THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE; JJSC, ODOKI; TSEKOOKO; OKELLO; KITUMBA; AG. JJSC]

5 CONSTITUTIONAL APPEAL NO 01 OF 2013

BETWEEN

1. CENTRE FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD)
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKKIRIZA
4. INZIKU VALENTE ::] APPELLANTS

AND

THE ATTORNEY GENERAL::] RESPONDENT

15 *[Appeal from the Ruling of Justices of the Constitutional Court (Mpagi – Bahigeine, DCJ, Byamugisha, Kavuma, Nshimye, Kasule, JJA) dated 5th June, 2012 in Constitutional Petition No. 16 of 2011*

JUDGMENT OF DR. KISAAKYE, JSC

This appeal arises from the Ruling of the Constitutional Court rendered in
20 Constitutional Petition No. 16 of 2011 in which the appellants had challenged certain actions and omissions of the Government and its staff in proving maternal health services in Government hospitals/health facilities. The Constitutional Court struck out the appellants' Petition without hearing its merits, on two grounds, the first being that the Petition did not disclose
25 competent questions that required interpretation of the Constitution.

29/1/2016.

Secondly, the Constitutional Court struck out the Petition on grounds that the Court could not look into the acts and omissions the Petitioners were complaining of because of the Political Question doctrine.

5 Background to the appeal

The background to this appeal is that the appellants filed Constitutional Petition No. 16 of 2011 under **Articles 137(3), (4)** and **45** of the Constitution of Uganda, 1995 and Rule 3 of the Constitutional Court (Petitions and References) Rules, (SI No.91 of 2005). In this Petition, the appellants 10 challenged certain actions and omissions of the Government and its workers in providing maternal health services, which included, among others, the non-provision of basic indispensable maternal health commodities in Government health facilities; the inadequate number of midwives and doctors to provide maternal health services; the inadequate budget allocation to the 15 maternal health sector and the imprudent unethical behaviour of health workers toward expectant mothers which, had resulted in the death of some women during childbirth.

The Petitioners alleged that these actions and omissions were inconsistent 20 with several provisions of the Constitution, which included Objectives 1(1), XIV (b) XX, XV and Articles 33(2) & (3), 20(1) & (2), 22(1) & (2), 24, 34(1), 44(a), 287, 8A and 45 of the Constitution.

The Petitioners prayed for the following declarations and orders from the Constitutional Court:

25 a) *That the acts and/or omissions of the respondent's agents (Ministry of Health and Health workers) stated in this petition are in contravention of and inconsistent with the petitioners' and women rights that are*

insured by the constitution in Articles 33(2) and (3), 20(1), and (2), 22(1) and (2), 24, 34(1), 44(a), 287, 8A & 45.

5

b) *That it is a violation of the right to life guaranteed under Article 22 of the Constitution when death of expectant mothers results from non provision of the basic maternal health care packages in government hospitals.*

10

c) *That it is the violation of the right to health when health workers and the government fail to take the required health essential care during pre- and post-natal periods.*

15

d) *That the inadequate human resource for maternal health specifically midwives and doctors, frequent stock outs of essential drugs for maternal health and lack of emergency Obstetric Care (EmOC) services at Health Centres III, IV and hospitals is an infringement of the right to health under Objective XX,XIV(b),XV and Article 8A of the Constitution.*

20

e) *That the unacceptable higher maternal deaths in Uganda which are as a result of non provision of the basic minimum maternal health care and non attendance of the health workers to the expectant mothers are unconstitutional in as far as they are contrary to and against Articles 33(2) and (3), 20(1), and (2), 22(1) and (2), 24, 34(1), 44(a), and 8A of the Constitution of the Republic of Uganda.*

25

f) *A declaration that the families of the mothers who have died due to negligence of the government health workers and the Government's*

non provision of basic maternal health care package be compensated because of the rights violations.

g) *An order that the families of Sylvia Nalubowa and Jennifer Anguko who died in Mityana District and Arua Regional Referral Hospital respectively due to negligence of the Government health workers and the Government's non provision of the basic maternal health care package be compensated because of their rights violation.*

h) *Such other relief as this Honourable Court may deem fit.*

In its reply to the Petition, the Attorney General contended that the Petition was speculative and disclosed no question for Constitutional interpretation. Without prejudice to that assertion, the Attorney General further averred that there were other competing interests and fundamental human rights which the Government had to be cater for, from the meagre resources at the State's disposal and that therefore, the few isolated acts and omissions which had been cited by the petitioners could not be used to dim the untiring efforts being made in the Health Sector to better for the well being of Ugandans.

At the commencement of the hearing of the Petition, Ms. Mutesi Patricia raised a preliminary objection on behalf of the respondent, against the Petition on the basis of the "political question doctrine." She contended that the way the petition was framed required the Constitutional Court to make a judicial decision involving and affecting political questions and that in so doing the Court would in effect be interfering with political discretion which by law is a preserve of the Executive and the Legislature.

The Constitutional Court upheld the objection and accordingly struck out the Petition, without hearing the parties on its merits. Dissatisfied with that holding, the appellants appealed to this Court on the following grounds:

1. *The learned Justices of the Constitutional Court erred in law when they misapplied the Political Question Doctrine.*

2. ***The learned Justices of the Constitutional Court erred in law when they held that the Petition did not raise competent questions requiring their interpretation under Article 137 of the Constitution.***

3. ***The learned Justices of the Constitutional Court erred in law and misdirected themselves when they decided that the Petition called upon them to review and implement the health policies.***

The appellants prayed for the ruling of the Constitutional Court to be set aside and for an order directing that Constitutional Petition No. 16 of 2011 to be heard on its merits.

The appellants were represented in this Court by Counsel Peter Walubiri, Kizito Sekitoleko and Mr. David Kabanda. Ms. Patricia Muteesi, Principal State Attorney represented the respondent, the Attorney General. Counsel for both parties filed and relied on their written submissions.

Consideration of the Appeal

There are three grounds of appeal set out in the Memorandum of Appeal. I will tackle ground 2 first and then grounds 1 and 3 together.

Ground 2 of appeal was framed as follows:

"The learned Justices of the Constitutional Court erred in law when they held that the Petition did not raise competent questions requiring their interpretation under Article 137 of the Constitution."

Submitting on this ground, counsel for the appellants faulted the learned Justices of the Constitutional Court for their decision to strike out their Petition on grounds that it did not raise competent questions requiring interpretation under Article 137 of the Constitution.

They submitted that Article 137(1) vested powers of interpretation of the entire Constitution in the Constitutional Court. Counsel further submitted that all Acts of Parliament or other laws and things done under the authority of any law and all acts and omissions by any person or authority, which included acts and omissions of the executive relating to the rights under Article 33 and 34 of the Constitution are justiciable before the Constitutional Court.

Counsel also contended that the powers of interpretation of the Constitutional Court were very wide and that no single article of the Constitution was ring-fenced from interpretation since no act or omission of Government, if alleged to be in contravention of the Constitution could be protected from scrutiny by the Constitutional Court on any account.

Lastly, counsel for the appellants contended that the Petition raised issues relating to omissions of the Government that contravened several provisions of the Constitution. As a result, they submitted that the Constitutional Court was obliged to entertain the Petition since it fell squarely within Article 137(3) of the Constitution. Counsel for the appellants relied on this Court's decision in ***Ismail Serugo v. Kampala City Council & Another, (Constitutional Appeal No. 2 of 1998),*** among others, to support their contentions.

On the other hand, the Attorney General supported the decision of the Constitutional Court. The Attorney General contended that the learned Justices of the Constitutional Court correctly exercised their discretion when they refused to hear a case whose determination required the Court to encroach on the powers of other arms of Government. She contended that the learned Justices of Appeal acted judiciously with regard to all circumstances of the case since they noted that the petitioners could seek redress in the High Court by way of judicial review or through the enforcement of their rights in respect of the alleged acts and omissions.

The Attorney General also contended that this Court should not adopt a strict interpretation of Article 137 as obliging the Constitutional Court to determine any issue before it, regardless of whether the Petition called for Court to exercise powers of other arms of Government. In the Attorney General's view, allowing the Courts to exercise their jurisdiction by encroaching on the powers of other arms of Government would undermine the doctrine of separation of powers and consequently the rule of law leading to constitutional instability and anarchy.

In rejoinder, counsel for the appellants contended that under Article 137(3), the Constitutional Court was not only authorized to hear Petitions falling therein but was obligated to resolve them. Counsel for appellants submitted that the doors of the Constitutional Court should remain wide open for people of Uganda to have access to the Court at all times to seek for declarations and redress under Article 137 of the Constitution, in the event of any violation. Counsel relied on ***Uganda Association of Women Lawyers & 5 others v. Attorney General, (Constitutional Petition No. 2 of 2003)*** in support of their assertion.

