THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT MENGO

CONSTITUTIONAL APPEAL NO 2/2004

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, AND KATUREEBE, JJ.SC).

1. DIMANCHE SHARON}
2. MOKERA GILPHINE }
3. NANSEREKO LUCK }:::::::::::::::::::::::::::::::: APPELLANTS

AND

MAKERERE UNIVERSITY :::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Constitutional Court (Mukasa-Kikonyogo D.C.J, Mpagi-Bahigeine, Berko, Twinomujuni and Katumba, JJ.A) dated 24 September 2003 in Constitutional Petition No.1 of 2003].

JUDGMENT OF KATUREEBE, JSC.

This appeal is against the decision of the Constitutional Court which dismissed a petition seeking protection of the right and freedom to exercise religious beliefs as guaranteed by Article 29(1)(c) of the Constitution of Uganda.

The appellants are Seventh Day Adventists Students at Makerere University, the respondent. They contend that the policy and regulations of the Respondent requiring the appellants to attend lectures and sit examinations on Saturdays violate their constitutional rights to

religion in so far as it compels them to "work" on the Sabbath Contrary to their religious belief. The Constitutional Court dismissed their petition, hence this appeal.

The appellants were students of the respondent. They belong to the Seventh Day Adventist Faith, which, it is stated, believes in the sanctity of the Sabbath. To these believers, no work is to be done on the Sabbath, which falls on the day commonly known as Saturday. Accordingly the appellants contended that they could not attend lectures or sit examinations on Saturdays as this amounted to doing work on the Sabbath. They sought to be accommodated by the Respondent by asking that they be allowed to sit their exams outside the hours of the Sabbath, i.e. between sunset on Friday and sundown on Saturday. There correspondence between the appellants and members of their Faith on the one hand and the officers of the Respondent on the other hand showing an attempt to resolve the matter amicably.

The Respondent contends that it is a secular public university which does not favour any particular religion. It says that in order to carry out its legal mandate of expanding university education and making it available to as many people as possible at the lowest cost possible, the university formulated the policy that the core activities of the University, like teaching and examinations, would take place on any day of the week including Saturdays and Sundays. Regulations were then formulated to implement this policy. This information was made available to all persons intending to join the university through the Joining Instructions and letters of admission sent out to students. The Respondent 's position was that the appellants could be accommodated

by allowing them to re-take any missed examination at the next sitting when that examination would be offered, but it could not allow the appellants to sit at different times from other students as this might compromise the integrity of the examination results. It would also lead to extra costs.

When the Parties failed to reach amicable resolution, the appellants filed a Petition in the Constitutional Court. They alleged that the Policy of the Respondent and its regulations requiring the appellants to attend lectures and sit examinations on Saturday (Sabbath) violated their constitutional rights and was inconsistent with Articles 20, 29(1) (c) and 30 of the Constitution. The Constitutional Court heard the petition and considered affidavit evidence filed by both parties and dismissed the petition by unanimous decision. Hence this appeal

In this court, the appellants were represented by ***MR. Christopher Madrama*** assisted by ***Mr. Frederick Sentomero and Mr. Nsubuga Ssempebwa.*** The respondent was represented by **Mr. Dennis Wamala.**

The appellants filed six grounds of appeal as set out here below:

1. **That the learned Justices of the Court of Appeal/Constitutional Court erred in law and fact when they held that the Respondent policies and regulations in issue are not inconsistent with articles 20 and 30 of the Constitution and that the**

Respondent was justified in requiring the appellants to sit examinations on their Sabbath.

2. That the learned Justices of the Constitutional Court/Court of Appeal erred in law and in fact and misdirected themselves on questions of law and fact when they held that the Respondent's policy and regulations that compelled the appellants to sit exams on their Sabbath or any day of the week between 7 am in the morning and 10.00 p.m at night is not inconsistent with and did not violate the appellants human rights under articles 20, .29(1) (c), 30 and 37 of the Constitution.

3. That the learned justices of the Constitutional court erred in law when they held that the fresher joining instructions of the Respondents notifying the Appellants on joining the Respondent University that programmes would run seven days a week and that the Respondent would not be obliged to respect any day of worship was sufficient notice that appellants fundamental tenet of religion in respect of keeping a Sabbath on Saturdays when required to sit exams on that day and that the appellants should have turned down the offer to join the respondent at the beginning.

4. That the learned Justices of the Constitutional Court erred in law and in fact when they held that the policy of the Respondent requiring students to sit exams on the Sabbath irrespective of their religion, did not give rise to an unconstitutional burden on the appellants that violated their freedom of religion by virtue of a fundamental tenet of the Adventist Christian Faith.

5. The appellants shall demonstrate that the learned Justices of the Constitutional Court severally misdirected themselves on matters of law, procedure and fact when they substantially found that there was no inconsistency in the appellants petition/case with article 20, 29, 30 and 37 of the Constitution, there being no violation of any rights therein and the respondent therefore did not have the onus of proving justifiable derogation from any rights of the Appellants.

6. The learned Honourable Justices of the Court of Appeal failed to properly evaluate the evidence and therefore erroneously found that accommodating Seventh Day Adventist students on the Sabbath day issue would impair or adversely affect the fundamental rights and other freedoms of other persons.

