earning remissions under the **Prisons Act.** Similarly, the Supreme Court did not prescribe a penalty that would have been prohibited under article 28 (12) of the Constitution and only interpreted existing provisions of law.

With regard to article 23 (8), by definition, life imprisonment sentences are indeterminate sentences which depend on the lifespan of the convict. This did not do away with the provisions on remission under the **Prisons Act** and therefore it did not bar measures for early release of convicts within a lesser period than the lifespan of the prisoner and the deeming of life imprisonment to be 20 years' imprisonment was an enforcement measure for purposes of calculating the remissions to be earned. On the other hand, there is no definite figure from which the period that a convict spent in pre-trial detention prior to his conviction can be deducted in an indeterminate sentence which as defined is supposed to last for the lifetime of the convict. It would be a contradiction in terms, to deduct a period out of a life imprisonment sentence at the point of imposition of sentence when the deduction or taking into account commanded by article 23 (8) of the Constitution is supposed to take place. Imposition at that stage of life imprisonment is within the jurisdiction of court while deeming life imprisonment to be twenty years' imprisonment is for purposes of enforcement by the Executive and cannot be part of the sentence.

Provisions on remission do not redefine the penalty of life imprisonment but are measures instituted by Legislature and the Executive for the enforcement of the sentence of life imprisonment. In the premises, there was no infringement or violation of the Constitution as framed in the issue 5 above.

In conclusion, the petitioners petition partially succeeds and in light of my judgment above on the questions considered, the following declarations and orders shall issue:

1. Any order by a court of law that imprisonment would be served without earning remission by a prisoner interferes with the doctrine of separation of powers and is without jurisdiction. Imposition of a sentence under the enabling laws of Uganda is the preserve of the Judiciary while the enforcement of the sentence is the preserve of the Executive under laws enacted by Parliament.

2. Sentences of between 21 years and 73 years presented by the petitioners do not have any enabling legislation prescribing such a penalties in breach of article 28 (8) and (12) of the Constitution of the Republic of Uganda.

3. Sentences of between 21 years and 73 years' imprisonment imposed severally on the petitioners by the courts which sentenced them as such, will be deemed to be sentences of 20 years' imprisonment.

4. The **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** does not apply to sentences imposed before it came into force.

5. The Judiciary has no jurisdiction to bar the application or enforcement of a provision in an Act of Parliament such as section 86 (3) of the **Prisons Act 2006,** without first declaring such a provision unconstitutional or ultra vires.

6. Any order by a court that a sentence of life imprisonment shall be served without earning remission before the coming into force of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019** is a discriminatory treatment of such convicts in comparison with other prisoners also sentenced to life imprisonment and infringes article 21 of the Constitution. Further such an order is also without jurisdiction because it interferes with both Legislative and Executive authorities. It also violates the principle of legality and therefore such orders to serve a term of imprisonment without remission are null and void to the extent of the inconsistency of barring application of a section 86 (3) of the Prisons Act, 2006.

7. Further the Executive and the Parliament of Uganda ought to have reformed the law immediately after the decision of the Supreme Court affirming the decision of the Constitutional Court in the **Attorney**

General Vs Susan Kigula and 416 others as it has now belatedly done under the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019**.

8. Before enactment of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019,** there was no lacuna in the law because the discretionary death penalty to be imposed at the discretion of court already existed under the Penal Code Act for certain offences and the mandatory death penalties provisions only became discretionary death penalty provisions and this did not change the law except the mandatory nature of the sentences prescribed under the former Penal provisions of the laws of Uganda which prescribed the mandatory death penalty for certain offences.

9. The petitioners petition is of public interest affecting the administration of justice in Uganda and for that reason, each party shall bear his/her or its own costs.

Dated at Kampala the ... day of ... 2022

Christop er Madrama Izama

Justice of Court of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

(Coram: Egonda-Ntende; Madrama, Kibedi, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 24 OF 2019

1. SUNDYA MUHAMUDU
2. CHESAKIT MATAYO
3. MUHWEZI PONSIANO
4. OMOLLO BEN
5. OPOLOT BEN
6. GODFREY MPAGI

& 536 OTHERS ..... PETITIONERS

VERSUS

ATTORNEY GENERAL .....RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

I have had the benefit of reading in draft the judgment of my brother, Hon. Justice Christopher Madrama Izama, JCC. I agree with the findings therein and the reasons therefor, and would abide the orders attendant thereto.

Dated and delivered at Kampala this ... 4th day of ..... 2022.

Monica K. Mugenyi
Justice of the Constitutional Cou

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, C. Mandrama, Monica Mugenyi, Muzamiru M Kibeedi and C. Gashirabake; JJCC/JJCA]

CONSTITUTIONAL PETITION NO 0024 OF 2019

SUNDYA MUHAMUDU AND OTHERS..... PETITIONERS

VERSUS

THE ATTORNEY GENERAL AND OTHERS..... RESPONDENTS

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JJCC

I have read in draft the judgment prepared by my brother, Hon. Justice Christopher Izaama Madrama, JCC and I concur with his findings and conclusion.

Christopher Gashirabake,

Justice of the Constitutional Court.

2/12/2022

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Madrama, Kibeedi, Mugenyi & Gashirabake, JJA I JJCC]

Constitutional Petition No. 24 of 2019

BETWEEN

Sundya Muhamud=-==========Petitioner No. I

Chesakit Matayo==========Petitioner No.2

Muhwezi Ponsiano==========Petitioner No.3

Omollo Ben==========Petitioner No.4

Opolot Ben==========Petitioner No.5

Godfrey Mpagi==========-Petitioner No. 6

And 563 Others========== ==========Petitioners

AND

Attorney General==========Respondent

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

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

[2] As Kibeedi, Mugenyi, and Gashirabake, JJCC, agree, this petition is allowed with the declarations and orders proposed by Madrama, JCC.

Dated, signed, and delivered at Kampala this """day of G 2022

Fredrick Egonda-Ntende

Jusf e of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: EGONDA-NTENDE, MADRAMA, KIBEEDI, MUGENYI, GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO 0024 OF 2019

1. **SUNDYA MUHAMUDU}**
2. **CHESAKIT MATAYO}**
3. **MUHWEZI PONSIANO}**
4. **OMOLLO BEN}**
5. **OPOLOT BEN}**
6. **GODFREY MPAGI}**

AND 563 OTHERS}..... PETITIONERS

VS

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 withthe reasons given, conclujons made, and the orders proposed.

Signed, dated and delivered at Kampala thi tday 2022

MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF THE CONSTITUTIONAL COURT