THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ. ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC).

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL ================================ APPELLANT

AND

SALVATORI ABUKI ================================RESPONDENT.

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala, (MANYINDO DCJ, OKELLO, MPAGI-BAHIGEINE, TABARO AND EGONDA-NTENDE JJ.) dated 13th day of June 1997 in Constitutional Case No. 2 of 1997).

JUDGEMENT OF WAMBUZI, CJ.

This is an appeal by the Attorney general against a decision of the Court of Appeal sitting as the Constitutional Court granting the following declarations:

1. ***The sections interpreting witchcraft, 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 offered a fair trial as the offence was not known. Articles 28(12) and 44(c) of the Constitution were contravened.***

3. ***The exclusion order is unconstitutional because it threatens the petitioner's life by depriving him of the means of subsistence and deprives him of access to his property. Hence it is in human 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 Articles 26 of the Constitution as well.***

4. ***The petitioner is entitled to immediately release from custody."***

Briefly the facts were as follows: the first respondent, Salvatori Abuki, and one Richard Obuga petitioned the Constitutional Court challenging their convictions under the Witchcraft Act (Cap. 108). They were separately tried in the Magistrate grade II Court of Aduku in Lira District. Richard Obuga died in prison and although the petition was joint the offences were different and to that extent Obuga's petition abated.

Salavatori Abukli was charged in one count with practising witchcraft on three different people, Agol, Alisandoro and Ogola contrary to section 3 (3) of the Act. He pleaded guilty, was convicted and sentenced to 22 months imprisonment and was in addition banished from "that home" for ten years after serving the sentence of

imprisonment.

I agree with the remarks of the learned Deputy Chief Justice that the first respondent should have been charged in three separate counts, one for each of the three complaints.

In this judgement, I will refer to the first respondent as the petitioner.

The amended petition alleged 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 Witch craft 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 of ten (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, 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, 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 that is not defined in contravention of Article 28(12) of the Constitution.

c) *the penalty of exclusion order placed on them subjects them to inhuman and degrading treatment, which is consistent with Articles 24 and 44 of the Constitution.*

d) *their right to reside and settle in any part of Uganda, enshrined in Article* 29(2) *of the Constitution is being infringed.*

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 petitioners' 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 there 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 petitioners"

The answer to the petition was as follows:

1. ***That the Witchcraft Act (Cap.108) Laws of Uganda is not inconsistent with the provisions of the Constitution of the Republic of Uganda,* 1995.**

2. ***That the exclusion orders banning the petitioners from appearing in their respective homes for a period of ten years each does not contravene Articles 29(2) and* 26{2) *of the Constitution since the exclusion order is a penalty of a prescribed offence consistent with Article* 28(12) *of the Constitution.***

3. ***That the petitioners have not been deprived of their property without compensation as contemplated in article 26(2) of the Constitution; and***

4. ***That the petitioners had a right of access to court by way of an appeal against conviction or sentence or both".***

Four issues were framed at the hearing. They were:

> ***"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 provisions 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."***

By majority, the Constitutional Court answered issues 1, 3 and 4 in the affirmative and the declarations referred to earlier in my judgment were issued.

There were written submissions for the appellant. However, at the hearing, learned Counsel for the appellant Mr. Cheborion indicated that the written submissions were not in accordance with the Rules of this Court but they were intended to act as notes

for the Court. We decided to hear Counsel and to ignore the written submissions.

There are 7 grounds of appeal. However, grounds 1, 6 and 7 were abandoned.

Grounds 2 was amended to read:

> ***"That Justices Mpagi-Bahigeine, J.P.M Tabaro, Egonda-Ntende and Okello erred in law when they held that section 3 of the Witchcraft Act does not define the offence of Witchcraft and therefore it contravenes Article 28(12) of the Constitution.***

Ground 5 was amended to read:

> ***"That the Constitutional Court erred in law when it held that a banishment order or exclusion order under the "Witchcraft Act is unconstitutional and amounted to a threat to livelihood, which is a threat to life contrary to Article 22 of the Constitution"***

Under ground 2, Mr. Cheborion critised the Constitutional Court for holding in effect that section 3(3) of the Witchcraft Act was vague and did not sufficiently define "the offence of witchcraft".