Having set out the parties' submissions, let me now revisit the holding of the Constitutional Court which gave rise to this ground. In striking out the appellant's Petition, the Constitutional Court observed and held as follows:

5 *"This petition was brought to this Court under Article 137(3), (4) and Article 45 of the Constitution. The parameters within which this court is required to operate are established in Article 137(1) and (3) of the Constitution. It provides as follows:-*

10 *(a) .....*

(b) any act or omission by any person or authority; is inconsistent with or in contravention of a provision of this Constitution may petition the Constitutional Court for a declaration to that

15 *effect, and for redress where appropriate."*

This Court has jurisdiction on matters where the Petition, on the face of it shows that an interpretation of a provision of the constitution is required. See Ismail Serugo Vs Kampala City Council

20 *Attorney General Constitution Appeal NO. 2 of 1998*

....

The Petitioners' contention is that the State has failed to provide

25 *basic indispensable health items in Government facilities for expectant mothers taking into consideration their unique status and their natural maternal function in the society. ... In the Petitioners' opinion, this is in violation of the National Objectives and Directive Principles of State policy Numbers 1(i), XIV(b) XXVIII(b) and*

Articles 33(2), (3), 20(1), (2), 22(1), (2), 24, 34(1), 44(a), 8(a) and 45 of the Constitution of Uganda.

...

5 *We are in agreement with the respondent's argument that the petition deals generally with all hospitals, health centres, and the entire health sector and broadly covers all expectant mothers. The Role of this Court as stated in Article 137 is to interpret the provisions of the Constitution. The petitioner must prove before*
10 *court that the constitutional provisions have been violated.*

..."

With all the greatest respect to the learned Justices of the Constitutional Court, I disagree with their reasoning and the conclusions they reached.

15 The appellants in paragraph 5 of their Petition contended that non provision of basic indispensable health maternal commodities in Government health facilities and the imprudent and unethical behavior of health workers towards expectant mothers constituted acts and omissions which contravened and were inconsistent with the Constitution.

20 Furthermore, in paragraph 10 of their Petition, the appellants also set out the acts and omissions of Government and maternal health workers,, which they alleged were inconsistent with or in contravention of the Constitution. The alleged acts and omissions were spelt out in paragraph 10 (c), (g) (h), (i) (j), and (p) of the Petition, which I will only cite in the relevant parts as follows:

25 *"10 (c) "Non provision of basic maternal health commodities to expectant mothers and the failure on the part of health workers to exercise the requisite health care leads to death of children*

hence and infringement of their rights guaranteed under Articles 22, 33 and 34 of the Constitution."

...

5 *10(g)* *When the government and its agents – the health workers neglect, refuse and or fail to take care of the expectant mothers, this non provision of the minimum health care package ... contrary to Article 33 and 34.*

10 *10 (h)* *The state has failed in its obligation to provide the basic health facilities and opportunities necessary to enhance the welfare of women to enable them realize their full potential and advancement which contravenes article 33(1) of the Constitution.*

15

10(i) *The expectant mothers are mal treated with lots of insults and harsh handling by the health workers in many of the government health centres all in contravention of Article 24 which guards against inhuman cruel and degrading treatment.*

20

10 (j) *The non provision of essential maternal kits, the non supervision of the public health facilities and the resultant omission and un professionalism of health workers contravenes Article 33(3) .....*

...

25

10(p) *The provision of basic minimum maternal health care to vulnerable poor women in government hospitals is of comparable priority under various regional and international instruments and of particular interest is article 12 of the ICESCR*

and comment 14 to which Uganda is a party and its failure contravenes objective XXVIII, Article 8A and 45 of the Constitution.

Apart from making allegations about the acts and/or omissions of the
5 Government and health care workers, as indicated above, the Petitioners also cited the various provisions of the Constitution which they alleged the various acts and/or omissions which they were complaining about were inconsistent with or in contravention of. These included Articles 8A, 20(I) & (2), 22(I) & (2), 24, 33(2) & (3),34(I), 44(a), 287 and 45 of the Constitution. These
10 Articles were cited in paragraph 10 of the Petition.

It is clearly evident from the above pleadings that the appellants specified the acts and omissions of the Government and its workers in the health sector which they alleged were inconsistent with and in contravention of the Constitution. The appellants also cited the particular provisions of the
15 Constitution which the said acts and omissions of respondent and its workers were alleged to be contravening. The appellants also prayed in their Petition to the Constitutional Court for specific declarations to the effect that those acts and omissions contravened the Constitution and also for redress.

All these averments, in my view, gave rise to competent questions for the
20 Constitutional Court to hear, interpret and determine, with a view to establishing whether the Petitioners' allegations had been proved to warrant the Constitutional Court to issue the declarations sought by the Petitioners and to either grant the Petitioners redress or to refer the matter to the High Court with the appropriate directions, in accordance with the dictates of
25 Article 137(4).

It is therefore my finding that the Constitutional Court erred in striking out the appellant's Petition partially on the ground that holding that there were

no competent questions set out in the Petition that required interpretation of the Constitution by the Court.

I would therefore allow ground 2 of appeal.

<u>Grounds 1 & 3 of appeal</u>

5 Ground 1 of appeal was framed as follows:

> *1. The learned Justices of the Constitutional Court erred in law when they misapplied the Political Question Doctrine.*

On the other hand, ground 3 of appeal was framed as follows:

> *3. The learned Justices of the Constitutional Court erred in law and*
10 *misdirected themselves when they decided that the petition called upon them to review and implement the health policies.*

These grounds arise from the following holding of the Constitutional Court:

> *"Much as it may be true that Government has not allocated enough resources to the health sector and in particular the maternal health*
15 *care services, this court is, with guidance from the above discussions, reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement polices of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive*
20 *and no person or body has the power to determine, formulate and implement these polices except in the Executive.*
>
> *This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let alone, their implementation. If this*
25 *Court determines the issues raised in the petition, it will be substituting its discretion for that of the executive granted to it by law.*
>
> *In matters which require any court to draw an inference, like in the instant petition, an application for redress can best be entertained by the High Court under Article 50 of the Constitution. An*

application for redress can only be made to the Constitutional Court in the context of a petition under Article 137 brought for the interpretation of the Constitution. See Ismail Serugo Vs Kampala City Council supra.

5 *From the foregoing, the issue raised by the petitioners concern the manner in which the Executive and the Legislature conduct public business/issues, affairs which is their discretion and not for this court. This court is bound to leave certain constitutional questions of a political nature to the Executive and the Legislature to*
10 *determine.*

We appreciate the concerns of the petitioners as regards what to them is the unsatisfactory provision of basic health maternal commodities and services towards expectant mothers that motivated them to lodge this petition. But with the greatest respect, we find the
15 *solution to the problem is not through a Constitutional petition that is in the nature of requiring this Court to resolve a political question like this one is. There are other legal alternatives that the Constitution and other laws provide for resolution of such."*

The contention in the above two grounds is essentially the applicability of the
20 Political Question Doctrine in Uganda.

Counsel for the appellants contended that under the Constitution of Uganda, there was no room for application of the political question doctrine. Counsel submitted that the doctrine was based on the American Constitution construction which was not applicable in Uganda. Counsel criticized the
25 doctrine as being a relic from the past and contended that the case of ***Marbury v. Madison 1 Cr. (1803),*** from which the doctrine was enunciated by the United States Supreme Court, was decided over two centuries ago and was a case on judicial review and not on Constitutional interpretation.

Counsel for the appellants further contended that the people of Uganda
30 enacted their own Constitution to suit their own circumstances and therefore cannot be held hostage to 19th century American jurisprudence. Counsel urged this Court to move under Article 132(4) of the Constitution and depart

from the case of ***Attorney General v. Maj. Gen. David Tinyefuza, (Constitutional Appeal No. 1 of 1997) which ruling had given rise to*** the proposition that the political question doctrine was applicable in Uganda. The basis of departure, according to counsel, was that it was no longer good law, but most significantly that it did not constitute part of the *ratio decidendi* of the judgment of Court since it was not based on a specifically framed issue of political question. According to counsel, it was only reflected in the judgment of Kanyeihamba, JSC as a comment on principles of constitutional interpretation.

Counsel further contended that the doctrine of separation of powers under the United States of America Constitution was not the same in Uganda since in the United States of America, Cabinet Secretaries cannot sit in the Senate, whereas in Uganda, cabinet ministers can also be Members of Parliament. He contended that Uganda was a constitutional democracy, where there was no strict separation of powers. To this end counsel submitted that the political question doctrine based on the American construction does not apply in Uganda.

Counsel further submitted that the Constitution of Uganda was supreme and had binding force on all authorities including the Executive. Relying on Article 20 (2) of the Constitution, counsel for the appellants contended that all organs and agencies of Government had an obligation to respect, uphold and promote the rights and freedoms enshrined in Chapter 4 of the Constitution of Uganda and that these rights included those that were in issue in this appeal. Counsel for the appellants contended that therefore, no act or omission of Government, if alleged to be in contravention of the Constitution could be protected from scrutiny by the Constitutional Court, on account of the antiquated political question doctrine.

