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

CORAM: (S.T. MAYINDO, DCJ, G.M. OKELLO, J. A.E.M. BAHIGEINE, J. J.P.M. TABARO,J. & F.M.S. EGONDA-NTENDE,J.)
CONSTITUTIONAL CASE NO.2 OF 1997
BETWEEN

1. SALVATORI ABUKI

2. RICHARD ABUGA:: PEETITIONERS

AND

THE ATTORNEY GENERAL ::. RESPONDENT

JUDGMENT OF MANYINDO - DCJ

The Petitioner, Salvatori Abuki and one Richard Obuga brought this petition challenging their convictions under the Witchcraft Act. They were tried separately in the Grade II Magistrate's Court of Aduku in Lira District. Salvatori was charged in one count with practicing witchcraft on Albatina Agol, Okai Alisandoro and David Ongola contrary to section 3(3) of the Act. He pleaded guilty, was convicted and sentenced to 22 months imprisonment. In addition he was banished from his home for 10 years after serving the sentence of imprisonment. Clearly, he should have been charged in three separate counts, one for each of the complainants.

Richard Obuga was convicted of being in possession of articles used for witchcraft, contrary to section *5(1)* of the Act in the first count and with practicing witchcraft contrary to section 3(3) of the Act in the second count. He was sentenced to 36 months imprisonment on the first count and 24 months imprisonment on the second count. The sentences were to run concurrently. An exclusion order for 10 years was also made against him. Their appeals to the Chief Magistrate's Court failed.

The two men then brought this petition for declarations:-

"(i) that the witchcraft Act Cap 108 Laws of Uganda ,and
(ii) the convictions sentences and exclusion orders
thereof, are inconsistent with the Constitution Articles 21(1), 28(1),
28(12), 24, 44, 26 and 29(1) (b) - (c) and 29 (2)."

And for the grant of an order

“quashing the convictions, setting asides the
sentences and the exclusion orders and setting
the petitioners free OR refer the matter to the
High court to investigate and determine an appropriate redress.”

Article 21(1) states that all persons are equal before the law regardless of their standing in society. Article 24 prohibits the subjection of a person to any form of torture, cruel, inhuman or degrading treatment or punishment. Under Articles 26 every person has a right to own property which must not be taken away from him or her except in specified circumstances and even then after that person has been fairly and adequately compensated for the loss Article 28 (1) guarantees a right to a fair hearing before Courts and other tribunals established by law. Article 28 (12) provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law. Under Article 29 (1) (b) and (c) freedom of thought, conscience and belief and religion is guaranteed while under Article 29(2) every Ugandan has the right to reside and settle anywhere in Uganda; to have a Passport or other travel document and travel in and out of Uganda.

Finally, Article 44 prohibits derogation from particular human rights and freedoms to wit (a) freedom from torture, cruel, inhuman or degrading treatment or punishment, (b) freedom from slavery or servitude (Article 25 (1), (c) the right to fair hearing and (d) the right to an order of habeas corpus (Article 23 (a)).

The petition which was accompanied by an affidavit sworn by the petitioner on 3 1/1/97 was amended, with leave of court. The grounds of the petition state as follows: -

“1. Your petitioners are persons having interest in or are affected by the following matters being inconsistent with the constitution whereby your petitioners are aggrieved.

(a) that the Witchcraft Act Cap. 108 Volume IV Laws of Uganda, is inconsistent with the constitution for it: -

(i) creates the offence of practicing witchcraft in S. 3 (3) and possession of any article used in witchcraft, *5* (1).

(ii) Provides for banishment of a convict from his home area for a period often (10) years after serving a custodial sentence, and

(b) that the Magistrate Grade ii of Aduku Magistrate’s court in convicting the Petitioners under the Witchcraft Act, sentencing them, and excluding the petitioners from their home area after

serving the sentence, and the Chief Magistrate in dismissing their appeals and confirming the said convictions, sentences and exclusion orders, under the authority of the Witchcraft Act, were both in contravention of the Constitution.
(c) that the said convictions, sentences and exclusion orders are inconsistent with or in contravention of provisions of the Constitution namely articles 21(1), 21(2) 28 (1), 28 (12), 24,44,26,29, (1) (b) - (c), and 29 (2).
2. Your petitioners state that by convicting, sentencing and banishing them from their home areas their constitutional rights are being infringed, in that:

(a) their right to a fair hearing, enshrined in article 28(1) was infringed by being charged and tried under a law which is vague and lacked precision.

(b) they were convicted of a criminal offence which is not de fine in contravention of article 28 (12) of the constitution.
(c) the penalty of exclusion orders placed on them subjects them to inhuman and degrading treatment which is inconsistent with articles 24 and 44 of the Constitution.
(d) their right to reside and settle in any part of Uganda, en shrine in article 29 (2) of the Constitution is being in fringed.

(e) in breach of article 26 of the Constitution, the petitioners are being deprived of their properties; immovable and moveable without compensation, and the said Witchcraft Act makes no provision for the petitioner’s access to court.
(f) the Witchcraft Act S.5 (1) thereof contravenes the anti - discrimination provisions enshrined in articles 21(1) of the
Constitution.
(g) the Witchcraft Act violates freedom of thought, conscience
and religion guaranteed by article 29 (1) (b) - (c) of the constitution.

3. WHEREFORE your petitioners pray that the court may: (a grant a declaration.
(i) that the witchcraft Act Cap 108 Laws of Uganda, and

(ii) the convictions, sentences and exclusion orders thereof.
Are inconsistent with the Constitution articles 21(1) 28 (1), 28

(12)24, 44, 26, and 29 (1) (b)-(c) and 29(2).
(b) grant an order quashing the convictions, setting aside the sentences and the exclusion orders and setting the petitioners free OR refer the matter to High Court to investigate and determine an appropriate redress.
(c) grant costs of this petition to the Petitioner".
The respondent's answer to the petition was (a) that the Witchcraft Act is not inconsistent with the provisions of the Constitution (b) that the exclusion orders are penalties of prescribed offences and therefore do not contravene Articles 29 (2) and 26 (2) of the constitution, (c) that the petitioners have not been deprived of their property without compensation as contemplated under Article 28 (12) of the constitution and (d) that in any case, the petitioners had a right of access to court by way of an appeal against conviction or sentence or both and or should not have come to the constitutional court.
Sadly Richard Obuga passed away at Murchison Bay Prison Luzira a day after the hearing of his petition had started. Accordingly, his petition abated under rule 15 of the Modifications of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions 1996 (Legal Notice No. 4 of 1996.

Counsel for the petitioner framed the following issues which were accepted by the counsel for the respondent:

(1) whether the Witchcraft Act and in particular the provision for the exclusion orders in section 7 infringes or is inconsistent with Articles 24, 26 (2), 29 (2) and 44 of the Constitution,
(2) If the answer to (1) is no, can the conviction of the appellant be maintained in view of the provision in Article 28 (12) of the Constitution?
(3) whether the petitioner was afforded a fair trial or hearing under Article 28(1) of the Constitution.
(4) whether the Witchcraft Act infringes Article 21 of the Constitution which Article guarantees to all persons equality and freedom from discrimination.
Mr. Emoru who presented the petitioner's case argued that the offence of witchcraft is not defined in the Witchcraft Act which contravenes Article 28 (12) of the Constitution. According to him only acts of witchcraft are spelt out in section 3 of the Act which states:

“3 (1) Any person who directly or indirectly threatens another with
death by witchcraft or by any other super natural means shall be guilty of an offence and on conviction shall be liable to imprisonment for life.
(2) Any person who directly or indirectly threatens to cause disease or any physical harm to another, or to cause disease or harm to any livestock or harm to any property of whatever sort of another by witchcraft or by other supernatural means shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding ten years.
(3) Any persons who practices witchcraft who holds himself out as a witch, whether on one or more occasions, shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding five years.”
(4) …….
In Mr. Emoru’s view, section 3 quoted above is vague - it does not create an offence. It follows that the petitioner was tried on an undefined offence which means that he was not given a fair trial. This contravened Article 28 (1) and (12) of the Constitution.
With regard to the exclusion orders Mr. Emoru contended that the provision for same in section 7 of the Act is inconsistent with Articles 24 and 44 of the Constitution in that banishment is inhuman, cruel and degrading punishment, as it deprives the convict of food and shelter which are essential to life. The person concerned is made homeless and destitute. Yet derogation from the enjoyment of the freedom from cruel, inhuman or degrading treatment of punishment is prohibited by Article 44 of the constitution. Mr. Emoru argued that banishment, which he thought, wrongly in my view, amounted to some form of internal deportation, offends Article 29 (2) (a) of the Constitution which permits every Ugandan to move freely throughout Uganda and to live anywhere in Uganda.

It was also argued that the exclusion order would mean that the petitioner would lose control of his house and other property - it would amount to an indirect deprivation of property without compensation which would violate Article 26, of the Constitution.
A submission under ground 2 (f) of the petition on the basis that the Witchcraft Act was discriminatory in that the offences therein related to men only was abandoned when it occurred to counsel for the petition that that was not the position. Also the ground alleging violation of thought, conscience and religion by same provisions of the Witchcraft Act was abandoned

because under section 2 of the Act witchcraft does not include among others, bonafide spirit worship.

For the respondent it was submitted by Mr. Tumwesige, the Director of Civil litigation in the respondent' chambers that the Witchcraft Act is not inconsistent with any provision of the Constitution. He maintained that the offence of witchcraft is well defined in section 3 of the Act. He referred us to the definition of "witchcraft" in the Shorter Oxford English Dictionary as "the practices of witch or witches; the exercise of supernatural power supposed to be possessed by persons in league with the devil or evil spirits" In his view the exercise of supernatural powers amounts to witchcraft under section 3 (1) and (2) of the witchcraft Act. The details of the witchcraft can only be seen by the trial Court from the evidence to be adduced by the prosecution. The petitioner was therefore properly and fairly tried and convicted of a known offence.

Regarding the exclusion or banishing order, Mr. Tumwesige contended that such an order is part of the sentence and that it does not violate the right to live anywhere in Uganda as that right applies only if one has not committed an offence for which there is a prescribed sentence. Here he relied on Article 23 (1) (a) which provides thus: -

"23 (1) No person shall be deprived of personal liberty except in any of the following cases.