Learned Counsel referred to the provisions of section 3, which in his submission sufficiently define the offences "in relation to witchcraft". He referred to the definition of the term "witchcraft" in section 2 of the Act and also to the preamble to the Act. He referred to a number of cases dealing with belief in witchcraft including

Eriya Galikuwa v. **Rex** (1951) 18, EACA 175, ***R. v. Kimutai Arap Mursoi*** *(*1939) 6, EACA 117, ***R. v. Kiwanuka Wa Mumbi and Others*** 14 KLR 137. Learned Counsel critised the Constitutional Court for relying on the Canadian case ***Canadian Pacific Ltd. v. R***. (1996) 7 LRC 78 in their conclusion, that section 3 of the Witchcraft Act is vague.

Mr. Emoru, for the respondent, generally supported the decision of the Constitutional Court. On ground 2, Learned Counsel outlined the history of the Witchcraft Act.

He submitted that Article 28 of the Constitution which concerns the right to fair hearing must be read together with Article 44 of the Constitution which provides for non-derogation of that right. He referred to a number of authorities to the effect that witchcraft is a complicated subject incapable of precise definition and the Courts cannot remedy the situation where the language used was vague and overboard.

In his judgement, Okello, J., as he then was, considered the provisions of sections 2 and 3 of the Witchcraft Act. Basing himself on the Canadian case of ***Canadian Pacific Ltd. v. R***. he held,

> ***"The purpose of Witchcraft Act as contained in the preamble is to prevent witchcraft and banish persons practising 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:-

> ***'Witchcraft does not include bona fide spirit worship or bona fide manufacture, supply or sale of native medicine'***

> ***Mr. Tumwesigye submitted that for the definition or meaning of witchcraft one can look into the dictionary since that is an ordinary English ward. 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 offence 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 the 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 cannot be properly determined because the conduct constituting witchcraft is not known. Without knowing the ingredients of an offence, one cannot meaningfully prepare his defence"***

Three other members of the Constitutional Court agreed with the learned Judge on this point, which made it the decision of the Court.

Article 28(12) of the Constitution provides as follows:

> ***"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".***

Quite clearly the Article requires a criminal offence to be defined by law. It does not require every word used in the law to be defined. Nor does it require the offence to be defined in the section which creates the offence.

Section 2 and 3 of the Witchcraft Act provide as follows in so far as is relevant:

> **"2.** ***For the purposes of this Act, 'witchcraft' does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines.***
>
> ***3. (1) Any person who directly or indirectly threatens another with death by witchcraft or by any other supernatural 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 any 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 person who practises witchcraft or 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…."***

I must observe, in the first place that quite a number of their lordships in the Constitutional Court referred to the offence of "witchcraft" not being defined. And indeed both Counsel in their address to us now and again referred to the offence of "witchcraft". With respect, there is no offence known as "witchcraft". The offence known as "witchcraft".
Section 2 of the Act defines the term "witchcraft". The offences for purposes of this appeal are those specified in sub-sections (1), (2) and (3) of section 3, namely:

(a) threatening to cause death by witchcraft of other supernatural means;

(b) threatening to cause disease or physical harm to another or to cause disease or harm to livestock or harm to property by witchcraft or other supernatural means, and

(c) to practise witchcraft or to hold out as a witch.

What is witchcraft? Section 2 of the witchcraft Act defines witchcraft by exclusion. Witchcraft does not include bona fide spirit worship or bona fide manufacture, supply or sale of native medicines. This means that spirit worship or the manufacture, supply or sale of native medicines, is witchcraft unless it is bona fide.

From the wording of section 3 it appears that the expression "threaten by witchcraft or

any other supernatural means" to cause death or harm means that witchcraft is a supernatural means.