On the contrary, counsel submitted that Courts in Uganda, in interpreting the Constitution were required to be guided by national interest and common good enshrined in the National Objectives and Directive Principles of State Policy as provided for under article 8A of the Constitution. These principles, counsel for the appellants submitted, included the obligation of the Government of Uganda to ensure that all Ugandans (including women) enjoyed rights and opportunities and access to, among others, health services. Accordingly, counsel for the appellants submitted, this obligation on the part of the Government left no room for the operation of the political question doctrine in Uganda.

Without prejudice to the above submissions, counsel for the appellants further contended that the political question doctrine was not applicable where rights of an individual and the constitutionality of a law or an act or omission were in issue. Counsel cited authorities where Courts in different jurisdictions entertained matters that were political in nature on grounds that the rights of an individual were in jeopardy.

Counsel for the appellants cited and relied on the American case of ***Zivotosfsky v. Clinton, Sec of State.132 S. Ct. 1421 (2012),*** where the Supreme Court of the United States of America allowed citizens born in Jerusalem to have "Israel" listed as the place of birth on their passports, in spite of the State Department's arguments to the contrary that were based on the long standing policy of not taking a position on the political status of Jerusalem.

Counsel for the appellants also cited in support of their submissions the Canadian case of ***Bertrand v. AG of Quebec [1992] 2 LRC 408***, where the Supreme Court of Quebec, Canada, held that if a citizen claims that his

fundamental rights are threatened by Government action, the Courts must decide whether there has been a violation of the said rights.

Lastly, counsel for the appellants contended that the Petition alleged contravention of several provisions of the Constitution, some dealing with fundamental rights and freedoms. Counsel for the appellants therefore contended that the Constitutional Court erred in law when it ruled that the political question doctrine prevailed over the Constitutional Court's duty to interpret the Constitution. Counsel for the appellants urged this Court to so find and to allow the appeal and reinstate the Petition for hearing on its merits by the Constitutional Court.

Attorney General's submissions on grounds 1 & 3 of Appeal

Counsel for the respondent, on the other hand, supported the decision of the Constitutional Court to strike out the appellants' petition on grounds of the political question doctrine.

Counsel argued that the Petition required the Constitutional Court in the course of exercising its interpretation jurisdiction, to exercise power/discretion which was reserved by law to Parliament and the Executive. This, according to respondent's counsel, contravened the doctrine of separation of powers which was reflected in the political question doctrine.

For emphasis, counsel contended that the appellants' petition required the Constitutional Court to review the general performance of the maternal health sector. This review, according to counsel, would be a breach of Article 90(1) of the Constitution, as well as Rules 133 and 161 of the Parliamentary Rules of Procedure which operationalized Article 90, which give the Parliament of Uganda an oversight responsibility over the implementation of government policies and programmes.

Counsel further submitted that the appellants' petition also required the Constitutional Court to review the propriety of government macro-economic policy of resource allocation to the maternal sector *vis a vis* other sectors, contrary to the provisions of Article 111(2) of the Constitution of Uganda, as well as section 7(2) of the Budget Act.

It was also counsel for the respondent's contention that the political question doctrine was not concerned with jurisdiction under Article 137 but with "justiciability". Counsel submitted that Court's jurisdiction under Article 137 was never disputed but that what was disputed was whether the matters that were raised in the Petition were justiciable. According to counsel for the respondent, justiciability, unlike jurisdiction, was a matter for the discretion of the Court. Thus a court of competent jurisdiction could exercise its inherent discretion and decline to hear a matter which was properly before it, if it determined that the issue was best suited for resolution by other arms of government, or that its determination would involve an undue encroachment on the power of parliament or the Executive. Counsel for the respondent contended that since the doctrine entailed the use of discretionary power, it should be exercised judicially with regard to the circumstances of the case. Counsel cited ***AG v. Paul K Ssemogerere & Z. Olum, Constitutional Appeal No. 3 of 2004*** in support of the respondent's submissions.

Counsel for the respondent further submitted that when Courts exercise their jurisdiction to check the excesses of other branches of the government or their departments, they should not do so by encroaching on the powers of the executive or parliament. Counsel for the respondent cited an example of Judicial Review, where the High Court, could review the decision making process but that it would not substitute exercise of discretion or make a decision which was legally reserved to another arm of government.

In conclusion, counsel for the respondent urged this Court to uphold the political question doctrine as being applicable in Uganda, and to hold that the doctrine is consistent with our Constitution, laws and jurisprudence.

In rejoinder, counsel for the appellants contended that the appellants' Petition
5 to the Constitutional Court concerned a demand for a declaration regarding government obligations with respect to Uganda's preventable healthcare crisis. Counsel further contended that by applying an erroneous understanding of the political question doctrine, the Constitutional Court failed to address the central question presented by the appellants, that is:
10 *"whether the persistent denial of labour and delivery care to expectant mothers violated the appellants' constitutional rights".*

Counsel for the appellants also contended that several jurisdictions strongly disfavoured the political question doctrine. In support of their contention, they cited, *inter alia* ***Zivotosfsky v. Clinton ,Sec of State.(supra); Minister of***
15 ***Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC); Paschim Banga Khet Mazdoor Sanity v. State of West Bengal, (1996) 4 S.C.C 37;*** and ***Government of Rep. of South Africa v. Grootboom, 2001 (1) SA 46 (CC).***

Counsel contended that where government action or omission violates the Constitution which is the fundamental law, the Courts as guardians of the
20 Constitution could intervene and make declarations even on matters that would ordinarily be of policy in nature.

Lastly, counsel also contended that the executive had no untouchable prerogative to allocate resources and make policy decisions or omissions in clear breach of the Constitution. Counsel then reiterated their prayers in the
25 Memorandum of Appeal.

Having set out the parties' submissions let me now revisit the holding of the Constitutional Court which gave rise to this ground. In striking out the appellant's Petition, the Constitutional Court observed and held as follows:

5 *"Political question doctrine" holds that certain issues should not be decided by courts because their resolution is committed to another branch of government and /or because those issues are not capable, for one reason or another, of judicial resolution. Its purpose is to distinguish the role of the judiciary from those of the Legislature and the Executive, preventing the former from encroaching on either of the*
10 *latter. Under this rule, courts may choose to dismiss the cases even if they have jurisdiction over them.*

...

The Constitution has clearly streamlined the roles of each of the organs of Government. I.e. the Legislature, the Executive and the
15 *Judiciary as follows:*

Article 79 Functions of Parliament

...

Article 111. The Cabinet

...

20 *Article 126 Exercise of judicial power*

...

These articles clearly stipulate the different roles assigned to each of the three organs of Government by the Constitution.

According to Halsbury's Laws of England, 4th Ed. Butterworths,
25 *London, 1989, Para 5, the doctrine of separation of powers implies that;*

1. *A particular class of function ought to be confided only to the corresponding organ of Government.*
2. *The personnel of the three organs of Government must be distinct.*
30 3. *The autonomy of each branch of government must be immune from undue encroachment from any of the others."*

Resolution of Grounds 1 and 3 of Appeal

It is important at the onset to examine the meaning of the political question doctrine and whether it is applicable in Uganda. According to Black's Law Dictionary, 9th Edition at page 1277, the political question doctrine is defined 5 as follows:

> ***"A Judicial principle that a Court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government."***

A political question, on the other hand is defined, on the same page as 10 follows:

> ***"A question that Court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government-Also termed as non justiciable question."***

The origins of the political question doctrine can be traced back to the 15 Supreme Court of the United States in the case of **Marbury v. Madison 5 U.S. (1 Cr.) 137 (1803)**, where the Court held that the province of the court was solely to decide on the rights of individuals and not to inquire how the Executive, or Executive officers perform duties in which they had discretion and secondly, that questions, which are by their nature political, or which 20 are, by the constitution and laws, submitted to the executive can never be made in this court.

It has also been observed that while it was neither created by legislation nor is it a part of the United States of America's Constitution, this rule appears to emanate from the doctrine of Separation of Powers. It has hence been 25 described as a judicial doctrine created by the Court as part of the broader concept of justiciability—the issue of whether a matter is appropriate for court (or judicial?) review. The Political Question doctrine rule is therefore both interpretive and self-imposed by the courts.

In **Coleman v. Miller, 307 U.S. 433, 454-455,** the United States Supreme Court further observed that the dominant considerations in determining whether a question falls within the political question category are the appropriateness under the system of government of attributing finality to the
5 action of the political departments and also the lack of satisfactory criteria for a judicial determination.

However, even in the Unites States where the political question doctrine is said to have originated from, the Supreme Court has not always reached similar outcomes wherever the doctrine is invoked. For example, in **Baker v.**
10 **Carr 369 U.S. 186 (1962)** Mr. Justice Brennan, who wrote the opinion of the Court, held as follows:

> ***"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially***
> 15 ***discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need***
> 20 ***for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."***

Mr. Justice Brennan continued,

> ***"Unless one of these formulations is inextricable from the case at bar,***
> 25 ***there should be no dismissal for non justiciability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot***

reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority."