(a) in execution of the sentence or order of a court,

whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court".

On the question of deprivation of property, Mr. Tumwesige submitted that the petitioner's property, if he had any, was left intact by the exclusion order. The order merely meant that the petitioner would not enjoy the use of that property during the period of banishment just as he would not use the property during his period of incarceration about which he was not complaining.

As this Court observed in: **Tinyefuza vs Attorney General, Constitutional** Petition No. 1 of 1996, (unreported) the rules applicable to interpretation of statutes apply to construction of Constitutional Provisions but that a Constitution should be given liberal construction, unfettered with technicalities with regard to human rights and freedom. I find the observation by Lord

Diplock in Attorney **General of the Gambia vs Modon Jobe (1984) A.C689 at 700** (Privy Council he point. He said:

"A constitution, and in particular that part of it which protect and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

With these principles in now turn to the issues raised in the grounds of the petition. They can be summarised as follows:

(1) whether the petitioner was convicted of a defined offence. carrying a prescribed sentence;
(2) if the answer to (1) is in the negative, whether the petition was denied a fair hearing;
(3) whether the exclusion order is cruel, inhuman and degrading punishment; **V**
(4) whether the exclusion order amounted to depriving the petitioner of his property without compensation;
(5) whether the petitioner is entitled to the declarations sough:

Section 3(3) of the Witchcraft Act under which the petitioner was charged and convicted has been set out above. Clearly the section prescribes the sentence for the offence. The offence carries a maximum sentence of five years imprisonment. Therefore the main question in the issue No. 1 is whether the offence of witchcraft is a defined offence for the purpose of Article 28(12) of the Constitution. The word offence is not defined in our law. The word seems to me to be of no fixed or technical meaning. It denotes an act contrary to, offending against, and punishable by4 law but particularly one made by statute rather than by common law, the latter being usually called crimes and also particularly one punishable on summary conviction. Obviously the distinction between crimes and offences is a matter of common usage of words rather than of legal definition. Thus, the usual terminology is of "road traffic offences."

The word witchcraft is not defined under the Witchcraft Act. Section 2 of the Act which is the interpretation section simply states that for the purposes of the Act, witchcraft does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines. In the Concise Oxford Dictionary witchcraft is defined as "sorcery, the use of magic." And in the Webster Dictionary a witch is defined as "one who practices the black art or magic, one regarded as possessing supernatural or magical power by compact with an evil spirit, especially with the Devil; a sorcerer or sorceress." It seems clear to me from the above that witchcraft is an inherent

mysterious power of certain weird and peculiar people to do harm to others.
In the instant case the charge against the petitioner was drawn as follows:

STATEMEN OF OFFENCE

PRACTICING WITCHCJAFT C/S 3 (3) OF WITCHRAFT ACT

PARTICULARS OF OFFENCE

SALVATORI ABUKI ON THE **4TH** DAY OF DECEMBER 1995 AT AGWENYERE "B" AORNGA PARISH NAMBIE CO SUBCOUNTY ,KWANIA COUNTY IN APACH DISTRICT PRACTICED WITCHCRAFT ON ALBATINA AGOL, OKAI ALISANDORO AND DAVID ONGOLO"

In my view the above charge is not different from say that of murder where the indictment usually states as follows:"

STATEMENT OF OFFENCE

MURDER, Contrary to section 183 of the Penal Code.

PARTICULARS OF OFFENCE

CD, on the --- day of---- 199—at x village in the District, murdered Y."

For the ingredients of the offence one has to look elsewhere. In the case of witchcraft, I am of the opinion that section 3 has to be read together with section 6 which states:

"Notwithstanding the provisions of any law or practice to the contrary, where any person is charged with the commission of an offence under the provisions of this Act, evidence may be adduced.

(a) to show the reputation of such person as a witch;
(b) to establish that by common repute any substance, means, process or ceremony proved to have been administered, used or performed, or attempted or caused or advised to be administered, used or performed, is commonly administered,
used or performed in the practice of witchcraft".

In the premises I can not agree that the petitioner was convicted of an undefined offence. It may well be that the particulars of offence should have indicated the acts of witchcraft which were

practiced on the complainants to enable the petitioner fully prepare his defence to the charge but that does not mean that the offence does not exist. What happened in this case is that after hearing the testimony of the three prosecution witness the petitioner changed his plea of not guilty to one of guilty. The prosecutor then relied on the facts as stated by the first witness which showed that the petitioner had practiced witchcraft on the complainants with use of a tortoise, goat horns and other substances contained in a pot and a gourd The petitioner accepted those facts as correct whereupon he was convicted and sentenced. In the circumstances I do not see how it can be said that he was not accorded a fair trial. I would therefore answer the first two issues in the negative.

I will consider the third and fourth issues together which relate to the exclusion order. Under section 7(1 (of the Act the trial Court may, in addition to or in lieu of the custodial sentence, make an exclusion order in relation to the convicted person. Here the trial Magistrate made the exclusion order in these terms:

"As the law stands now, he is to be banned for 10 years from that
home after serving his sentence."

It is clear that the trial Magistrate thought that it was mandatory to make the exclusion order. That is not so. Be that as it may, the order has been attacked on the ground that it is cruel, inhuman and degrading and, therefore, is inconsistent with the Constitution. It is true that this sort of treatment and or punishment generally outlawed under Article 24 of the Constitution. It is a good provision given the sad experience this Country went through when innocent Citizens were subjected to untold suffering of torture and degradation at the hands of fascist and dictatorial regimes. However, Article 24 must be read together with Article 23 which clearly limits or restricts the liberty of an individual in that it permits Courts of law to pass sentences and orders that deprive an individual of such liberty. And so in my view Article 44(a) which provides that there shall be no derogation from the freedom from torture, cruel, inhuman or degrading treatment, must mean that there shall be no derogation from the rights and freedoms specified therein except by a sentence or order of Court.

To hold otherwise would mean that a sentence of death, imprisonment or corporal punishment, among others, would be unconstitutional. This would render certain provisions of the Constitution meaningless. For example, under Article 22(1) a person may be deprived of life in

execution of a sentence passed by a competent court after a fair trial, and after the sentence has confined by the final court of Appeal. Article 23(8) envisages a sentence of imprisonment and empowers the trial court to take into account the period the convict has spent on remand before conviction when assessing sentence. Then there us Article 25(3) (a) which allows courts to pass sentences which require the convict to perform forced labour. Finally, there is Article 43 which provided s for general limitations of fundamental and other human rights and freedoms. Under that article the enjoyment if rights and freedoms prescribed in chapter 4 of the constitution may be limited in the public interest provide that the limitation does not go beyond what is acceptable in a free and democratic society, or what is provided in the constitution.

Clearly the constitution does recognize the fact that it is in the public interest to punish criminals who have been fairly tried and found guilty by the courts. People who commit crimes must not expect to be treated with kid gloves. They must expect to receive sentences that fit the offence they have committed. The sentence may be cruel, inhuman and degrading but they are lawful even under the constitution. Such sentences are accepted even in greater democracies such as the United States of America and the United Kingdom. They are a necessary evil. That is why the framers of our constitution retained them. I think that real point is that the Uganda of today no one, except the courts of law, may punish a person in a manner that is cruel, inhuman and degrading.

The exclusion order restricted the petitioner's right, under Article 29 (2) (a) to move freely throughout Uganda and to reside and settle in any part of Uganda. In my view that right can only apply if one has not committed an offence for which there is a prescribed sentence. In the case before us the exclusion order is part of the sentence under the Witchcraft Act. It is therefore lawful under Article 23 of the Constitution.
I do not agree that the order deprived the petitioner of his property without compensation. Under article 26 (2) of the Constitution no person may be compulsorily deprived of property or any interest in or right over property except in circumstances specified in the Article and even then fair and adequate compensation must be paid before the property is taken away. In this case the exclusion order does not and could not take away the petitioner's property. All it does is to temporarily inconvenience him in that he could not live in his house during the pendency of the order. It is a generous order in that it does not when it could, prohibit the petitioner from living

elsewhere in the village. He can have access to his food crops if any, through his family or friends since the order does not, when it could prohibit communication between him and such people.

The Witchcraft Act may have outlived its usefulness but in my view it is not in consistent with the Constitution. In the result I would not grant the declarations sought and instead would declare:

(a) that section 2,3 and 7 of the Witchcraft Act are not inconsistent with Articles 21(1) 24, 26, 28, (1)28 (12), 29(1) & (2) and 44 of the Constitution.

I would therefore dismiss the petition and order that each party meets its own costs of the petition. But in accordance with the majority opinion, it is ordered that the following declarations shall issue: -

1. The sections interpreting witchcraft, that is sections 2 and 3
of the Witchcraft Act are void for being vague and ambiguous and do not meet the requirements of Article 28 (12) of the constitution.

2. As a result of (1) above the petitioner was not afforded a fair trial as the offence was unknown. Articles 28 (12) and 44 11 (c) of the Constitution were contravened.

3. The exclusion order is unconstitutional because it threatens f the petitioner's life by depriving him of the means of subsistence and deprives him of access to his property. Hence it is inhuman, as it is a threat to life, and contravenes Articles 24, 44 (a) of the Constitution. By depriving the petitioner of access to his property, the exclusion order contravenes Artie 26 of the Constitution as well;

4. The petitioner is entitled to immediate release from custody

It is also ordered that the respondent shall pay the costs of the petitioner.

DATED AT KAMPALA this 13th *Day* of June 1997

S. T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGMENT OF OKELLO J.

This Petition challenges the Constitutionality of the Witchcraft Act Cap. 108 in particular section 7 thereof. This section provides for exclusion order.

The Petition was jointly brought by two Petitioners. But the 2nd Petitioner Richard Obuga died before the hearing on the Amended Petition began. His petition naturally abated in terms of rule 15 (1) of the modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996 (Legal Notice No. 3 of 1996). This judgment is therefore in respect of the Petition of the 1st Petitioner only. He shall hereinafter be referred to as the Petitioner.