Section 6 of the Witchcraft Act provides as follows:

> ***"Notwithstanding the provisions of any law or practice to the contrary, where any person is charged with the commission of an offence under the provision of this Act, evidence may be adduced.***
>
> ***(a) to show 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 my view a reading of sections 2, 3, and 6 of the Witchcraft Act gives a fair of what witchcraft is and sufficient notice of the prohibited conduct. Witchcraft is:

(a) the worship of spirits or the manufacture, supply or sale of native medicines otherwise than for bona fide purposes;

(b) threatening to cause death, disease or harm by supernatural means; and

Practicing witchcraft is doing anything in (a) or (b) or both; and reputation is

in deciding whether the person is a witch and common repute is relevant in determining substances, means, processes, or ceremonies administered, used or performed in the practice of witchcraft .
Besides, Article 6 of the Constitution provides in clause (1) thereof:

> ***"The official language of Uganda is English"***

In ***Katikiro of Buganda v. Attorney -General*** of Uganda (1959) EA 382, it was held by the Court of Appeal for East Africa (Sir Kenneth 0' Connor P.) at Page

> ***"The first declaration sought is a declaration that the Legislative Council of the Uganda Protectorate as at present constituted (that is to say as constituted on June 25,1958, the date of filing the plaint) is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955. The Legislative Council as constituted on October 18, 1955, consisted, as has been shown, of the Governor, ex-officio members, nominated and representative members. It was presided over by the Governor who had an original and a casting vote. The Legislative Council as constituted on June 25, 1958, consisted of the Governor (who had no vote), a Speaker who had no vote, ex-officio, nominated and representative members and was presided over by the Speaker. I agree with Mr. MacKenna who argued for the respondent that the first declaration asked for raises a pure question of construction - whether the words, "the Legislative Council***

of the Protectorate" in the Second Schedule include a Legislative Council presided over by the Speaker ill which neither the Governor nor the Speaker has a vote.

What is to be construed are the words of a Schedule which has been given the force of law and the rules of construction applicable to it are the rules for construction of general public enactments and not the rules which merely apply to contract or to private Acts or Ordinances which may be analogous to contracts It is correct that the **1955** ***Agreement is a Treaty, but this Court is not an International Tribunal and the part of the Treaty which we were interpreting has been given the force of law and must be construed according toi1ii~riiles for the construction of laws.***

The rest of the **1955** ***Agreement only, falls to be construed to the extent that it would be admissible to consider it under the rules for the construction of laws ...*** **"**

The learned President went on at p.395,

"It is trite law that if the words of an enactment are themselves precise and unambiguous then no more is necessary than to expound those words in their ordinary and natural sense.

'The words themselves alone do, in such a case, best declare the intention of the law giver' ......

> ***But where the meaning is not plain, a court of justice is still bound to construe it and, as far as it can, make it available for carrying out the objects of the Legislature, and/or doing justice between the parties".***

The holding of the learned President regarding the law applicable for interpretation of constitutional provisions was approved by the Privy Council when the case went to it on appeal, (1960) EA 784.

As for the provisions of the Witchcraft Act, the offences in section 3 of the Witchcraft Act are clear and unambiguous. What is required is to expound the words used. If the meaning is not plain, then the Court is under a duty to construe the words to give effect to the objects of the Legislature and to do justice to the parties.
On the use of dictionaries, I would like to refer to the case of ***The Queen v. Peters*** (1886) 16 QBD 636. In order to convict an undischarged bankrupt under 31 of the Bankruptcy Act 1883 of the offence of "obtaining credit of the amount of twenty pounds upwards from any person without informing such person that he is an undischarged bankrupt", it was necessary to determine what was "obtaining credit". Lord Coleridge, CJ had this to say at p. 640;