In the ***Baker Case (supra)***, the Court rejected the political question argument and went on to hold that the political question did not bar Courts from
5 reaching the merits of a challenge brought against Tennessee's system of apportioning its state legislature. The Court held that although the case was "political" in the sense that it was about politics, and there were questions about how Courts might grant relief if Tennessee's apportionment scheme was declared unconstitutional, the Court saw neither as reasons for
10 invocation of the political question doctrine.

The question that then arises is whether the political question doctrine is applicable in Uganda, and if so, whether it bars the Constitutional Court from entertaining questions raised in the appellants' Petition.

The Constitution prescribes the jurisdiction of the Constitutional Court in
15 Article 137 (1) as follows:

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

Justice Mulenga, JSC (as he then was) in ***Paul Semogerere & 2 ors v. the***
20 ***Attorney General, Constitutional Appeal No. 1 of 2002,*** while commenting about the mandate of the Constitutional Court under Article 137(1) observed as follows:

"The court is thus unreservedly vested with jurisdiction to determine any question as to the interpretation of any provision of the
25 *Constitution. With regard to interpretation of the Constitution, the court's jurisdiction is unlimited and unfettered. This is reiterated in clause (5), which provides for reference of "any question as to the*

interpretation of this Constitution", arising in any proceedings in a court of law, to the Constitutional Court "for decision in accordance with clause (1)".

Under the Constitution of Uganda, when a person claims that ***"anything in or done under the authority of any law"*** or any action or inaction on the part of ***"any person or authority"***, is inconsistent with or in contravention of the Constitution, the Constitutional Court is the appropriate court to determine whether the person's claim has substance or not. Therefore, the Constitutional Court cannot abdicate this duty by declining to entertain a Petition filed under Article 137 of the Constitution on grounds that the matter will be infringing on the discretionary powers of another organ of the State.

Let me now turn to examine the issue whether the political question doctrine applies to bar the Constitutional Court from looking into the acts and/or omissions on the part of those vested with executive powers.

Article 111(2) provides as follows:

> *"The functions of the Cabinet shall be to determine, formulate and implement the policy of the government and to perform such other functions as may be conferred by this Constitution or any other law."*

While this Article vests the power to determine, formulate and implement government policies in the Cabinet, Article 137(3)(b) of the Constitution grants any citizen who alleges that any act or omission by any person or authority is inconsistent with and in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect and for redress where appropriate. This Article provides in the relevant part as follows:

> *"A person who alleges that –*
> *(a) ...; or*
> *(b) any act or omission by any person or authority,*

is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect and for redress where appropriate."

The ruling of the Constitutional Court on the application of the political
5 question doctrine acting as a bar on the Constitutional Court to look into the acts and/or omissions of the Executive complained of by the Petitioners cannot be upheld.

As I have already discussed above, Article 137(3)(b) of the Constitution of
10 Uganda gives a right to any person who alleges that any act or omission by any person or authority, is inconsistent with, or in contravention of, any provision of the Constitution, to access the Constitutional Court directly by filing a Petition to challenge such acts or omissions. Once this is done, the Constitutional Court has a duty to entertain it and may, after hearing the
15 parties, grant the declaration that such an act or omission is inconsistent with or contravenes the provision(s) in question.

Let me now turn to highlight the constitutional provisions relied on by the Attorney General in relation to the role of Parliament.

Article 79 of the Constitution of Uganda provides for the functions of
20 Parliament. Article 90(1) of the Constitution further provides for Parliament to "appoint committees necessary for the efficient discharge of its functions." It should however be noted that although Article 79, among others, vests Parliament with the power to make laws, this does not mean that these laws are impervious to scrutiny from court. This is because under Article 137(3)
25 of the Constitution, the same Constitution also vests any person with power to challenge the constitutionality of any law that he or she believes contravenes or is inconsistent with the Constitution. The same Article also vests the Constitutional Court with power to hear and make determination on Petitions filed against any Act passed by Parliament under Article 79 which is allegedly

inconsistent with or in contravention of any provision of the Constitution. Thus, in my view, Article 79 is not absolute. It is subject to the Constitution.

Clearly, the above provisions read together, do not warrant the exclusion of the Constitutional Court from looking into matters reserved for Parliament on 5 the basis of the political question doctrine. Therefore, the arguments of the Attorney General that the Constitutional Court cannot inquire into matters reserved for Parliament is not supported by the clear provisions of Article 137(1) and (3) (a) of the Constitution.

Turning to this appeal, it is important to note that the role of Parliament was 10 never an issue in this Petition. The petitioners (now appellants) did not allege that any acts or omissions on the part of Parliament, to prompt the Constitutional Court to rule on the applicability of the political question doctrine determine this issue. Rather, the appellants were challenging the actions and omissions of the executive and its agents. Since the issue of the 15 political question doctrine vis-a-vis functions of Parliament was never raised by the Petition, it therefore follows that this part of the holding of the Constitutional Court cannot stand and should be set aside. This is because the Court ruled on an issue that was neither raised in the Petition nor canvassed during the parties' respective submissions on the preliminary objection.

20 Given my finding above, I would, therefore hold that the political question doctrine has limited application in Uganda's current Constitutional order and only extends to shield both the Executive arm of Government as well Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution. It goes without 25 saying that even in these circumstances, factual disputes will always come up where a private citizen challenges either the Executive or Parliament action or inaction and the resultant outcome of such actions and inaction in respect

to either institution's implementation of its respective constitutional mandate and whether such action or inaction contravenes or is inconsistent with any provision of the Constitution. It is my considered view that it was for this very purpose that the Constitutional Court was established and given powers under Article 137(1) and (3) to consider these allegations and determine them one way or another.

Indeed, the Constitutional Court has had no problem in the past in dealing with such kinds of problems before. For instance in ***Paul K. Semogerere & Anor. v. AG, [Constitutional Petition No. 5 of 1999]***, the Constitutional Court did not have any problem with striking out the Referendum and Other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution.

Recently, in ***Oloka-Onyango & 9 others v. AG, [Constitutional Petition No. 08 of 2014]***, the Constitutional Court once again struck out the Anti-Homosexuality Act 2014 on ground that it was passed by Parliament while it lacked the requisite quorum required.

Was the Constitutional Court correct and justified to strike out the appellants' petition without hearing its merits?

In refusing to hear the petition on its merits, the Constitutional Court held as follows:

> *"This court, while executing its duties, is bound to follow the principles of Constitutional interpretation laid out in Paul Kawanga Ssemwogerere & 2 others Vs Attorney General constitutional Appeal NO. 1 of 2001 (SC). The constitutional provisions must not be read and considered in isolation but as a whole so as to complement each other.*

…

It would appear to us that the petitioners to this petition have available remedies that they can pursue in the law we have pointed out, other than resorting to this petition, which calls upon us to resolve what we have appreciated to be a political question.

Further, we are also of the view that the petitioners who aver that they are being aggrieved by the respondent can apply for redress under Article 50 of the Constitution.

Accordingly, we do not find any competent questions set out in the petition that require interpretation of Constitution by this court. The acts and omissions complained of fall under the doctrine of "political question".

Article 20(2) of the Constitution provides as follows:

> "*The rights and freedoms of the individual and group enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.*"

Clearly this article does not exclude any institution, be it the Executive or Parliament from respecting, upholding and promoting the rights and freedoms enshrined under Chapter 4 of the Constitution. It therefore follows that where the Court is being called upon to look into whether certain laws, actions or omissions of Parliament are in contravention of Article 20(2) and/or any other provision of the Constitution, it would not be right for the Court to decline to consider the merits of the allegations made in the Petition, before it would be able to pronounce itself on the allegations made in the Petition filed under Article 137(3) of the Constitution.

Secondly, Article 137(3) permits Petitions to be based on allegations that the acts and omissions are inconsistent with the Constitution. Such a Petition can therefore be presented before the Constitutional Court, and should be entertained by the Constitutional Court irrespective of whether or not it would be upheld by the Constitutional Court after hearing it on its merits, provided the Petition discloses a cause of action as was defined by this Court in ***Serugo v AG* (supra)**.

In this particular case under consideration, the Constitutional Court was being called upon to inquire into the alleged acts and omissions of the Executive with respect to the delivery of maternal health services in the country and to make declarations if it was satisfied on the evidence before it that the allegations had been proven. The Constitutional Court was also requested to give redress if it found it appropriate or to refer the matter to the High Court to investigate and determine the appropriate redress.

All these matters were properly within the ambit of the powers vested in the Constitutional Court by Article 137 of the Constitution. Article 137 vests the Constitutional Court with the power and the responsibility to hear petitions lodged under it and to consider and determine whether there is any merit in the alleged violations of the Constitution as stated in the petition. In my view, the jurisdiction vested in the Constitutional Court is not discretional, but mandatory. Hence, the Constitutional Court cannot abdicate its duty to hear a Petition properly lodged before it on its merits and to make a determination whether or not to grant the declarations sought, as well as the redress, where appropriate.