The Petitioner Salvatori Abuki hails from Agwenyere 'B' village Aoranga Parish, Nambieco sub-county, Kwania County in Apac District. He was arrested on a date he could not remember on a complaint of witchcraft and was taken to the Gombolola Head Quarters and detained. On 7/12/95 he was taken before a "magistrate Grade 11 at Aduku where he was charged with practicing witchcraft contrary to section 3 (3) of the Witch craft Act. He pleaded not guilty. On 2nd January 1996 in the course of the hearing of his case, the petitioner changed his plea to that of guilty and he was accordingly convicted and was sentenced to 22 months imprisonment. In addition to that sentence he was

banished from his home for 10 years after serving the prison sentence. His appeal to the Chief Magistrate court was dismissed. Hence this petition

The petition alleges that the conviction, sentence and exclusion order are inconsistent with or in contravention of Articles 21 (1) 21 (2), 28 (1) 28 (12), 24 and 44, 26, 29 (1) b—c and 29 (2) of the Constitution of Uganda 1995. In the Petition the following grounds were set: -

(a) that his right to a fair hearing enshrined in article 28 (1) of the Constitution was infringed by being charged and tried under a law which is vague and lacked precision.

(b) that he was convicted of a criminal offence which is not defined in contravention of article 28 (12) of the constitution.

(C) that the exclusion order placed on the petitioner, subjects him to inhuman and degrading treatment which is inconsistent with articles 24 and 44 of the constitution.

(d) .that the petitioner's right to reside and se1tle in any part of Uganda enshrined in article 29 (2) of the constitution is being infringed.

(e) that the petitioner is being deprived of his properties movable and immovable without compensation and the said witchcraft Act makes no provision for the petitioner's access to court in contravention of article 26 of the constitution.

(f) that the right to non-discrimination enshrined in article 21 (1) of the constitution is infringed by section 5 (1) of the Witchcraft Act.

(g) that the right to freedom of thoughts, conscience and Religion guaranteed by Article 29 (1) (b-c) of the constitution is being violated by Witchcraft Act.

The petition was supported by the affidavit sworn by the petitioner on 31/1/97. The position taken by the petitioner in that affidavit is that he did not understand the charge under which he was convicted and that he believed •the exclusion order made against hint deprived him of his 'properties and denied him the right to reside and settle in any part of Uganda.

The Respondent filed an Answer to the petition. In the answer, the Respondent denied that witchcraft Act Cap. 108 is inconsistent with any provision of the constitution or that exclusion order is in contravention of articles 26 (2) and 29 (2) of the Constitution. He contended that exclusion order is consistent with article 28 (12) of the constitution it being part of a penalty prescribed by law.

The answer to the petition was supported by an Affidavit of one Angela Kiryabwire a State

Attorney sworn on 20th of February 1997. The affidavit denied that exclusion order contravenes any of the stated articles of the constitution.
At the commencement of the hearing, the following issues were agreed on for determination of the court:

(1) whether the Witchcraft Act Cap. 108 especially the provisions relating to exclusion order section 7 thereof infringes : -
(a) articles 24 and 44
(b) article 29 (2)
(C) Article 26 (2) of the Constitution.
(2) If the answer to 1, (a) is in the negative, is section 7 of the Witchcraft Act justified on the basis of Article 28 (12) of the Constitution and or Parliamentary Power to prescribe Penalties.

(3) Whether the Petitioners were accorded fair trial guaranteed under article 28 (1) of the constitution at the trial.
(4) Whether the witchcraft Act infringes article 21 of the constitution.
During the hearing, counsel for the petitioner did not pursue the ground relating to issue No. 4 and 1 (b).
On whether the Witchcraft Act especially section 7 thereof infringes.
(a) Articles 24 and 44 and
(b) Article 26 (2) of the Constitution,
Mr. Emoru submitted that the exclusion order subjects the petitioner to inhuman treatment or punishment because it deprives him of shelter, food and other basic necessities for life. By making the petitioner homeless without the state providing for him shelter and food, Emoru argued, the order becomes inhuman and therefore violates articles 24 and 44 of the constitution. He cited constitutional reference by Marobe provincial Government (1983) CRC (Const. 642. He also sought to rely on Article 25 of the universal protection of human rights adopted and proclaimed by the General Assembly Resolution 217 (111) of 10th December, 1948.

The article states that:-

Every one has the right to a standard of living adequate for the health and well—being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

He submitted that under section 7 of the Witchcraft Act, once exclusion order takes effect, the petitioner loses food and shelter.

Mr. Emoru further contended that though exclusion order does not expressly order the acquisition or destruction of the petitioner's properties, its effect is to deprive the petitioner of his properties without compensation in violation of article 26 of the constitution. For authority he cited (1) The Queen v. Big N Drug Mark Ltd. (others Intervening 1986 LRC (Const. 332;

(2 Society United and others vs. Government of Mauritius; Marine Workers Unira and others vs. Mauritius Marine Authority and others (1985 1 ALL ER 864.

The Respondent's case was that, exclusion order is part of a sentence prescribed by law. It is consistent with article 28 (12) and 23 (1) (a) of the Constitution and therefore is not inconsistent with articles 24 and 44 of the constitution.

On deprivation of the petitioner of his properties, Mr. Tumwesige contended that exclusion order did not compulsorily deprive the petitioner of his properties and therefore does not infringe article 26 (2) of the constitution.

Our task in this petition is to determine the constitutionality of Witchcraft Act Cap. 108 particularly section 7 thereof. It is therefore relevant at this point to set out the principles applicable to determine whether a statute is unconstitutional. In this connection, it is instructive to refer to other jurisdictions. In Canada, the Supreme court unanimously adopted in The Queen v. Big M Drug Mart Ltd. (Other Intervening above, the "purpose and effect" principle. Under this principle, court would consider both the purpose and effect of an impugned statute to determine its Constitutionality. If the purpose of the statute infringes a right guaranteed by the Constitution, that statute is declared unconstitutional. Where the purpose of the statute is purportedly within the constitution, court would go further to examine its effects. If the effects violates a right guaranteed by the constitution, that statute is also declared unconstitutional.

In The Queen v. Big M Drug case above, the issue for determination was whether the Lords day Act which prohibited sales on Sundays infringed the right of freedom of conscience and Religion

guaranteed by the Canadian Charter of Rights and
Freedoms. The Attorney General of Alberta conceded that the Act was religious in its purpose but contended that it is not the purpose but the effects of the Act alone which are relevant to determine its constitutionality. The Chief Justice who wrote the leading judgment rejected that view in these words.

“I can not agree, in my view both purpose and effects are relevant in determining constitutionality; either unconstitutional purpose or an unconstitutional effect can invalidate legislation”.

The learned chief Justice explained his view in the following words -

“All legislation is animated by an object the legislature intends to achieve. This object is raised through the impact produced by operation and application of the legislation. Purpose and effect respectively in the sense of the legislations object and its ultimate impact are clearly linked if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation’s object and thus its validity”.

Purpose and effects of a statute are indivisible and are both relevant considerations in determining constitutionality of a statute.

The application of the “purpose and effect” principle also featured in an American case of MCGowan vs. Mary Lane 366 US 420 6 LBD 393 (196l. In that case the court was considering whether a statute similar to The Lords Day Act of Canada was unconstitutional. Chief justice Warrant expressed the approach to determine that question in these words,

“We do not hold that Sunday Legislation may not be a violation of the “Establishment” clause if it can be demonstrated that its purpose evidenced either on the face of the legislation in conjunction with its legislative history or in its operative effects -

-- is to use the state” coercive power to aid religion”.

That “Purpose and effect” principle to determine the constitutionality of a statute is quite persuasive. I propose to adopt it in this case.

Turning to the case at hand, the petitioner’s case was that exclusion order is inhuman and therefore violates articles 24 and 44 of the constitution. Article 24 provides that,

“No person shall be subjected to any form of torture, cruel; inhuman or degrading treatment or punishment”.

That article prohibits any torture or treatment or punishment which is inhuman or degrading. This aimed at upholding the birth right to dignity and freedom from torture, cruel or inhuman treatment or punishment of citizens as human being.

Article 44 of the constitution provides that,

“Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:

(a) freedom from torture cruel, inhuman or degrading treatment or punishment.
(b) freedom from slavery or servitude.
(c) the right to fair hearing.
(d) the right to an order of habeas corpus”.
That article noticeably reinforces article 24 by prohibiting derogation of those rights and freedom. That shows the importance the legislature took to ensure the dignity of mankind.
It was submitted by Mr. Emoru that exclusion order is inhuman. What is “inhuman”. There is no judiia1 definition of that word. The shorter Oxford English Dictionary definition of the word “inhuman” includes not having the qualities proper or natural to human being, destitute of natural kindness or pity, brutal unfeeling. Because of the difficulties in ascertaining t1he exact meaning1 of the word, courts in other jurisdictions have resorted to illustrate the meaning by referring to some kinds or modes of punishments which were historical].y prohibited in England for being inhuman or cruel. They included the use of racks, thumbscrew, stretching limbs etc. Use of rack was also practiced in some parts of Uganda to punish witches or Witch-Doctors (Night Dancers). The common feature in this punishment is the causing of severe pains and suffering to the victim either physically or mentally. These may include cutting of one hand of a thief and castration which is often called for by some women Rightists in this country to punish Defilers. These are cruel and inhuman punishments. In my view these are the types of punishments which Articles 24 and 44 seek to prohibit. What is the effect of exclusion order? Mr. Emoru submitted that it leaves the petitioner homeless without any shelter, food or any means of livelihood. Under section 7 the Witchcraft, the petitioner is prohibited from having contact with any body in the area from which he was banished. All these are apt to cause the petitioner anguish.

It was argued by the Respondent that exclusion order is a part of a penalty prescribed by law and therefore consistent with articles 28 (12) and 23 (1) (a) of the constitution. Article 23 (1) (a) sets limitation to freedom of personal liberty in execution of the sentence or order of a court established by law.