> ***"The contention for the prisoner is that what is sought to be prevented by this section is not the obtaining of goods now and then but the obtaining of a regular mercantile credit, which he may or may not use, as he thinks fit. But against that contention must be set the words themselves which are used in the section and we must ascertain their meaning, being in mind that it is undesirable to take words in an Act of Parliament as being used out of their***

ordinary sense unless they are clearly so intended to be taken. The words of this section are: 'obtains credit'. Did the prisoner obtain credit? It is said that he did not, because he did not stipulate for it: but the Act does not say that there must be a stipulation for credit or that it must be obtained on a specified contract to give it. In such a case as the present, where a man obtains goods and does not pay for them for a substantial period of time, I am not prepared to say that we ought to limit the plain meaning of the words in the Act of Parliament. The prisoner has obtained credit and has had it, whether or not he stipulated for it as the time of purchase. I am quite aware that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well known rule of Courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books. Now in Johnson 'credit' is defined as being 'correlative to debt'; and in the present case the debt was created by getting the horse and not paying for it; in other words, the creditor gave credit to the debtor. Webster defines it as 'trust, the transfer of goods in confidence of future payment'; a definition which is strictly applicable to the present case, where the man in Ireland delivered the horse relying on the credit and probity of the buyer".

The word "witchcraft" is an English word. What is its natural or ordinary The Shorter Oxford English Dictionary defines witchcraft as "the practices of a witch or witches; the exercise of supernatural power supposed to be possessed by persons in league with the devil or evil spirits". "Witch" as a verb is "to practise witchcraft, to use sorcery or enchantment" and as a noun it is defined as "a man who practises witchcraft or magic, a magician, sorcerer or wizard”. It is also defined as "a female magician, sorcerer, a woman supposed to dealings with the devil or evil spirits or to be able by their co-operation to perform supernatural acts.”

It appears to me that the natural and ordinary meaning of the word "witch" is a man or woman who practises witchcraft and "witchcraft" is the exercise of supernatural powers by a person in league with the devil or evil spirits. These definitions do not appear to be markedly different from the definitions of witchcraft in section 2 of the Witchcraft Act as further illustrated by the provisions of section 3 and 6 of the Act. It is my considered view that the offences in relation to witchcraft are sufficiently defined and do satisfy the provisions of the Article 28(12) of the Constitution.

I might mention here that the particulars of the charge against the petitioner do not indicate what specific acts were alleged to constitute practising witchcraft. They merely stated 'Salvatori Abuki on the 4th day of December 1995 at Agwenyore D. practised witchcraft on Agol, Okai and Ogola.' To that extent the charge could be defective but the law under which the charge was laid is not thereby necessarily rendered defective. He second ground of appeal would succeed in my view.

The third ground of appeal is to the effect that the Constitutional Court erred in (law when it held that a banishment order is unconstitutional because it contravenes Articles 24 and 44 of the Constitution which prohibit cruel, inhuman

and degrading treatment.

Learned Counsel for the appellant supported the finding of the learned Deputy Chief Justice to the effect that Article 23 of the Constitution limits or restricts the liberty of an individual in that Courts are permitted to pass sentences or orders that deprive an individual of the right. The learned Deputy Chief Justice also held that freedoms and liberties of the individual are subject to public interest under Article 43 of the Constitution.

Learned Counsel criticised the majority finding of the Constitutional Court that exclusion orders under section 7 of the Witchcraft Act are unconstitutional on the ground that they are cruel, inhuman and degrading treatment or punishment because the majority of Ugandan are peasants. That exclusion orders are not under the category of punishments causing severe pain and suffering to the victims either physically or mentally.

He submitted that the Constitutional Court wrongly based its decision on the issue, on the Constitutional reference by the **Mombe Provincial Government** LRC 642. The order of banishment is lawful on the basis of Article 23 which allows a person to be deprived of personal liberty by a Court of competent jurisdiction and which deprivation need not be in a prison. He concluded that exclusion orders under section 7 are constitutional as they are lawful orders authorised by law.