Furthermore, it is my view that the Constitutional Court not only has the jurisdiction, but also the responsibility to construe such provisions, with a

view to determining whether the acts or omissions complained of are inconsistent with or contravenes the provision(s) in question.

Therefore, the fear that the Constitutional Court will transgress into areas reserved to the other arms of government was not warranted. The primary role of the Constitutional Court is to interpret the Constitution, and make declaration(s) where it finds that certain laws, acts or omissions are either inconsistent with or in contravention of some provisions of the Constitution. Inevitably, the Constitutional Court will, in the process of adjudicating these matters before it, evaluate both sides of the argument in order to reach a just decision.

My reasoning is fortified by the opinion of Justice Mulenga, JSC (as he then was) in ***Paul Semogerere & 2 ors v. the Attorney General, Constitutional Appeal No. 1 of 2002*** where while considering the role of the Constitutional Court, he held as follows:

> ***"Even where it is not possible to harmonize the provisions brought before it, the court has the responsibility to construe them and pronounce itself on them, albeit to hold in the end that they are inconsistent with each other. Through the execution of that responsibility, rather than shunning it, the court is able to guide the appropriate authorities, on the need, if any, to cause harmonization through amendment. In my opinion therefore, the decision that the Constitutional Court has no jurisdiction to construe or interpret any provision of the Constitution is misconceived and erroneous in law."***

I am further fortified in my reasoning by the following additional considerations. First, if this Court were to uphold the respondent's contentions to the effect that the political question in Uganda ousted the Constitutional Court's jurisdiction to inquire into the acts and omissions that

the appellants had alleged were inconsistent with or in contravention of the Constitution, all the acts and omission of the Executive will be beyond judicial scrutiny. The Constitutional Court may end up dealing with only constitutional violations of private actors. Such a result would run contrary to the clear language of the Constitution which clearly entrenched provisions intended to ensure that all the arms of the State and everyone, irrespective of whether he or she is acting in their official or private capacity, respects and upholds the Constitution.

Such a result would also run contrary to the letter and spirit of the Constitution which recognizes the doctrine of separation of powers of the three arms of government, while at as the same time building in a system of checks and balances between the Executive, the Legislature and the Judiciary.

Secondly, going by Black's Law Dictionary definition of a political question as "a question that Court will not consider because it involves the exercise of discretionary power by the executive or the legislative branch of government", it would be very difficult if not impossible for either the respondent to successfully argue that the questions/matters that were raised by the appellant's Petition to the Constitutional Court indeed raised a political question or several political questions.

It should be recalled that the appellant's Petition alleged, among others, omission to stock drugs and supplies, neglect of duty by the government's medical personnel, and inhumane treatment of expectant mothers. The Petitioners contended that these acts and omissions had resulted in an unacceptably high maternal mortality rate in the country. Could it be argued that it was part of Government policy to achieve the alleged actions and omissions! It should be noted that the Attorney General did not plead in defence of the Executive that the acts that the appellants complained of by its

health workers were in furtherance of the Government of Uganda policy of the delivery of Maternal Health Services in Uganda. Therefore, in as much as it is an undisputable fact that the constitutional mandate of the Executive covers the determination, formulation, and implementation of the maternal health policies in Uganda, there is no way the acts and omissions complained of by the appellants can be brought under the ambit of the Executive's mandate, to shield it from judicial inquiry.

The only allegation in the appellants' Petition that could be argued could possibly come under the political question doctrine was the allegation that failure to stock the necessary drugs was a result of inadequate budgetary allocation to the maternal health sector. But even with such an allegation in the Petition and even if the Constitutional Court believed that it may be raising a political question, I am still of the view that the Constitutional Court should have heard the parties and made a determination based on the merits or demerits of the Petitioner's claim and not struck out the Petition summarily without hearing them.

I therefore find that although the political question doctrine has some limited application in Uganda, in this particular case, the Constitutional Court erred in law when it abdicated its constitutional duty to hear the merits of the appellants' Petition before reaching the decision whether to allow or dismiss it on the political question doctrine.

I now wish to address myself to the Constitutional Court's reasoning that the Petitioners should have gone to the High Court. This, in my view, is a self defeating argument. If indeed the political question doctrine precluded the Constitutional Court from questioning government's actions or inaction, how then could the High Court exercise its powers under Article 50 or Section 33 of the Judicature Act or under the Government Proceedings Act, without being confronted with the political question issue in a similar manner?

As I have already observed, the jurisdiction of the Constitutional Court under Article 137 is not exclusive to just interpretation. (*Attorney General v. David Tinyefuza, (supra)*).

5 Other than making a declaration sought under Article 137(3), the Court may grant an order for redress under Article 137(4), if it considers that there is need to do so or refer the matter to the High court to investigate and determine the appropriate redress.

10 A petitioner cannot therefore be faulted for seeking redress under his or her Petition filed under Article 137(3). This is especially so, where the petitioner has in the petition sought for both a declaration and redress. Seeking redress does not make a Petition bad in law.

If the Constitutional Court felt that it could not grant any redress, it should 15 have dealt with the part of the petition seeking a declaration/interpretation and referred the matter of redress to the High Court. This is because the Constitutional Court has a legal and mandatory duty to adjudicate on any matter dealing with the interpretation of the Constitution.

20 It is not a requirement under the Constitution that in order for a person to seek redress, the Petitioner must have suffered a personal legal grievance. The petitioner, in my view, need not show that he or she has experienced or is experiencing or is under the threat of experiencing harm based on the challenged law, act or omission. The grievance extends beyond a petitioner 25 directly aggrieved by any act or omission to petition Court. On the other hand, seeking redress in the High Court presupposes that the petitioner suffered a grievance.

I would therefore find that although the political question doctrine has limited application in Uganda, the Constitutional Court erred in law when it struck out the appellants' Petition without hearing it on its merits on grounds that they had no jurisdiction and that the Petition raised political questions. I would therefore allow ground 1 and 3 of appeal.

Conclusion

In conclusion, I would allow the appeal and make the following Orders:

a) The Constitutional Court is directed to proceed and hear Constitutional Petition No. 16 of 2011 on its merits.

b) Given that it is not the fault of either party that the appellants' petition was not heard on its merits, coupled with the need for this country to develop its constitutional jurisprudence in the areas covered by the Petition, I would not make any order as to costs. Each party will therefore bear their respective costs.

Dated at Kampala this 30th day of October 2015.

HON. DR. ESTHER KISAAKYE

JUSTICE OF THE SUPREME COURT

29/1/2016

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(Coram: Katureebe, CJ, Tumwesigye, Dr. E. Kisaakye , JJSC; Dr. Odoki, Tsekooko, Okello, & Kitumba, Ag. JJSC)

CONSTITUTIONAL APPEAL NO. 01 OF 2013

Between

1) CENTRE FOR HEALTH, HUMAN RIGHTS & DEVELOPMENT
2) PROF. BEN TWINOMUGISHA
3) RHODA KUKIRIZA
4) INZIKU VALENTE ....APPELLANTS

AND

ATTORNEY GENERAL...**RESPONDENT**

Appeal from the ruling of the Constitutional Court (Mpagi-Bahigeine, DCJ, Byamugisha, Kavuma, Nshimye & Kasule, JJA) at Kampala dated 5th June 2012 in Constitutional Petition No. 16 of 2011

JUDGMENT OF G.M. OKELLO, AG. JSC

I have had the benefit of reading in draft the judgment of my learned sister, Justice Dr. E. Kisaakye, JSC; and I agree with her that the Constitutional Court should have heard the Petition and

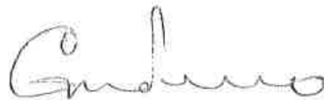
29/1/2016.

decided it on the merit one way or the other on the evidence available.

The Petition clearly alleges that certain acts and omissions of the Government and its workers in the health sectors are inconsistent with or in contravention of some named provisions of the Constitution. These allegations raise questions of Constitutional interpretation which fall within the jurisdiction conferred on the Constitutional Court by Clause I of Article 137 of the Constitution. See **Ismail Serugo Vs KCC & A.G; SCCA NO. 2 of 1998.**

I also agree with the orders she proposed.

Dated at Kampala this...30th...day of.......October............2015.



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G.M. OKELLO

AG. JUSTICE OF THE SUPREME COURT

29/1/2016

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

5

{Coram: *Katureebe, CJ., Tumwesigye, & Dr. Kisaakye, JJSC.; Dr. Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC.}.*

10

Constitutional Appeal No. 01 of 2013.

Between

15
1. CENTRE FOR HEALTH HUMAN RIGHTS & DEVELOPMENT.
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKIRIZA
4. INZIKU VALENTE

.... APPELLANTS.

Versus

20

ATTORNEY GENERAL. .... RESPONDENT.