Article 79 (1) of the constitution gives parliament wide power to make laws on any matter for peace, order, development and good Governance. This includes prescribing crimes and penalties for them. The power given to parliament under that artic1e to
prescribe penalties is limited only by article 24 of the constitution. The penalties they prescribe are to uphold the dignity and protection from inhuman or degrading treatment or punishment.
As stated earlier in this judgment, a statute which purports to encroach on a personal or proprietary right of a citizen is to be construed strictly. The effect of exclusion order provided under section 7 of the Witchcraft Act does not conform to the pace set in articles 24 and 44 of the constitution. In the words of Wilson J. in The Queen v. Big M Drug Mart Ltd. at above at page 374.
“So long as a statute has such actual or potential effect on an entrenched right, it does not matter the purpose behind the enactment”.
Section 7 of the Witch craft is therefore not in consonance with Articles 24 and 44 of the constitution.
On deprivation of the Petitioner of his properties upon exclusion order, it was submitted for the Respondent that since exclusion order did not include compulsory acquisition of the Petitioner’s properties, it can not violate order 26 (2) of the Constitution.
Article 26 (2) of the constitution states that,
“No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied.
(a) the taking possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality of public health.
(b) the compulsory taking of possession or acquisition of property is made under
a law which makes provision for:

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

What article protects an individual against loss of his properties by a coercive act of others except where the conditions prescribed therein are met. This is a provision which protects and entrenches a fundamental right to property. I have said before. The principle regarding construction of such provisions is that they must be given liberal construction in order to leave the fundamental rights of the citizens intact.

In The Gambia v. Momodou Jobe (1984) AC 689 at 700

Lord Diplock dealing with the constitution of the Gambia said:-

"A constitution, and in particular that part of it which protects and entrenches fundamental Rights and Freedoms to which all persons in the state are to be entitled is to be given a generous and purposive construction".

The instant provision, Article 26 (2) of the Constitution protects and entrenches a fundamental right to properties which all persons in this country are accorded. It therefore deserves a liberal and purposive construction. Mr. Emoru contended that the loss by deprivation as a result of exclusion order is also protected under this Article. I agree. Society United Docks and Others — vs. — Government of Mauritius, Marine workers union and others – vs. Mauritius Marine Authority and others above are on the point. Those two appeals were consolidated In that appeal, the appellants where dock companies and stevedores who had over a long period been engaged to handle store and load of sugar for export *by* the syndicate of sugar growers and millers who controlled Mauritius sugar export. The appellant used manual labour for loading and their method required sugar to e bagged. For echnologica1 advancement, the Government of Mauritius under arrangement with the syndicate of growers and millers, built a mechanised terminal and vested it in a statutory corporation with monopoly of storage and loading of sugar. There was no provision to compensate the Appellants for their resultant loss of business. Both the Government and the syndicate refused to compensate the Appellants. On appeal to the Privy Council, the Government contended that the Appellant, business was not compulsorily acquired. It was held that in relation to compensation for loss of property right, the constitution was not restricted to providing protection for loss caused by compulsory acquisition but extended to loss caused by deprivation. Accordingly although the appellants business had not been compulsorily

acquired, that did not of itself prevent the appellant claiming compensation for loss by deprivation as a result of the statutory order. A similar view was also expressed in the American case of Manitoba Fisheries Ltd. vs. R (1979) 1 SCR 101.

Issue No. 2 is irrelevant in view of my finding in issue No. 1 above.

The next question is whether the Petitioner was accorded fair hearing guaranteed under article 28 (1) of the constitution at the trial. The petitioner had deponed in his affidavit in support of the petition that he did not understand the charge under which he was convicted. That would be a ground of appeal and not for a constitutional redress. His appeal to the Chief 1agistrate's court was dismissed. No further appeal was pursued. Mr. Emoru submitted that the petitioner could not have had a fair hearing when he was charged with a vague offence. Witchcraft is not defined in the Act.

Article 2 of the constitution provides for constitutional supremacy. Under clause 2 thereof, the constitution is supreme. Any law or custom which is inconsistent with any provision of the constitution shall to that inconsistency be void.

Article 2 states that:-

"(1) this constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

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

It is clear from clause 2 above' that for any other law or custom to be valid it must pass the test of constitutional validity.

It must be inconsonance with all the provisions of this constitution. Mr. Emoru submitted that because of its vagueness, witchcraft Act is inconsistent witch articles 28 l2) of the constitution because it does not sufficiently define what conduct is prohibited. Similarly that vagueness, counsel submitted, renders the Act inconsistent with article 28 (1) of the constitution because an accused can not be given a fair trial without being clearly informed of his conduct which constituted the offence. For authority Mr. Emoru cited a Canadian case of Canadian PACIFIC LTD. Vs. R (AG) (Others Intervening) (1996) 1 LRC 78 at 103.

Mr. Tumwesige contended for the Respondent that witchcraft Act is not inconsistent with articles

28 (1) and 28 (12) of the Constitution because the offenses created in the Act are defined in sections 3 and 4 thereof. He contended that the definition of the word Witchcraft can be looked up in a Dictionary since that is an ordinary English word.
Article 28 (12) of the constitution provides that,
Except for contempt of court, no person shall be convicted.
“of a criminal offence unless the offence is defined and the penalty for it prescribed by law’.

In short, that article requires an offence to be defined and the penalty for it prescribed by law. The reasons for these requirements are not hard to find. Firstly, it is to notify the citizens clearly of what conduct which the statute prohibits. This assists a citizen to distinguish the prohibited conduct from the permissible conduct and therefore be able to guard against violation. Secondly, in the event of a charge being labeled against him under the statute, a citizen shall be able to prepare his defence since the ingredients of the offence are known.

In other jurisdictions vagueness was held to constitute ground for declaring a statute unconstitutional. The principle applicable to determine whether or not a statute is unconstitutional for vagueness was discussed in detail in Canadian Pacific Ltd. vs. R. (Ag. and others Intervening above.

In that case the Railway Company had burnt dry grass and weeds 4 n its Railways right of way in a Residential area in order to clear the right of way of combustible material which posed a potential fire hazard. Complaint was raised that the smoke arising from that burning had caused environmental hazard. The Railway Co. was therefore charged with unlawfully discharging or permitting the discharge of a contaminant namely smoke into the natural environment that was likely to cause an adverse effect contrary to a provision of the Ontario Environmental Protection Act 1980. On appeal to the Supreme Court of Ontario, the railways, Company contended that the section under which he was charged was unconstitutionally vague and over broad and therefore infringed the fundamental right guaranteed under section 7 of the Canadian Charter of Rights and Freedoms 1982. That it was so vague and broad that it failed to provide an intelligible standard hat would enable citizen to regulate their conduct and that it was so open—ended that it constituted a standard less sweep.
The Supreme Court by majority rejected that argument. It relied on the interpretative approach

which was set by the same court in R. vs. Nova Scotia Pharmaceutical Society (1992 2 SCR 606 at page 643, that,

“a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate’.

Lower C.J. explained the rationale behind that legal principle. He said,

“This requirement of Legal precision is founded on two rationales: —

(a) the need to provide fair notice to citizens of prohibited conduct.

(b) the need to prescribed enforcement discretion.’

In undertaking vagueness analysis, court must first develop the full interpretative context surrounding an impugned provision. This is because the issue facing the court is whether a sufficient basis for distinguishing between permissible conduct or for ascertaining an area of risk was given. The question to be resolved is whether:

“The law provides sufficient guidance for legal debate as to the scope of the prohibited conduct”.

Court must decide whether the impugned statute provides sufficient basis for legal debate as to the scope of the conduct prohibited. Relating that principle to the case at hand, the question that must be answered is does section 3 (3) of the Witchcraft Act give sufficient guidance for legal debate?

The purpose of Witchcraft Act as contained in the preamble is to prevent witchcraft and to punish persons practicing the same. To understand the conduct prohibited by the Act, it is necessary to understand what witchcraft is. Yet the Act does not adequately define it.

Section 2 which is the Interpretation section does not help much.

It says that: —

“Witchcraft des not include bonafide spirit worship or bonafide manufacture supply or sale of native medicine”.

Mr. Tumwesige submitted that for the definition or meaning of Witchcraft one can look into the Dictionary since that is an Ordinary’ English word. I say the learned counsel was not serious when he made that suggestion. Which Dictionary should one consult? There are many different

English Dictionaries that may give varying meanings. I do not accept that suggestion. Article 28 (12) is very clear. It requires that off 2nce must be defined. That definition in my view must be clear enough to enable a citizen to distinguish between the prohibited conduct and the permissible one. Any vague interpretation will not satisfy the requirement of article 28 (12). Section 3 (3) of Witchcraft Act does not specify what conduct constitutes witchcraft. To that extent it does not afford sufficient guidance for legal debate. The ingredients of the offence can not be properly determined because the conduct constituting witchcraft is not known. Without knowing the ingredients of an offence, one can not meaningfully prepare his defence. I would therefore declare as follows:

(1) Sections 2 and 3 (3) of the Witchcraft Act are vague. They do not meet the requirements of Article 28 (12) of the Constitution.
(2) The Petitioner was not accorded a fair hearing as required under article 28 (1) of the constitution.
(3) Exclusion order is unconstitutional for being inconsistent with article 24 ‘and 44 and 26 in that it threatens the petitioner’s life and right to property.
(4) Redress: As the trial was a nullity, the Petitioner having been tried of a vague offence, the petitioner would be ordered to be set free.
I would therefore allow the petition with costs to the petitioner.
Dated at Kampala this 13th day of June 1997.

G.M. OKELLO
JUDGE.

JUDGMENT OF J.P.M. TABARO JUDGE.

I have real the judgment of Oke1, J. in draft. I am entirely in agreement with it, arid would make

only a few observations.

Initially there were two petitioners, Richard Obuga and Salvatori Abuki. Richard Obaga has since died in prison and his petition abated. Presently, hence, court is concerned with the petition of Abuki alone.

The petitioner was tried for offences under the Witchcraft Act (cap 108 Laws of Uganda) before a Magistrate Grade II at Aduku, Apac district in lira Magisterial Area. He was convicted of practising witchcraft c/s 3 *(3)* of the Act. According to the record of proceedings after three witnesses testified the accused changed his plea to that of guilty. After conviction he was sentenced to 22 months imprisonment, and in terms of Section.7 of the Act the petitioner was banned from access to his home for 10 years, the period to run on completing his sentence.