Referring to Articles 24 and 44 of the Constitution, Mr. Emoru for the respondent, submitted that an exclusion order is in violation of these provisions as it places the prisoner's life at risk. It is a threat to life as it denies the prisoner the essentials of life like shelter and food. These basics are provided in prison. The prisoner is also subjected to mental torture as to where to sleep or where to get food. Learned Counsel relied on a number of authorities including ***Catholic Mission for Justice and Peace in Zimbabwe v. Attorney General and Others (1993)*** **2LRC 279,** ***Tallis and Others v.***

Bombay Municipal Corporation and Others **(1987) LRC (Const.) 351, F.C M*ullin* v, ET.** ***Delhi.*** He submitted that holding number 3 to the effect that the exclusion order contravened Articles 24, 26, and 44 (a) of the Constitution as inhuman because it is a threat to life should be upheld.

The issue framed for the Constitutional Court in this respect was to the effect that the Witchcraft Act and in particular, the provisions for exclusion orders in section 7 infringe or are inconsistent with Articles 24, 26 (2), 29(2) and 44 of the Constitution. It appears that the issue relating to Article 29(2) was not pursued.

Okello J., considered the principles applicable to the determination of whether a statute is unconstitutional in Canada, "the purpose and effect" principle in the case of ***The Queen v. Big M. Drug Mart Ltd.*** (1996) LRC (Const.) 332. The learned judge also considered the American case of ***MC Gowan v. Mary Land 366 US 420-6LED*** **394** (1961) in which the same principle was examined. Persuaded by those two authorities, the learned Judge referred to the provisions of Articles 24 and 44 and held that section 7 of the Witchcraft Act is not "in consonance" with those Articles. The learned Judge also held that the exclusion order deprived the petitioner of his property. Three other members of the Court agreed with the learned Judge.

Article 24 of the Constitution provides:

> ***"No person shall be subjected to any form of torture, cruel inhuman or degrading treatment or punishment."***

Article 44(a) of the Constitution provides:

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

(b) ***Freedom from torture, cruel, inhuman or degrading treatment of punishment…"***

To my mind the provisions in paragraph (a) mean in effect that no law shall be made authorising torture, cruel, inhuman or degrading treatment or punishment.

Section 7 of the Witchcraft Act provides as follows in so far as is relevant:

"(1) A Court (including a Court which is empowered under section 9 of this Act to try cases under this Act) by which 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 this section shall prohibit, for such periods as may be stated therein, the person in respect of whom it is made from entering or remaining in a specified area including and surrounding the place in which the offence was committed. The Court making an exclusion order may impose such other conditions as in the circumstances of the case may be 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 excluded…".

The first comment I would like to make is that under these provisions an exclusion order shall prohibit for such period as may be stated therein, the person in respect of whom it is made "entering and remaining in a specified area including and surrounding the place in which the offence was committed". It does not say that the order shall prohibit the person in respect of whom it is made from entering or remaining in his or her home or lands. It is possible under these provisions to make an order not affecting the home of the person against whom the order is made. In my view, the issue was as were the pleadings, wrongly framed. It was too wide affecting all exclusion orders made under the section instead of restricting the inquiry to the exclusion order made against the petitioner. In fact, as will appear later, the exclusion order prohibited the respondent not from entering his own home but the home of his victims.

In my view the provisions of section 7 of the Witchcraft Act ***per se*** do not justify conclusion reached by the Constitutional Court. The third ground of appeal accordingly succeed. I may add here that Article 2 of the Constitution that the Constitution is the supreme law of Uganda and under clause (2) of the article,

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

It was open to the Constitutional Court to find that section 7 of the Witchcraft Act is void to the extent that it authorises the making of an exclusion order excluding a person from his or her home which would be a violation of a fundamental right of the petitioner. In the case of ***Grace Stuart Ibingira and Others v. Uganda*** 1966 EA 306 where a similar issue was considered, the appellants had been held in custody pending

a decision by the Minister concerned as to whether or not an order for their deportation should be made under the Deportation Ordinance. On an application for a writ of habeas Corpus, the detention was challenged on the grounds that the Deportation Ordinance was void for inconsistency with the provisions of the 1962 Constitution of Uganda, Section 1 of the Constitution provided with exceptions that if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency be void. Section 19(1) (j) of the Constitution provided that no person shall be deprived of his personal liberty save as may be necessary in the execution of a lawful order. The High Court held that the Deportation Ordinance fell squarely within the provisions of section 19(1) (j) that ***a priori*** it did not infringe any other provision of the Constitution.