{ Appeal from the ruling of the Costitutional Court at Kampala (Mpagi-Bhigeine, DCJ/ JCC, Byamugisha, Kavuma, Nshimye and Kasule, JJCC / JJSS.) dated 05th June, 2012 in
25 *Constitutional Petition No. 16 of 2011.}*

Judgment of J.W.N. Tsekooko, Ag. JSC. :–

This Constitutional Appeal is against the ruling of the Constitutional Court.
30 The Constitutional Court upheld an objection by the Attorney General about the competence of the petition instituted by the present appellants namely Centre for Health, Human Rights and Development, (1st Appellant), Prof. Ben. Twinomugisha, (2nd Appellant), Rhoda Kukiriza (3rd Appellant) and Inziku Valente (4th Appellant). The Constitutional Court struck out the
35 petition essentially because of its views that the issues raised are political questions. The four Appellants were dissatisfied with the decision and so they have now appealed to this Court.

29/2/2016.

I have had the benefit of reading in draft the judgment prepared by her Lordship the Hon. Lady Justice Dr. E. Kisaakye, JSC. I agree with her conclusions that the appeal be allowed and that the Constitutional Court should hear and determine the petition. I have also perused the well reasoned concurring judgment of the learned Chief Justice. I agree with his analysis. I agree with both their Lordships that each party should bear their own costs.

Delivered at **Kampala,** this 30th day of October, **2015.**

J.W.N. Tsekooko,
Ag. Justice of the Supreme Court.

29/1/2016.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE, C.J.,TUMWESIGYE, KISAAKYE, JJ.SC, ODOKI, TSEKOOKO, OKELLO, KITUMBA, AG. JJ.SC)

CONSTITUTIONAL APPEAL NO: 02 OF 2014

BETWEEN

1. CENTRE FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD)
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKIRIZA
4. INZIKU VELENTE

:::::::::::::::::::::::::::::::::::::: APPELLANTS

AND

ATTORNEY GENERAL :: RESPONDENT

[Appeal from the judgment of the Constitutional Court at Kampala (Mpagi-Bahigeine, D.C.J, Byamugisha, Kavuma, Nshimye and Kasule, JJCC) dated 05th June, 2012 in Constitutional Petition No. 16 of 2011]

<u>JUDGMENT OF TUMWESIGYE, JSC</u>

I have had the benefit of reading in draft the judgments of Hon. Justice Dr. Esther Kisaakye and the Chief Justice, Bart Katureebe, and I agree with them that this matter should go back to the Constitutional Court for that court to consider the petition on the merits.

I would therefore, allow the appeal.

I agree that each party should bear its costs in this court and in the court below.

Dated at Kampala this ....30th.......day of ....October.......2015

Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT

29/1/2016.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

CORAM: KATUREEBE CJ, TUMWESIGYE, KISAAKYE, JJ.S.C, ODOKI, TSEKOOKO, OKELLO, AND KITUMBA, AG. JJ.S.C.

CONSTITUTIONAL APPEAL NO.01 OF 2013

BETWEEN

1. CENTRE FOR HEALTH, HUMAN RIGHTS & DEVELOPMENT
2. PROF BEN TWINOMUGISHA
3. RHODA KUKIRIZA
4. INZIKU VALENTE

:::::APPELLANTS

AND

ATTORNEY GENERAL ::RESPONDENT

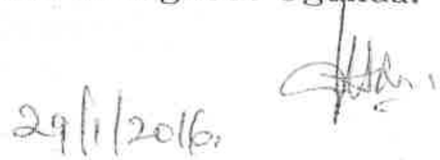
[Appeal from the ruling of the Constitutional Court (Mpagi Bahigeine, DCJ, Byamugisha, Kavuma, Nshimye and Kasule JJ.A) at Kampala dated 5th June 2012 in Constitutional Appeal. No.16 of 2011]

JUDGMENT OF KITUMBA, AG. JSC

I have had the benefit of reading in draft the lead judgment prepared by my learned sister Kisaakye JSC.

I agree with her reasoning and conclusion. The petition should be returned to the Constitutional Court for hearing and determination on merit and each party should bear its own costs.

I would, however, like to add for emphasis that the supremacy of the constitution is clearly provided for in Article 2 of the Constitution and that it has binding force on all authorities and persons throughout Uganda.



Article 137 of the Constitution gives the Constitutional Court the mandate to deal with all questions of constitutional interpretation.
Sub article 3 there provides:

(3) *A person who alleges that–*

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

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

This article has been interpreted to mean that when the petitioner alleges anything done by anybody or authority or any omission to be inconsistent with or in contravention of the provisions of the Constitution, the Constitutional Court has the jurisdiction to hear and determine the petition. See *Ismail Serugo versus Kampala City Council & Attorney General (Supreme Court Constitutional Appeal No 2 of 1998).*

In the instant appeal the petitioners alleged certain acts and omission of the government regarding the provision of maternal health services to be inconsistent with and in contravention of the constitution and quoted the allegedly contravened articles of the constitution. The petition which contained such pleadings was clearly within the jurisdiction of the Constitutional Court. The court had to hear and determine the petition depending on the evidence provided.

The Constitutional Court declined to hear the petition because of the political question doctrine.

I am of the considered view that whatever is done in Uganda by anybody or authority if it does not conform to the provisions of the constitution it can be challenged in the Constitutional Court. Hence the Constitutional Court has rightly looked into the proceedings of Parliament and declared as null and void Acts of Parliament which were passed without the required

quorum as required by law. See *Paul Semwogerere and Another Vs Attorney General Const Petition No.5 of 1999.*

The same is applicable to policy decisions made by the cabinet. In case such decisions are inconsistent with or in contravention of the Constitution they can be challenged in the Constitutional Court.

Dated at Kampala, this 30th day of October 2015.

C.N.B. KITUMBA

AG. JUSTICE OF THE SUPREME COURT

29/1/2016.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL APPEAL NO.01 OF 2013

CORAM [KATUREEBE C.J; TUMWESIGYE; KISAAKYE;ODOKI; TSEKOOKO; OKELLO; KITUMBA; JJSC]

1. CENTRE FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD)
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKIRIZA
4. INZIKU VELENTE .... APPELLANTS

VERSUS

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

An appeal from the judgment of the Constitutional Court before Hon. AEN Mpagi Bahigene, DCJ/JCC, Hon. Justice C.K. Byamugisha, JA/JCC, Hon. Justice A.S. Nshimye, JA/JCC and Hon. Justice Remmy Kasule, JA/JCC given at Kampala on the 5th day of June, petition No. 16 of 2011.

JUDGMENT OF KATUREEBE,CJ

I have read in draft the judgment of my learned sister Kisaakye,JSC and I agree with her that the appeal should

29/1/2016.

succeed and the matter be referred to the Constitutional Court to inquire into and determine the petition on the merits.

In my view, this appeal raises issues pertaining to the right to health and its rightful place within the Constitution of Uganda. Although the petition appears to have been clumsily drafted, nonetheless it does raise some issues that ought to be inquired into for possible constitutional interpretation.

The critical issue is whether under our Constitution courts can or may decline to exercise their jurisdiction on a matter because the determination of that issue has been committed by law to either the executive or the legislature.

The Constitutional Court in this case held that, the Constitution clearly streamlines the roles of each organ of government i.e the Legislature, the Executive and the judiciary under articles 79, 99 and 126 respectively. That the executive has the political responsibility to determine, formulate and implement policies of government which duty is the preserve of the executive and no person or body has the power to determine, formulate and implement the policies except the Executive.

The Constitutional Court went on to hold that the court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make review of some, let alone their implementation. That if the court determines the issues raised in the petition, it will be substituting its discretion for that of the executive granted to it

by law. The Court therefore upheld the preliminary objection of the petition could not be entertained under the political question doctrine.

Counsel for the Respondent held the same view as that of the Constitutional court. She added, that this court should not adopt a strict interpretation of the jurisdiction granted to the Constitutional court by Article 137 of the Constitution to mean that the Constitutional Court is obliged to determine any issue before it regardless of whether it calls for court to exercise powers of other arms of government. That to do so would undermine the separation of powers and thus the rule of law, leading to constitutional instability and anarchy.

Counsel for the Appellant on the other hand contended that the power of interpreting the entire Constitution is vested in the Constitutional Court under Article 137 of the Constitution. That under that article, all Acts of Parliament or other laws and things done under the authority of the law and all acts or omission by any person or authority (including omissions of the executive relating to health rights) are justiciable before the Constitutional Court. That the constitutional Court is not only authorized to hear such petitions but also obliged to resolve them. He submitted that the power of the court under the Constitution is so wide that it covers the entire Constitution and that no single article of the constitution is ring fenced from interpretation on account of the Political Question Doctrine.