S. 7 (i) of the Act states: —

"7 (i) A Court (including a court which is empowered under s.7 of this Act to try cases under this Act) may, in addition tm in lieu of any other punishment which it is empowered under this Act to impose make an exclusion order in relation to such person'.

Under S. 7(2) of the Act an Exclusion Order

"shall prohibit, for such periods as may be stated therein, the person in respect of whom it is made from entering end remaining in a specified are a including and surrounding the place in which the offence was committed. A court making an exclusion order may impose such other conditions as in the circumstances of the case may- seem expedient for the purpose of preventing the person in respect of whom the order is made communicating with persons in the area from which he is exc1uded.

Learned counsel for the petitioner Mr. Emoru framed a number of

grounds on which he sought to challenge the constitutionality of the legislation in question. I have perused the grounds 4iligently. In my humble opinion they crystallise basically into three —

(i) that the offence of witchcraft or practising witchcraft is not defined sufficiently- as required by Article 2 (12) of the Constitution.

(2) That making an exclusion order is not constitutional 1cause it is inhuman, cruel or degrading and

(3) deprives the convicted person of access to his or her property.

Under Article 24 of the Constitution it is provided as follows —

“No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment”.

Article 26 is couched in these terms -

26(1) every person has a right to own property

whether individually or in association with others.

(2) No person shall be compulsorily deprived of property of any interest in or right over property of any description except where the following conditions are satisfied:—

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public security or public health, and

(b) the compulsory taking of possession or occupation of property is made under a law

which makes provision for

(i) prompt payment and fair adequate compensation prior to the taking of possession or acquisition of the property and.

(ii) a right of access to a court of law by any person who has an interest, or

right over the property.

I agree with my brother Okello, J. that this petition should be granted. It is a cardinal principle of penal law that before one can be punished for a criminal contravention the offence attracting the punishment must be defined, except perhaps for contempt of court. Article 28 (12) of the Constitution enacted that principle. It is stated in these words under the article —

“28 **(12)** Except for contempt of Court no person shall be convicted of a criminal of fence unless the offence is defined and the penalty for it is prescribed by law”.

Under the legislation in question, that is the Witchcraft Act, (Supra) the nearest provision to a definition attempted is to be found in the interpretation section of the Act.

Therein it is state —

“Interpretation (in the marginal note). For purpose

of this Act, “witchcraft’ does not include bona fide spirit worship or Bona fide manufacture of native medicine”

Evidently, the section is singular for stating what witchcraft is not end does not define what it is, As matters are one con be charged with an offence based on any-thing so long as that thing is not bone fide spirit worship, or bona fide manufacture of native medicine, depending on some people

‘s beliefs, intellectual disposition, or intellectual outlook or philosophical inclinations. I will give an example. In this particular case Obuga the first petitioner was allegedly found in possession of a tortoise. To his accusers this rare animal was proof that Obuga was a witch. Needless to others, to others a tortoise is no more or no less than a pet animal. Hence in the definition section clearly the prosecution and the defence should be able to tell whether possession of a tortoise or any rare or curious object brings the accused within the ambit of the criminal law. Learned Counsel for the petitioner took issue with time at which the legislation in question was enacted and submitted that it is archaic and outdated. The Witchcraft Act was enacted on 28th March, 1957 some five years or so before independence (9th October, 1962). Under the act the following offences are created: —

(1) Threatening death with the use of witchcraft or other supernatural means.

(2) Threatening to cause disease to anyone or physical harm to anyone or to any property, using witchcraft.

(3) Practicing witchcraft or holding oneself out as a witch.

(1k) Procuring another person to practice witchcraft.

(5) Inputting witchcraft to another person and

(6) Possession of articles used in witchcraft.

In the same year as Uganda’s Witchcraft Act was passed the British Parliament repealed its Witchcraft Act of 1735 as well as some sections of the Vagrancy Lot, 1824, Northern Ireland continued to administer the Witchcraft Act — for position of the laws in ‘Britain, see’ the Fraudu1ent Mediums Act, 1951 available in HALSBURY’S STATUTES PF ENGLAND 3rd Edition Vol. 8 at p.390.

But society is not static. What might have been appropriate in Uganda in 1951 (which is contentious in this particular case with regard to the law in issue) is not necessarily appropriate, presently. Today there are many people in Uganda ho will not feel in any way threatened with suggestion that someone has ability to bewitch them, It is no exaggeration to assert that by virtue of skills taxi understanding of Science (whether social or physical) a big section of Uganda society will pity rather than condemn

those who believe •in witchcraft. It is no consolation to the legislature to say that witchcraft may be known or understood in an African society, because, needless to emphasis, the test in Article

28 (12) of the Constitution must be met. As the
legislation in question is vague and ambiguous, in the sense that witchcraft is understood differently by different people, I would find that it is unconstitutional, in accordance with the case of CANADIAN PACIFIC LTD. VR. 1956 1 LRC 78 at p. 103.

Thereat the Canadian Supreme Court observed (GONTHIER J.)

“Thus a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This requirement of legal precision is founded on two rationales: the need to provide for notice to citizens of prohibited conduct and the need to prescribe enforcement discretion.
In undertaking vagueness analysis a court must first develop the full interpretative e context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an area of the Witchcraft Act compounds its vagueness by permitting the prosecution to adduce evidence of reputation that the accused is a witch or that witchcraft articles in issue by common repute are used in the practice of witchcraft, under section 6 of the Act. So under this legislation what is required in evidence is not scientific truth alone but also the subjective beliefs of the public, however unscientific they may be so long as they lead some people to believe generally that so and so practices witchcraft
— an art that since 1951 the legislature has been unable or unwilling to define. For proper Protection of citizens, I am inclined to hold that the legislation in question is unconstitutional1 for lack of sufficient definition.
I wish to next deal with the third ground, for convenience, that is, with Mr. Emoru’s submission that the exclusion order offends against Article 26 of the Constitution because it deprives the accused of access to his property. In my humble “pinion this issue can be summarily dealt with. In determining the constitutionality of legislation, its purpose and effect must be taken into’ account — THE QUEEN VS. BIG MART LTD. [1986] LRC (Const.) 332 at P. 356 decided by the Supreme Court of Canada. t page *356,* MCKSON J. delivering the judgment of DICKSOW, BEETZ, MCINTYRE, CHOUINARD and. LAMER J.J. observed, inter alia,—

‘..,.. In my view both purposes and effect are relevant in determining constitutionality: either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realised through the impact produced y the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked if not invisible. Intended and actual effects have been looked to for guidance in assessing the legislation’s object end thus, its validity”.

There can be no doubt that the effect of en exclusion order is to deprive the convicted person of access to his or her property — which is prohibited in *express* terms by the clear provisions of Article 26(2) of the Constitution except where a citizen’s property *may* be acquired or taken possession of, compulsorily in public interest, that is, for public use, interest of defence. Public safety, public order, public morality or public health I suppose this is the provision that permits the state to nationalize private property in public interest. Needless to say, there are conditions attached to the nationalization therein; the state shall pay adequate compensation prior to the taking, and the affected citizen shall be accorded a right of access to court, presumably, in connection with the property, for compensation and other matters concerning- the affected property.

It is not so with an exclusion order. The convicted person is denied access to his or her property for up to 10 years, after serving a tern of imprisonment as in the present case. Let us not forget that the greatest number of consumers of this legislation will come from the peasantry whose only tools of production seldom go beyond the hoe and the panga, men and women whose skills are primarily not developed beyond the needs of a pitiable subsistence economy. Consequently, a person against whom an exclusion order is imposed cannot easily change his or her occupation so as to gainfully engage in any activity for a 1ivirg once the order has been enforced. He or she would need to acquire land for subsistence in a new area where he or she may not be accepted, or land availed (if it can be afforded after serving a tern of employment); the alternative is to look for employment in a country where jobs arc scarce by virtue of underdeveloped industry. Since this judgment is not a study in poverty, I need not delve into the question whether even money- for traveling outside his or her area of residence might not be difficult to secure, after serving the sentence. 3 it as it may, the effect of the exclusion order is void for offending against Article 26 (2) of the Constitution. I do not think the argument that imprisonment is constitutional and that

an exclusion order is in the same category is tenable. In prison the state provides means of subsistence that is food, shelter, clothing and some social amenities. An attempt is made to instruct inmates in skills such as tailoring, carpentry, modern farming etc. in a word1 an endeavor is made to rehabilitate the inmate end equip him or her with capacity to lead a meaningful life after discharge. It is not so with an exclusion order. The effected person is left to the vagaries of nature aid and unknown social environment as he or she is not allowed access to his relatives or neighbors in the traditional area of residence**.** I must say this exclusion order **is** antisocial and may serve only to brutalise the offender and deny him or her opportunity to be rehabilitated which leads me to the final issue that is whether the exclusion order should be pronounced void for being cruel**,** inhuman or degrading.

As already indicated the Constitution does not allow anyone to be subjected to any form of torture, cruel**,** inhuman or degrading treatment or punishment It is noteworthy that the phraseology is couched in the same terms as in the Universal Declaration of Human 1ights **(**of the United Nations**)** — see Articles 5 thereof. It is used to be opined that an African has to be severely punished for penal laws to be meaningful. That view can no longer be regarded as enlightened, if ever it was. The myth of Africans requiring harsh punishment has been exploded by the judgment of the South African Supreme Court in the STATE VS. MAKWANYANE an M. MCHUNU case No CCT/3/94 delivered on 6th June, 1995, discussing the constitutionality of the death penalty) in which it is shown that African values are based on “need for understanding but not for vengeance, and need for reparation but not retaliation, a need for ubuntu(italics) bat not for victimization”. Of course the concept of “ubuntu”, the idea that being human entails humaneness to other people is not confined to South African or any particular ethnic group in Uganda. It is the whole mark of civilised societies.

For application of the concept/herein explained, see the judgment Mohamed J. Makwanyane case, reported [1995] (5) BCLR665. It will be recalled that the word “ubuntu” though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda. I would gladly associate myself with the view expressed by- MADALA J. in the same case (of Makwanyane (ibid) that the African concept embodies within itself humaneness, social justice and fairness, and permeates fundamental human rights. LANGA J. in the same case expressed the sane ideas when he concluded that the concept carries with it the idea of human

dignity end true humanity.