It is in that context that the learned Justices of the Constitutional Court suggested that the appellants had a choice to go to other institutions where their interests could be better accommodated; I do not agree with Counsel for the appellants that this amounted to asking the appellants to waive their right to freedom of religion or religious practice. All the relevant provisions of the Constitution had to be looked at as a whole, which the learned Justices of Appeal did. In my view, the **Syndicate case** is distinguishable from the present case. The appellants were not required at any time to waive their right to freedom of religion. They could have chosen another institution or accepted the accommodation offered by the respondent. I therefore hold that this ground of appeal has no merit and ought to fail.

Grounds 2 and 4 were argued together. Counsel submitted that freedom of religion entailed the right to manifest that religion through practice. The sincerity with which a person held his beliefs was not to be questioned. Counsel criticised the judgment of Twinomujuni, JA. He based his criticism on the authority of the ***Drug Mart Case*** *(supra)*. The material part of that judgment (at page 359) reads:

> ***"Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest belief and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience".***

On the facts and evidence of this case, I do not see that the appellants were being coerced into anything. They were being reminded that they

knew about the policy of the respondent, who was offering them some accommodation so that they could still practice their faith.

The question of sincerity of belief is very important and deserves consideration. Were the sincerity of the appellants' belief questioned in any way?. In the **Syndicate case**, *(supra)* it was stated at page 553:

> ***"Freedom of religion.....consists of the freedom to undertake practices and .....beliefs, having a nexus with religion, in which an individual demonstrates her or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religions obligation, requirement or precept to invoke freedom of religion. It is the religions or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection. The state is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief and the court's role is to ensure that a presently asserted belief is in good faith, neither fictions nor capricious, and that it is not an artifice. Assessment of sincerity is a question of fact that can be based on criteria including testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religions practices."*** (emphasis mine).

The above guidelines are very useful in considering whether in this case the sincerity of the appellants' beliefs was put into question. The appellants filed affidavits in which they stated that as Seventh Day Adventists they sincerely believed that God's commandments required complete rest from doing work on the Sabbath. To do any work amounted to sin for which one would be condemned to hell. Indeed, to me, it is indicative of the sincerity with which they held this belief that they were prepared to postpone examinations and risk repeating a year for the sake of their beliefs. In my view no Court or anyone else should question this, nor did anyone question it. The problem seems to have come from Dr. Kakembo who testified as an expert on the beliefs of the appellants. In his affidavit, Dr. Kakembo attached certain literature including the Holy Bible to prove that the Sabbath is a day of total rest without any work at all. This invited the legal officer of the respondent, Nabawesi, to file an affidavit in reply to show that in the Bible there were exceptions to work on the Sabbath, given by Jesus Christ himself. It is this Bible that Twinomujuni JA quoted, in his judgment, to show that indeed the Bible does contain exceptions to the rule that no work should be done on Sabbath.

In my view, the Constitutional Court should have accepted the affidavit in rejoinder of Dr. Kakembo whereby he explained away, according to the Seventh Day Adventists beliefs, the supposed exceptions as not being exceptions within their faith. Court cannot tell the appellants what they <u>should</u> believe. It is what they believe that is important, and I am satisfied that in this case the sincerity of that belief was not under criticism. In any event references to the Bible did not affect the

outcome of the case since the Justices held that the policy and regulations of the respondent were not inconsistent with or in violation of Articles 20, 29 or 30 of the Constitution for reasons other than sincerity of belief.

It is important for the appellants and other members of society to appreciate that the rights and freedoms of the individual in respect of religion or education enshrined in the constitution are not absolute. They are enjoyed within certain acceptable limitations envisaged within the Constitution itself, and also in the context of a person's own duty to the society. At a time when there is a stated national objective to give more citizens access to university education at affordable costs, and when there is clear evidence that the policy of the respondent is promoting that objective, there is need to balance the rights of individuals with the national good or public interest so that reasonable accommodation is accorded to both concepts . It is not in the public interest for a person to emphasize his or her own freedom or right irrespective of how this impacts on the rest of society. To say that examinations be held between 7.30 p.m and 9.00 p.m which is the time for evening classes, as stated in the affidavit of Irankunda, but without taking into account what happens to those classes, or how this switch will affect the university administratively or cost wise, is in my view, not being cognisant of the public interest. In my opinion the Constitutional Court was right to believe the affidavit of the Vice Chancellor in that regard. Therefore grounds 2 and 4 of the appeal ought to fail.

On ground 6, counsel submitted that the Justices of the Constitutional Court did not properly evaluate the evidence. He asserted that had they properly evaluated the evidence in the affidavits in rejoinder by the appellants, the court would have found that the appellants and members of their faith could have been accommodated.

I have already covered some aspects of this ground. The court considered the affidavits of the appellants alongside the affidavits filed by the respondent, particularly the affidavits of the Vice Chancellor whose evidence, court observed, was not controverted. The court considered all the evidence in the context of the provisions of the Constitution being read together for a purposive and harmonious interpretation of the Constitution. Court came to the conclusion that there was great public interest at stake and that there was no inconsistency with the Constitution. The suggested methods of accommodation by the appellants, such as that they should be locked up during examinations, were considered to be unworkable. The respondent, on the other hand had offered accommodation to the appellants which they refused. I find no valid reasons for this court to interfere with the findings of the Constitutional Court. Ground 6 should also fail.

In the result, I would dismiss this appeal. However since this was a matter of public interest, I would make no orders as to costs.

Dated at Mengo this 18th day of August 2006.

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Bart M. Katureebe
Justice of the Supreme Court

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