Consideration of issues

Looking at the grounds raised in the memorandum of appeal which have already been set out in the lead judgment, and considering the submissions of both counsel, it would appear to me that the following are the issues for the determination by this court;

1. **Whether the political question doctrine is applicable under the Uganda Constitution.**

2. **If applicable, whether the Constitutional Court properly interpreted and applied the Political Question Doctrine**

Issue 1

Before delving into the issue whether the Political Question Doctrine is applicable in Uganda, it is imperative to first understand what the Political Question is, the origin of the Political Question Doctrine, what are the attributes of the doctrine and how the Courts over the years have applied it.

My learned sister has already cited the definition of "political question" by Black's Law Dictionary. Indeed even the Constitutional Court itself referred to that definition.

Political questions are:

> **"questions of which courts will refuse to take cognisance, or to decide on account of their purely political character, or because their determination would involve an**

encroachment upon the Executive or Legislative powers".

The Political Question Doctrine was first enunciated by the USA Supreme court in the case of **Marbury –vs- Madison 1 cr. 137 (1803)** (also cited by Sir Udo Udoma C.J, in Uganda v Commissioner of Prisons , exparte Matovu) where Marshall, C.J., stated:-

> **"The province of the Court is solely to decide on the rights of individuals, not to inquire how the executive , or executive officers , perform duties in which they have a discretion . Questions (which are) in their nature political or which are by constitution and laws, submitted to the executive can never be made in this Court".** (emphasis added)

In the case of **Baker –vs- Carr, 369 U.S. 186 (1962),** the US Supreme Court went at great length to explain the attributes of the Political Question Doctrine.

First of all, the court decided that the Political Question Doctrine is not concerned with whether the court lacks jurisdiction or not but rather on the appropriateness/ inappropriateness of any subject matter for judicial consideration- what it designated "nonjusticiability".

The court held at page 7 that;

> **"The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the court's inquiry necessarily proceeds to the point of**

deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction, either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art.III,& 2);or is not a "case or controversy" within the meaning of that section; or the cause is not one described by jurisdictional statute".

Secondly, the court explained the type of questions which fall under the category of the Political Question Doctrine. At page 12& 13 the court held that;

> **"Of course, the mere fact that the suit seeks protection of a political right does not mean it presents a political question.....In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also of satisfactory criteria for a judicial determination are dominant considerations....The non justiciability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed,**

is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical thread that make up the political question doctrine". (emphasis added)

The court went on to say that;

"It is apparent that several formulations which vary slightly according to the settings in which the question arise may be described a political question, although each has one or more elements which identify it as essentially a function of separation of powers. Prominent on the surface of any case to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standard for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the possibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiality on the ground of a political question's presence. The doctrine of which we treat is one of "political question" not one of "political cases". The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceed constitutional authority" (emphasis added)

What appears to come out of the above authorities is that the Courts will not decide on questions that are purely political and which the Constitution has reserved for determination by the other branches of government in their Constitutionally mandated discretion. But where rights of persons are involved and there is or has been a falling short of Constitutional requirement, then the Courts can not shy away. They must come in and interpret the Constitution.

In the Uganda case of **Attorney General v Major David Tinyefuza SCCA No. 1 of 1997 (unreported)** Kanyeihamba, JSC (as he then was) commented on the doctrine of Political Question and explained the extent to which courts should go in interpreting and concerning themselves with matters which are by the Constitution and law assigned to the jurisdiction and powers of parliament and the Executive.

Citing Luther –vs- Border 7 HOW 1 (1849) and Hirabayashi –vs- United States 320 US 81 (91-92) (1943) he noted that;

"The rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the legislature or the Executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the legislature and administrative decisions of the executive when challenged on the grounds that the rights or freedoms of the individuals are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.

......in Expate Matovu (op.cit) the supreme court of Uganda observed that in stating the rule in the American case of Marbury vs Madison (supra) and others like it, the explosion of legal principles on the wisdom of the courts resist the temptation of interfering in the matters outside their own normal jurisdiction cannot be faulted. The definition of the term "political" appears in the same passage and is said to be a question relating to the possession of political power of sovereignty of Government, the determination of which is based on congress, or in our case parliament, and on the president whose decisions are conclusive on the courts. The more common classifications of cases involving political questions include whether or not courts should demand proof whether a statute of the legislature was passed properly or not, conduct of foreign relations and when to declare and terminate wars and insurgences. These are matters that courts should avoid in

adjudicating upon unless very clear cases of violation or threatened violations of individual liberty or infringement of the constitution are shown

....the accepted principle is that courts will not substitute their own view of what is public interest in these matters especially when the other coordinate powers of government are acting within the authority granted to them by the constitution and law."

(emphasis added)

In my view, Kanyeihamba, JSC (as he then was) does not rule out the courts coming in to make Constitutional interpretation where the other branches of government act outside the powers granted to them by the Constitution. It would appear to me that the Court would inquire into the actions or omissions in question with regard to the provisions of the Constitution and decide whether those actions or omissions are within the power granted by the Constitution.

It would appear therefore that under the Political question doctrine, courts will only decline to exercise their jurisdiction, to hear and determine cases or issues whose resolution is committed by law to another branch of government and the resolution of which would involve encroaching on the executive or legislative powers and / or because those issues are not capable, for one reason or another, of judicial resolution.

I now wish to turn to and consider the relevant provision of the Constitution of Uganda.

Article 137of the Constitution of the Republic of Uganda provides that;

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

(3) A person who alleges that-

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

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

(4) Where upon determination of the petition under Clause (3) of this Article, the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may:

(a) grant an order of redress; or

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

(5) ....

(6) ....

(7) Upon a petition being made or a question being referred under this article, the Court of Appeal shall

proceed to <u>hear</u> and <u>determine</u> the petition as soon as possible and may, for that purpose, suspend any other matter pending before it." (emphasis added).

From the above Article, it is clear that any person who alleges that the government or any person or authority has done or omitted to do anything that is inconsistent with or in contravention of the Constitution, may petition the Constitutional Court for declaration to that effect, and for redress where appropriate.

The Constitutional Court is not only authorized to hear such petitions, it is equally obliged to resolve the issue.

The above article emphasizes that the Constitutional Courts doors should remain wide open for the people of Uganda to have access to it at all times for interpretation of the Constitution and declarations and redress where appropriate. This position was the decision of the Constitutional Court in the case of **Uganda Association of Women Lawyers & 5 others –vs- Attorney General**, Constitutional Petition No. 2 Of 2003 (the Judgment of S.G.Engwau, J.A) at page 3.

Therefore, no single article of the Constitution is ring fenced from interpretation by the Constitutional Court. All acts of parliament or other laws and things done under the authority of any law and all acts or omission by any person or authority, (which includes acts and omission of the executive in relation to rights under the

constitution) if brought before the Constitutional court for interpretation as to whether they are inconsistent with or in contravention of the Constitution become justiciable under Article 137 of the Constitution.

Now I should turn to the matters alleged in the petition and determine whether they indeed raise a political question which cannot be inquired into by the court. But before doing so, let me address the question of separation of powers under our Constitution as this was the basis upon which the Constitutional Court rejected this petition when it held that the matters contained in the petition raised issues of policy which was a preserve of the Executive and legislative branches, into which the court could not inquire.

There does not appear to be such a thing as absolute separation of powers between the executive, the legislature and the judiciary in any democratic society. What is required and provided for is a system of checks and balances. As indeed pointed out by the Supreme Court of India in the case of **S.P. Gupta –vs-President of India, (1982) 2 S.C.R.365 at 330,** coupling separation of powers with a system of checks and balances is the key to a viable democracy. For this reason, the judiciary should be an active participant in the judicial process ready to use law in the service of social justice through a proactive goal oriented approach.

Similarly, the South African Constitutional Court in the case of **Minister of Health –vs- Treatment Action Campaign, 2002 (5) SA 721 (CC)** recognized that while it is sensitive to and respects the separation of powers among the branches of government, it will not abdicate the primary duty of the courts to the constitution and law. The court further held that, to the extent that remedying a violation of individual right constitutes an intrusion into the domain of the executive that is an intrusion mandated by the constitution itself. The Court stated thus:-

> **"The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfill the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."**

Under our constitution, the responsibilities and functions are carefully demarcated between the three arms of the state.

Accordingly, Article 79 of the constitution provides, inter alia, that "**subject to the provisions of the Constitution,**

parliament shall have powers to make laws on any matter for the peace, order, development and good governance of Uganda" and, "**except as provided in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda without authority conferred by an Act of Parliament".** (emphasis added)

This has to be read together with article 137 of the Constitution. Even where Parliament has made law, the Constitutional Court has been vested with powers of review if a person alleges that the law is inconsistent with the Constitution. The political question doctrine and the separation of powers would not arise where the mandate has been given by the Constitution itself. An Act of Parliament will not be inquired into by the Court only if it is consistent with the Constitution.