It cannot be contended that deprivation of one's means of subsistence is not a threat to one's life. And of course, as a matter of axion, a threat to life is cruel and inhuman. Once one is deprived of subsistence one can only survive by the grace of God as the mercy of His people will no longer be available, except, perhaps, through begging-very degrading indeed.
In his judgment LANGA J. (as before) quoted Mr. Justice Schaefer of the Supreme Court of Illinois as stating: —
"the methods we employ in the enforcement of any criminal law has aptly been called the measures by which the quality of any civilisation may be judged".
Let it be emphasized that an offender is a citizen with human dignity deserving to be protected How are we to punish offenders — through rehabilitation or retribution? Speaking for myself, I think retribution is base end sordid arid is only a euphemism for a primitive instinct in man to revenge whenever wronged. But revenge in form of most cruel punishments imaginable, such as quartering and burning at the stake has never deterred crimes to any demonstrable level. An anecdote is often told of scenes of public hangings of thieves whereat some people went ahead to pick pocket others in attendance to witness the execution

So, what is the utilitarian value of brutal, harsh punishments? (For discussion of the futility of harsh punishments as a deterrent see the judgment of CHASKALSON in Makwanyane's case). In a civilised society the jurisprudence of a 'tooth for tooth and an eye for an eye" has no place. I would quote what WINSTON CHURCHILL said in the House of Commons in 1910 (See the judgment of KENTRIDGE A. J., as representative of enlightened attitude towards offenders in the modern age.
"The mood and temper of the public in regard to the treatment of crime end criminals is one of the most unfailing test of the civilisation of any country. A calm dispassionate recognition of the rights of the accused, end even of the convicted criminal, against the state— a constant heart— searching by all charged with the duty of punishment — a desire end eagerness to rehabilitate in the world of industry
those who have put their due in the hard coinage of punishments tireless efforts towards discovery of curative and regenerative processes unfailing faith that there is a treasure, if you can

find it in the heart of every man. These are the symbols, which in the treatment of crime and criminal mark and measure the stored up strength of a nation, and are sign end proof of the living virtue in it".

Clearly, enlightened opinion is in favour of rehabilitation of offenders; punishments that imperil the offender's life have no place in civilised penal institutions. As I am satisfied that en exclusion order endangers the life of the convicted person, I have no difficulty in finding that it is inconsistent with Article 24 of the Constitution and therefore cart be enforced: it is null and void

• It is true that Article 23 of the Constitution allows for deprivation of personal liberty in pursuance of a 2 awful court order such as imprisonment.

I have already said that imprisonment is generally different as the state provides for the maintenance and rehabilitation of the offender, the article cannot be invoked to justify a cruel, inhuman, degrading or punishment. As regards the question of freedom of movement I think a citizen cannot be deprived of his or her right to move freely throughout the Republic of Uganda unless Article 24 is complied with, that is any court order shall not amount to torture, inhuman, cruel or degrading treatment.

I am in complete agreement with the judgment of Okello J. I would grant this petition with **costs.**

J.P.M. TABARO

JUDGE

13/6/1 997.

JUDGEMENT OF A.E.M. BAHIGEINE - J

I have had the benefit of reading in draft the judgments of my brothers Okello and Egonda-Ntende JJ. I entirely agree with their observations and would only have a few comments to make.

Constitutional Petition No. 2 of 1997 challenging the validity of the Witchcraft Act (Cap 108) was initially presented by two Petitioners Salvatori Abuki and Richard Obuga as 1st and 2nd Petitioners respectively. Sadly the 2nd Petitioner Richard Obuga passed away at Luzira Prison before the commencement of the actual hearing. Therefore the Petition in respect of him abated under rule 15(1) Notifications to the Fundamental Rights and Enforcement Procedure rules 1992 - Directions 1996 (Legal Notice No.4 of 1996).

Mr. Vincent Emoru represented the Petitioners while the Director of Civil Litigation Mr. Nasa Tumwesige assisted by Mr. James Matsiko State Attorney appeared for the State.

The remaining Petitioner Salvatori Abuki was on *7/12/95* convicted of practising Witchcraft c/s 3(3) of the Witchcraft Act and sentenced to a twenty-two (22) months prison term by the

Magistrate Grade II Aduku, vide Criminal Case No. 109/97. He was also to be banished from his home for ten (10) years on completion of the prison sentence.

'The affidavit sworn by the Petitioner dated 31/1/97 in support of the Petition avers that he did not understand the charge as what he had done was not specified in the charge sheet. He also challenged the banishment order as being unconstitutional as it tends to deprive him of his property and denies him his right to settle in any part of Uganda he wishes.

The Grounds for this Petition are contained in Para 2(a)-(g) and in my view substantially crystallize into two:

(a)The offence of witchcraft is not sufficiently defined.

(b) The exclusion order is inhuman and degrading.

Regarding ground 2(a) that the Petitioner could hardly be said to have had a fair hearing as enshrined in Article 28(1) since he was charged and tried under a law which is vague and lacked precision was argued together with ground (b) which contended the offence was not sufficiently defined and was therefore in contravention of Article 28 (12) of the Constitution, which provides:

"Except for contempt of court, no person shall be convicted of a Criminal offence unless the offence is defined and the penalty for it prescribed by law"

Mr. Emoru submitted the Interpretation section 2 of the Act purports to define witchcraft by elimination. It states:

"For the purposes of this Act 'witchcraft' does not include
bona fide manufacture, supply or sale of native medicines"

Section 3 then goes on to list various offenses in relation to witchcraft:

(I)……..threatening death with witchcraft or by any other
supernatural means
(2)……..threatening to cause harm by witchcraft or by any
other supernatural means.
(3)……practising witchcraft or holding oneself Out as a witch.
(4)……...imputing the use of witchcraft to another

The Director of Civil Litigation contended there was nothing wrong with the Act. Section 3 sufficiently defined the offenses so as to adequately inform the accused of what he was charged

with. As regards the banishment order, he stated this was a penalty prescribed by law though it was discretionary. The magistrate could decide not to impose it, or could impose a lesser period than the maximum stipulated.

Mr Vincent Emoru argued that this is a very old Act dating back to 1957. It should be scraped as circumstances under which it was made have changed. He further pointed out that the banishment order was cruel and inhuman though what is cruel and inhuman has not been defined. Each case depended on its own circumstances. In this case deprived the Petitioner of his property and rendered him destitute.

I think it is clear penal Statutes can be categorized into two;

(1) Those that define the crimes/offence and

(2) Those that describe the procedures for determining the existence of a crime/offence.

The Witchcraft Act no doubt falls under the latter category. But under whatever category any penal statute may fall, it is trite law that there must be "adequate and fair warning" as to what conduct is criminal or the legislative guidelines for determining the existence of a crime must be clearly defined. Living under a rule of law in modern times entails various suppositions one of which is that all persons are entitled to be informed as to what 'the state commands or forbids. Statutes must therefore be precise so that their objectives are achieved and their enforcement do not violate fundamental liberties. It is better that a guilty person go free than to approve of the Government's prosecution of activity not specifically articulated in the statute. It has been held that in order to safeguard personal liberty against the intrusion of the state, Courts should strictly construe the words of penal Statutes. If after the ordinary rules of construction have been applied as they must be, there remains any doubt or ambiguity the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt. A man is not to put in peril on an ambiguity. London & North East Rail Co. **v Berriman (1946)AC 278 at 313. 314.**

With the above in mind, it was submitted by the Director of civil Litigation that the Petitioner half way through the proceedings changed his plea to that of guilty and therefore he must have understood the offence he was admitting. I think it is well established that an admission of liability cannot be called in aid when interpreting an enactment. The court should not find a man guilty of an offence unless he is aware of what the offence is and he has a guilty mind. Brend v Wood (1946)62 **TLR 462 D.C** at 463. The magistrate relied on the evidence adduced to change the plea to that of guilty, but as is evident opinions would differ as to the purpose and intention of

a party regarding the various objects/articles alleged to have been be used in witchcraft. While some might condemn them others might consider them quite innocuous.
Looking at the offenses listed under section it becomes clear the legislature purports to define witchcraft as supernatural means when it stipulates:

……..“by witchcraft or by other supernatural means . …..“ in their everyday meaning these word consort ‘to make things happen especially bad things’ according to Longman dictionary of Contemporary English. But Mozley and Whitley’s Law dictionary Ninth Edition by John B. Sanders has the following to say:
“Witchcraft is supposed intercourse with evil spirits; formerly punishable with death under Acts of 1541 and 1603, both of which were repealed in 1735. The last execution for witchcraft in England, that of a woman and her daughter of nine, took place by hanging in 1916. The witchcraft Act 1735 was repealed by the Fraudulent Mediums Act 1951” I think this speaks volumes.
It is clear from the above definitions, witchcraft is shrouded in mystery. It cannot be explained or clearly understood. I should however not be misunderstood to be saying that such powers and practices do not exist. They do and some selfish and malicious people employ such means to traumatise others. Only that the process employed lacks definiteness and might end up netting people who are vaguely undesirable in the eyes Of the law. oJJ
Sections 2 and 3 cannot therefore be said to be precise enough.
This is certainly dangerous to the liberties of an individual. As I pointed out above it is better that a guilty man go free than to approve of the Government’s prosecution of activity not clearly defined. The difficulty with this Act is that it is historically part of our society having been promulgated way back in 1957. Its words are therefore dependent for their meaning upon the social environment in which it was passed, which environs have now changed. In my view the Act violates Article 28 of the Constitution.
Ground Cc) of the Petition concerned the banishment order. Mr. Emoru condemned this as offending Article 24 of the Constitution which states:
”No person shall be subjected to any form of torture, cruel inhuman or degrading treatment or punishment.”
Article 44 prohibits any derogation from such freedom.

It was submitted by Mr. Emoru that what is cruel and inhuman has not been defined and each case depended on its own facts. He maintained the banishment order infringed the petitioner's right to settle in any part of Uganda as enshrined in Article 29(2). The director of civil Litigation, Mr. Tumwesige argued this was a sentence authorized by law under Article 23(l)(h) which states:-

"No person shall be deprived of personal liberty except

……

(a+g)……

(h) as may be authorised by law, in any other circumstances
similar to any of the cases specified in paragraph (a) to (g) of this clause."

Section 7 of the Act is unambiguous as the power to make a banishment order is discretionary. The court has the power to exercise any option or none at all. However turning to the question of punishment, once the court has decided to exercise the option, this is by way of punishment whose main objectives are restraint and deterrence. To achieve these objectives there is need for separating and removing the offender from society, so as to protect it from those who would harm others. It has always been emphasized that the punishment should fit the crime. Therefore the state should punish up to, but should not exceed "the point when infliction of pain results in the greatest benefits in deterrence of the crime." The underlying principle being to deter from future criminality and effect reform where possible but not to exact vengeance of society. By banishing the offender from his locality after the prison term, untold harm is likely to ensue rendering him destitute. The court should not lose sight of the effect of this order on his family and dependants. This is likely to be very frustrating and would eventually turn him into a criminal once again. It would therefore be ruinous and counter productive. As we move into the next millennium we should bear in mind that in different parts of Africa clarion calls can be heard for greater attention to Human rights.

"Human rights are viewed as (morally) prior to and above society and the state, and under the control of individuals who hold them and may exercise them against the state in extreme cases.

I think all in all the Petition ought to succeed. The Witchcraft Act as it stands is unconstitutional. I have not been able to lay my hands on the Fraudulent Mediums Act 1957 of Great Britain which repealed The Witchcraft Act 1735. I would hazard a guess the latter might have been

repealed for the same reasons. I would consider it appropriate to borrow a leaf from Britain and come out with a practical enactment.

A.E.M. Bahigeine
JUDGE

Dated at Kampala this 13th day of June 1997

JUDGMENT OF FMS EGONDA NTENDE J.

I have had the benefit of reading in draft the judgment of my brother Okello J. I agree with Okello J. That this petition must succeed for the reasons he has set out. I wish to add two or three matters. The facts are fully set out in the judgment of Okello J, and I need not reproduce them.

This court had accepted in Tinyefunza vs. attorney general constitutional petition No. 1 of 1996(unreported) that in constructing the constitution of this country especially as regards the protection and enforcement of the entrenched fundamental rights and freedoms in chapter 4 of our constitution, the court must construe the constitution so as to give to the individual the full benefits of the rights and freedoms so protected.

The limitations to the entrenched fundamental rights and freedoms are to be construed in such a manner that affords the individual to retain as much of the right or freedom in question as is permissible without doing violence to the language used. The limitations are to be approached restrictively.

Secondly, all the provisions of the constitution relevant to a particular subject must be looked at as a whole rather than in isolation so as to bring the constitution in harmony. It is with these principles in view that I approach the matter before the court.

Are the offences under section 3 of the witchcraft Act defined?

I concur with Okello J. That the offence under section 3(3) is not defined in compliance with article 28(12) of the constitution and join in the reasons to support the finding. I just wish to add that the reason for this finding applies with equal force to all the offences created under section 3(1). 3(2) 3(4) and 5 of the Witchcraft Act. In all these offences witchcraft is not defined. It would appear to me that the drafts persons assumed that everybody knew what witchcraft was therefore no definition was necessary to be set out in the Act. Whereas this could be permissible in 1957, when Uganda had no written constitution, the situation now must be examined in lights of what the constitution commands. The command of the constitution is now paramount. See Article 2 of the constitution of Uganda. Article 28(12) of the constitution provides:

"Expect for contempt of court no person shall be convicted of a criminal offence unless the office is defined and the penalty for it prescribed by law".

[Emphasis is mine]
The command for definition of an offence is akin to the duo process requirement in the United States. It was discussed in the US Supreme Court decision of Whitney vs. People of the Sate of California 1926 in the following words

"….a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalties and be couched in terms that are not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application".
Section 2 of the Act is the interpretation section of the Act. It declares what will not amount to witchcraft. It excepts bonafide spirit worship of bonafide manufacture, supply or sale of native medicines. In a way it states the obvious without defining what witchcraft is.

Section 5 of the Act may illustrate the problem of this Act. It states

“5(1) any person, other that a person in authority acting in the course of his duty, in whose possession or control any article used in practicing witchcraft is found, other that bona fide scientific purpose or as a cure, shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding five years.
(2) In any prosecution under this section the prosecution shall be required to show that the article which is used for the purpose of witchcraft, but shall not be required to show the particular purpose or significance of the article”.

In order to prove this offence of possession, the article does not have to be used in witchcraft, whatever witchcraft is. Common repute belief by a set of accusers that it is an article used in witchcraft is sufficient proof. The prosecution does not have to show the alleged purpose of the article or its significance in the practice of witchcraft. Possession of the white cock, tortoise or gourd might be enough to commit the offence if by some common belief among a class of persons they are believed or even imagined to be used in witchcraft. This offence is so vague that an accused can not know the prohibited conduct against which he is to guard. Possession of anything could amount to an offence. It is compounded by the absence of a definition of witchcraft.

It is important that the legislation sets out the particular conduct in sufficiently explicit terms that is prohibited. This can only be achieved if witchcraft or the practice of witchcraft that is penalised is defined. This is the command of the constitution. And it is our duty to enforce it.

It has been contended by learned counsel for the Attorney General that the prohibited conduct need not be set out in the penal statute as it can be brought forth in the evidence to be adduced at the trial. The fallacy with this argument is that it ignores the express provision of the constitution that requires definition of the offence. This is Article 28(12) of the constitution. The constitution orders the offence to be defined. Evidence cannot cure lack of a definition. On the contrary evidence ought to be produced only to prove that the elements of the prohibited conduct as defined in the offence creating section or section of the Act were committed. It the elements of prohibited conduct are vague. Unknown or not defined, production of evidence at the trial cannot cure the defect.

An accused person ought to know the offence he is to answer in order to prepare his defence. In order to know, the offence must be defined. The evidence brought forth to support the charge does not and cannot define the offence. It is to prove the element of the offence charged. If the elements are vague, or not defined, the accused person would not know the offence he is to answer.

It was suggested by the respondent' counsel that the petitioner knew the offence he was to answer because he admitted it and changed his plea to guilty. An accused person or indeed any person cannot waive the fundamental rights and freedoms guaranteed and protected by the Constitution. See major General Tinyefunza vs. Attorney General constitutional case no 1 of 1996. Tellis & others vs. Bombay municipal corporation & others [1987] LRC (const) 351. Whether an accused person pleads guilty to the offence in question would not operate to destroy to constitutional requirement that the offence be defined. Once it is defined, there can be no proper plea to such an offence. Any plea taken is a nullity.
I join Okello J. in holding that section 3 of the witchcraft Act is unconstitutional for contravening article 28(12) of the Constitution of Uganda.

The Exclusion Order

Section 7 of the Witchcraft Act states:-

"(1) A Court including a court which is empowered under section 9 of this Act to try cases under this Act any person is convicted of an offence under this Act may, in addition to or in lieu of any other punishment which it is empowered under this Act to impose, make an exclusion order in relation to such person.

(2) An exclusion order made under this section shall prohibit, for such periods as my be stated therein, the person in respect to whom it is made from entering and remaining in a specified area including and surrounding the place in which the offence was committed. A court making an exclusion order may impose such other conditions as in the circumstance of the case may seem

expedient for the purpose of preventing the person in respect of whom the order is made communicating with persons in the area which h is excluded.

(3) an exclusion order may be made against a person for a period not exceeding ten years on his first conviction or may be made for life on his second or subsequent conviction; and any such order made in relation to a person sentence to a term of imprisonment shall commence on the date of the expiration of his sentence".

The trial court in sentencing the petitioner made the following order

"according to the exciting provisions of the law, both accused are banned for en years from their present homes after their sentences".

The effect of this order in terms of section 7(2) was banished the petitioner from

"entering and remaining in a specified area including and surrounding the place in which the offence was committed"

Not only was the petitioner banished from his home, or residence for that matte, but also the surrounding areas to his home where partly the offence was alleged to have been committed. Since the alleged offence was committed against a school. Pupils and teachers inclusive, the banishment order could well include a rather large area. The result would be that the petitioner would not be able to return to his home or enter and remain in the surrounding areas including his land upon which , I presume, his livelihood depended, being in rural Uganda. I am prepared to take judicial notice of the fact that the majority of Ugandans live in rural Uganda working the land for their livelihood. The effect of a banishment order as in this case, would be to exclude such a person from shelter, food by denying him access to his land, and also means of sustenance, without provision of an alternative. The person so banished is rendered destitute on leaving the prison gates.

I agree with the conclusion reached by Okello J. that an exclusion order under section 7 of the witchcraft Act runs foul of Article 24 of the constitution as it is an in human punishment In the pre-colonial times in some societies in Uganda, banishment or exile from ones village was an acceptable form of punishment. But the person so banished or exiled was often accepted by his maternal relatives or blood brothers of his father until such a time that he was allowed to come back to his home. This ensured that the person so banished would still have shelter and the necessaries of life. It allowed for the possibility of rehabilitation or reform. The version of this punishment in the witchcraft act has no avenue for ensuring that the necessaries of life of the person banished are taken care of. This is different from imprisonment. Under a sentence of imprisonment, the state is obliged to provide shelter, food and other necessaries of life, like medical treatment and clothing. An exclusion order in our circumstances may have the effect, of threatening the right to life of a person banished. The only place where shelter and means of livelihood are available, at his home, are denied to the person banished.

As was observed by the Supreme Court in India, in Tellis & others vs. Bombay Municpal corp.& others 1987 LRC (const) 351 at page 368

"….the question we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, exceptions according to procedure established by law, that is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.

And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed an integral component of the right to life. Deprive a person of his right to livelihood and you shall deprive him of his life.'

These remarks apply in my view with equal force to the right to life as protected under our constitution.