Article 99 of the Constitution provides that **"the Executive authority of Uganda is vested in the President and shall be exercised in accordance with the Constitution and laws of Uganda."**

To me this means that as long as the President or those acting under his authority exercise their powers in accordance with the Constitution, the courts may not interfere with their actions. But the moment a person alleges that those actions or omissions are inconsistent with the Constitution, and then by constitutional command, the Constitutional Court must inquire into the

allegation and determine the issue. That would not be interfering in the powers of the executive. It would be part of the system of checks and balances and in fulfillment of the provisions of the Constitution which make the constitution supreme over every person, body or authority. In that type of situation, it is inconceivable that the government would plead the political question doctrine. The actions or omissions of the Executive are immune from judicial review ONLY in so far as they are made in accordance with the Constitution.

In the instant case the petition raises matters touching on the provision of medical services in this country. No one disputes that the Cabinet, under Article 111(2) of the Constitution, has the power and mandate **"to determine, formulate and implement the policies of the Government."** This includes the policies regarding the provision of medical services. At the same time the Constitution has provided for certain rights to citizens to access medical services.

Objective **No. XIV** the Constitution states as follows:

> **"The state shall endevour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that -**
>
> (c) *all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food, security and pension and retirement benefits."*

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Furthermore objective XX states as follows:

> *"The State shall take all practical measures to ensure the provision of basic medical services to the population."* (emphasis added)

If a citizen alleges that the implementation of that health policy or actions and omissions made under that policy are inconsistent with the provisions of the constitution as given above, then, in my view, the Constitutional Court has a duty to come in, hear the petition and determine whether indeed there is any act that is being implemented which is inconsistent with the Constitution. For example the court should be able to receive evidence on measures being taken by government to satisfy itself that they fall within the stated objective XX.

The court would have to interpret what amounts to *"all practical measures to ensure the provision of basic medical services."*

The court should also be guided by Objective I which spell out that *"the objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."* (emphasis added)

The court should, in my view, also have to consider Article 8A about the National interest which states that: ***"Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy."***

In paragraph 10 of the petition it is alleged that the acts and omissions stated therein are inconsistent with, inter alia, article 22 of the Constitution with regard to the right to life. In my view the Court would be within its mandate to look into those allegations and make an interpretation of article 22 i.e. what is meant by **"right to life"** in the context of that article, and in relation to the allegation.

I believe that the court would also have to address the provisions of the Constitution with regard to what constitutes ***"fundamental" and "other rights"*** under chapter 4 of the Constitution. In particular, the court would have to give an interpretation to article 20 (1) which states as follows:

(1) "Fundamental rights and freedom of the individual are inherent and not granted by the State."

Where does the right to medical services fall? Is it a fundamental human right that is inherent and not granted by the State?

In my view, the court would have to make the necessary interpretations of the above provisions of the Constitution.

To my understanding, the petition raises issues pertaining to what are called social rights. It calls upon the Constitutional

Court to give the right to health a place in the Constitution. This *cannot* be done without interpreting the Constitution.

What does it mean when the Constitution states that fundamental human rights are inherent and not granted by the State, and yet the petition is about the State failing to provide certain health services.

I do not agree with the Constitutional Court that these are not matters for Constitutional interpretation. I have already observed that the petition was clumsily drafted and is a mixed bag of all sorts of allegations.

There are matters such as alleged negligence or rude behavior or incompetence on the part of health staff which can appropriately be litigated in the High Court. There are known laws that can handle cases were servants of the government commit torts and the government can be sued under the Government Proceedings Act. It is inconceivable that any reasonable person would contend that the government would have a policy of recruiting and deploying negligent or rude officers. These persons found to be guilty of negligence or mistreating patients can even be disciplined under the laws of Uganda. This sort of allegation could not conceivably be one that calls for interpretation of the Constitution. The Constitutional Court would be right to reject that type of allegation. But the Court has to take care not to throw out the baby with the bath water, as the saying goes.

From the foregoing I am of the view that there is no matter done by the Executive or by the Legislature which may not be a subject of judicial review if it is not done in accordance with the provisions of the Constitution. It would appear to me therefore that the political question doctrine is of very limited application in Uganda, given the provisions of our Constitution.

Issue 2

The contention of the Appellants is that even if the Political Question Doctrine is applicable in Uganda, the Constitutional Court improperly interpreted and applied it.

They contend that the facts of this case do not fall within the category of cases regarded as nonjusticiable on the basis of the Political Question Doctrine, that the Constitutional court adopted an overly broad interpretation of the doctrine ignored the role of judicial review as an integral part of a system of checks and balances within our constitutionally designed government structure and that the Constitutional Court holding that all health care policy and public business is solely the discretion of the executive and legislature is found nowhere in the plain text of the constitution.

The contentions of the Respondents on the other hand are that the constitutional court correctly applied the Political Question Doctrine to the facts of this case because, the petition required the court to review the general performance of the maternal health sector and the propriety of government macroeconomic

policy of resource allocation to the maternal health sector vis-à-vis other sectors which in their view is the preserve of the legislature and the executive.

They also contended that the petition the way it is framed does not allow the court to adjudicate specific acts / omissions, but challenged unspecified incidents involving all health workers and unspecified expectant mothers in all hospitals in Uganda at any given time. That this is abstract and there is no judicially manageable standard to determine such allegations.

The Constitutional Court in their decision held that;

> **" We are in agreement with the Respondent's argument that the petition deals generally with all hospitals, health centers and the entire health sector and broadly cover all expectant mothers"**

The court further held that;

> **"Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with the guidance from the above discussion reluctant to determine the questions raised in the petition. The executive has the political and legal responsibility to determine, formulate and implement policies of government, for inter alia, the good governance of Uganda. This duty is a preserve of the executive and no person or body has power to**

determine, formulate and implement these policies except in the Executive.

This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let on, their implementation. If this court determines the issues raised in the petition , it will be substituting its discretion for that of the executive granted to it by law.

The court further held that;

> **"From the foregoing, the issue raised by the petitioners concern the manner in which the Executive and the legislature conduct public business/ issues , affairs which is their discretion and not of this court. This court is bound to leave certain constitutional questions of political nature to the executive and the Legislature to determine"**

With great respect to the Constitutional Court, I think they misunderstood what was required of the Court. I do not think the court was required to determine, formulate or implement the health policies of Government. In my view, the court is required to determine whether the Government has provided or taken **"all practical measures to ensure the basic medical services to the population."** In this case, it is maternity services in issue. The allegation by the petitioners is that the Government has failed to do so. If the Court says it has no Constitutional

mandate to hear and determine this allegation within the Constitution, then where does the citizen go.

In the South African case of **Minister of Health and others -vs- Treatment Action Campaign,** (supra), the Constitutional Court of South Africa, in order to enforce the Government's obligation under S.27(1) and (2) of the Constitution, made detailed orders to the government to ensure progressive realization of the rights of pregnant women and their new born children to have access to health services to combat mother- to- child transmission of HIV.

In the Indian case of **Pashim Banga Khet Mazdoor Samity& Ors -vs- State of West Bengal & Anor, (1996) AIR SC 2426 (Supreme Court of India)** the court in order to ensure that in future, proper medical facilities are available for dealing with emergency cases, the court issued detailed orders that cover policy and resource issues.

Finally, in the Tinyefunza case (supra) which was relied upon by the Constitutional Court to strike out the petition, Kanyeihamba JSC himself admitted that the courts will intervene and review legislative measures or administrative decisions when challenged on grounds that the rights or freedoms of individuals are clearly infringed or threatened.

The above authorities show that when issues of the State failing in its duty to the rights of citizens is brought before court for

interpretation the courts will not abdicate from determining such issues relying on the political question doctrine.

It is for the above reasons that I agree that this matter should go back to the Constitutional Court to consider on the merits and in the context of the relevant Constitutional provisions.

I would also agree that each party bears its own costs as this is a matter of great public interest.

As the rest of the court agree, the appeal is allowed. The matter is remitted to the Constitutional Court to determine on the merits. Each party shall bear its own costs in this court and in the court below.

Delivered at Kampala ...30th... Day of ....October 2015

Bart M. Katureebe

CHIEF JUSTICE

29/1/2016.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE CJ, TUMWESIGYE, KISAAKYE JJ. SC; ODOKI, TSEKOOKO, OKELLO, AND KITUMBA AG JJ.SC)

CONSTITUTIONAL APPEAL NO 01 OF 2013

BETWEEN

1. CENTRE FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT (CEHURD)
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKKIRIZA
4. INZIKU VALENTE

} :::::::::::::APPELLANTS

AND

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

[Appeal from ruling of Justices of the Constitutional Court (Mpagi-Bahigeine, DCJ, Byamugisha, Kavuma, Nshimye, Kasule, JJ.A) dated 5th June, 2012 in Constitutional Petition No 16 of 2011]

JUDGMENT OF DR ODOKI AG JSC

I have had the benefit of reading in draft the judgment prepared by my learned sister, Dr. Kisaakye, JSC, and I agree with her judgment and the orders she has proposed.

Dated at Kampala this 30th day of October 2015

Dr B J Odoki
AG JUSTICE OF THE SUPREME COURT

29/1/2016