In Uganda the right to life is protected under Article 22(1). It reads

"no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court,"

The right to life is excepted only in one circumstance. And this is only where a sentence of death is imposed after a fair trial by a court of competent jurisdiction in respect of a criminal offence. This article does not permit sentence of an exclusion order to threaten the right to life or to lead to the loss of the right to life through deprivation of shelter, food and essential sustenance. It permits, in my view, only one derogation to the right and that is a sentence of death.

Otherwise the right to life is inviolable. I take this view guided by the National Objectives and directive principles of state which we are enjoined to apply in interpreting this constitution in part thereof. I take comfort in part

"(xiv) General Social and Economic objectives" which provides;-

"The state shall endeavor to fulfill the fundamental rights of all Uganda's to social justice and economic development and shall, in particular, ensure that:

(a)……..

(b) 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."

An exclusion order under section 7 of the witchcraft Act seems to me to be set in the opposite direction from assuring access of the person banished to any shelter, food, security, clean and safe water, and healthy services.

It was argued by the respondent that an exclusion order is a lawful sentence both under the witchcraft Act and under the constitution. Reference was made to Article 23(1) (a) in this regard. It states;-

(1) No person shall be deprived of personal liberty except in any of the following cases;-

(a) in execution of the sentence or order of a court, whether established for Uganda, or another country or of an international court r tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court."

This article permits the loss of liberty in respect of a person under a lawful sentence. What is contemplated here is confinement of a person. It may be said that an exclusion order confines a person away rather than in a certain place. Therefore the argument runs, an exclusion order should be permissible under this article.

In my view, while this may be so, if its effect is to abrogate or put in peril the right to life, it cannot be protected by this article. For its effect, is to threaten the right to life that is inviolable except in only one permitted derogation. Article 23(1)(a) permits loss of liberty to loss of life or threat of loss of loss of life.

In determining the constitutionality of ana act, a court ought to look at the purpose and effect of the impugned legislation. This principle of which I approve was set out in The Queen vs. Big M. Drug Mart Ltd 1986 LRC Const 332 and Society United and Others Vs Government of Mauritius and Others[1989] ALLER 864

It was stated in The Queen vs. Big M Drug Mart Ltd [supra] at page 356:-

"in my view, both purpose and effect are relevant in determining constitutionality' either an unconstitutional purpose of an unconstitutional effect can invalidate legislation. All

legislation is animated by an object the legislation intended to achieve. This object is realised through the impact produced by operation and application of legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus its validity."

The purpose of the witchcraft Act s set out in the preamble is to prevent the practice of witchcraft and punish those engaged in the practice of witchcraft Te effect of punishment by an exclusion order under section 7 of that act may be to abrogate life or threaten the right to life. This effect is in my view. Unconstitutional, I would hold that section 7 of the witchcraft act is void at it contravenes the right to life under Article 22(1) of the constitution.

Torture cruel, inhuman or degrading treatment or punishment.

I agree with my brother Okello, J that an Exclusion Order amounts to cruel, inhuman and degrading punishment. I associate myself with the reasons advanced. I need o add only that it was contended for the respondent that since under Article 23(1)(a) execution of the sentence or order of a court was a permitted derogation, an Exclusion Order, regardless of whether it infringed Article 24 or not, was constitutionally protected. It was advanced by the respondent's counsel that article 24 was intended to apply to unlawful punishment or treatment but not sentence of court. I do not agree. If it was intended to apply to unlawful or illegal punishment the Article would have said so. It does not. It plainly refers to punishment. And punishment in my view includes in its ordinary meaning penalty for offences committed. [See the concise oxford dictionary, page 970]. In addition there are a number of decisions of the highest courts in the commonwealth that have considered similar provisions in the constitution of south Africa, Tanzania, Zimbabwe, India and Canada. In all the cases, punishments complained of or under review were penalties prescribed by law. See the State vs. T Makwayane and Mr. Mcchunu case No CCT/3/94of the constitutional court of south Africa [1995](5) BCLR 665 that reviews decisions of several commonwealth and other jurisdictions on the constitutionality of the death sentence.

I would hold that punishment referred to in article 24 of our constitution included penalty for offences by law. That being the case, Article 23(1)(a) must be read together with article 24 in accordance with the elementary rules of construction of the constitution that require all the constitutional provisions touching on a matter to be brought in view while construing the matter to which they relate. Considered together, I would find that the sentence or order of court permitted under Article 23(1) (a) to be an exception to personal liberty must not contravene Article 24 of the constitution. It must not be cruel or inhuman or degrading punishment. To hold otherwise would be to render the provisions of article 24 meaningless and of no effect.

And that cannot be, especially in the light of the fact, that under article 44 of the Constitution, Article 24 is non-derogable. It is an absolute right.

I agree with Okello, J that an exclusion order under section 7 of the Witchcraft Act amounts to cruel and inhuman punishment which is prohibited by article 24 of the Constitution.
Freedom of movement and the right to reside and settle in any part of Uganda

It is contended for the petitioner that an exclusion order made under section 7 of the Witchcraft Act infringes the petitioner's right under Article 29(2) (a) of the constitution as it denies the petitioner freedom of movement and the right to reside and settle in any part of Uganda by excluding him from his home and the surrounding areas for 10 years. It is contended for the respondent that this is permitted by Article 23(1) (a) as a sentence of court. And therefore that it is not unconstitutional.

Article 23(1) (a) of the constitution had already been set out above. I will set out Article 29(2) (a).

"2. Every Ugandan shall have the right

(a) to move freely throughout Uganda and to reside and settle in any part of Uganda"

I would take it that the proper approach in this case is to first test the law complained of against the substantive provision of the constitution that protects the right alleged to have been infringed.

If on the face of it the law complained of infringes the substantive right or freedom protected by the constitution, I would then examine any limitations set by the constitution or any other law and determine any of the limitations permitted by the constitution. I would then ascertain whether in light of the permitted limitation, the right or freedom complained to have been infringed has been infringed or not, it would not do, in my view in answer to the claim that Article 29(2) (a) of the constitution has been infringed just to assert that it is excepted by Article 23(1) (a) of the constitution.

The law complained of in this case section 7 of the witchcraft Act, must be tested against the provisions of Article 29(2) (a) and limitations thereto first. After that, it would be possible to determine whether it falls within the permitted or lawful sentence or orders of court except by article 23(1) (a). This is because if a sentence or order of court is unconstitutional or unlawful, it cannot fall within the purview of article 23(1) (a) of the constitution. Again, the reason for this approach is that one must bring in view all provisions of the constitution touching on a subject, consider all of them and determine the purpose and meaning of the constitution accordingly.

The limitation against Article 29 in the constitution is found in article 43. It reads

(1) “in the enjoyment of the right and freedom prescribed in this chapter, no person shall prejudice the fundamental or other human right and freedom of others or the public interest.

(2) Public interest under this article shall not permit

(a) political persecution

(b) detention without trial

(c) Any limitation of enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this constitution.”

From the above provision, it can be said that there are 2 major limitations to the enjoyment of fundamental rights and freedoms. Firstly, their enjoyment must not prejudice the rights and

freedoms of other persons. Secondly, their enjoyment must not prejudice public interest. And the test for both limitations is that they must be acceptable and demonstrably justifiable in a free and democratic society.

The question before us would therefore be:-

1. would a person convicted under section 3 of the witchcraft act after serving a term of imprisonment prejudice the fundamental rights and freedoms of other persons or the public interest it he returned to his home, to call for a limitation to be imposed on his freedom of movement and right to settle and reside anywhere in Uganda?

2. if (1) above is answered in the affirmative, it the limitation by way of an exclusive order acceptable and demonstrably justifiable in a free and democratic society? Or put more simply, is the limitation necessary in a democratic society? Is an exclusion order after a sentence of imprisonment reconcilable with the freedom of movement and right to stele and reside in any part of Uganda. Is it necessary in a free and democratic society, which is the constitution destiny for Uganda?

Once a petitioner, establishes that his constitutional right or freedom has been restricted, the burden to answer the above question shifts to those asserting that the exclusion order protects the fundamental rights and freedoms of other people the public interest and that it is acceptable and demonstrably justifiable in a free and democratic society. I take this view aided by the decision of the court of appeal of Trinidad and Tobago vs. Morgan [185] LRC/Const) 770 at page 797 Braithwaite JA stated:-

“Where an Act is passed into; Law….and that Act is one that restricts the right and freedoms of an individual in order to impugn such an Act, all that the individual is required to do is to show that one or more of his rights has been restricted. Having done so, because of the expressed constitutional policy, the burden is then shifted to the proponents of the Act to show that the provision of the act restricting such rights and freedoms are “reasonable restrictive”. If the proponent of the Act fails to discharge this burden, then a court of competent jurisdiction may pronounce against the validity of the impugned Act.”

The court of Appeal of Botswana expressed similar views in State v Petrus [1985] LRC (const) 699

In his address to us Mr. Tumwesigye for the Attorney General did not address us at all on whether the petitioner on release would be treated to the rights and freedoms of other people or the public interest. Nor did he assert that an exclusion order is acceptable and demonstrably justifiable in a free, just and democratic society.

I am unable to gather from the witchcraft act that an exclusion order made under section 7 of that act serves to protect either the fundamental rights and freedoms of other persons or that public interest. The section does not require an inquiry into this matter before an exclusion order is made. To that extent the imposition of an exclusion order under section 7 of the Act is arbitrary.

In my view an exclusion order is not a permitted limitation to Article 29(2)(a) of the constitution of Uganda under Article 43 of the constitution as its purpose is neither to protect the fundamental rights and freedoms of other persons or the public interest. Even if the purpose of the exclusion order could be established as either to protect the fundamental rights and freedoms of other persons or to protect the public interest, it would have been necessary to establish that the exclusion order under section 7 of the Act was acceptable and demonstrably justifiable in a free and democratic society. In light of my earlier finding that it may abrogate or threaten the right to life, I would not find that it was acceptable and demonstrably justifiable in a free and democratic society. I would hold that section 7 of the witchcraft act is inconsistent with Article 29(2) (a) of the constitution of Uganda and therefore void for inconsistency

I would award the costs of this petition to the petitioner.

Dated at Kampala this 13th day of June 1997

F.M.S Egonda-Ntende

Judge