On appeal the Court of Appeal for East Africa held at page 310,

> ***"Counsel for the State submitted that an order of deportation is "authorised by law" within the meaning of section* 19(1)*, because it is made under statutory power and the Statute that is, the Ordinance is authorised by section 19(1) itself. ...***
>
> ***We cannot accept these arguments. Ultimately, the dependence on the proposition that section* 19 *authorises legislation for the restriction of the movements and residence of the individuals. In our view it does not do so. All that para (j) does, as we have said, is to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty. To decide whether such a statute accords***

> ***with the Constitution, it is, however, necessary to look at the appropriate section of the Constitution, which is we think, clearly section* 28. *On this question we accept the appellant's arguments. We cannot see that the Ordinance as it stands falls within any paragraph of section* 28(3) *and we think, therefore, that, at least so far as it purports to affect citizens of Uganda, it contravenes section* 28 *and is in violation of the right of freedom of movement. If that is so, it follows, that, at least to that extent, it was abrogated by the coming into force of the constitution, immediately before October* 9, 1962. *It follows necessarily that no lawful order can be made against a citizen of Uganda under the Ordinance and since any order that might be made would be unlawful, para (j) of section* 19(1) *can have no application. This appeal must therefore succeed"*.**

The order of the High Court was set aside and the proceedings were remitted to that Court with a directive that a writ of habeas corpus be issued as prayed. This authority appears to be binding on this Court.

Before 1 leave this point, I would like to comment on one Canadian case referred to by Counsel for the respondent, the case of ***Orsborne v. Queen and two Other actions***. (1991) DLR 321. According to the head note, section 33 of the Public Service Employment Act RSC 1985 prohibits Federal Public Servants from “engaging in work" for or against a candidate or political party with specified exceptions. The respondents, a candidate for election to Parliament at the time of action and others who were public servants who wished to work on his behalf, brought actions against the appellant Public Service Commission, for declarations that section 33 of the Act was void by reason of

its conflict with guaranteed freedom of expression found in section 2(b) of the Canadian Charter of Rights and Freedoms and the guaranteed of association found in section 2(d) of the Charter. The Federal Court, Trial Division dismissed the actions. The Federal Court of Appeal allowed the respondents appeals and granted declarations that section 33(1) of the Act is on no force and effect except as it applies to the deputy head. A further appeal by the appellant Commission to the Supreme Court of Canada was dismissed.

Section 33(1) of the Public Service Employment Act reads as follows:

> ***"No deputy head and, except as authorised under this section, no employee, shall,***
>
> ***(a) engage in work for or against a candidate;***
>
> ***(b) engage in work for or against a political party; and***
>
> ***(c) be a candidate"***

In so far as is relevant the Canadian Charter of Rights and Freedoms provides as follows in section 1 and 2,

> ***"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.***
>
> ***2. Everyone has the following fundamental freedoms:***
>
> ***(a) …………………………………………….***
>
> ***(b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication….."***

In his judgement, Sopinka J. said at p.344,

> ***"This is a case in which I have concluded that, section 33 in many of its applications exceeds what is necessary to achieve the admittedly valid government objective of maintaining the neutrality of the civil service. In a number of cases to which the section applies the restriction is a justifiable limit on freedom of expression and, had it been limited to these, would have been unassailable. In these circumstances, where there exists a less restrictive alternative, the question arises as to whether the overbreadth should be cured by the legislature or by the Court. In this case Walsh J. chose to cure the defect rather than leaving it to parliament. He dealt with the respondents on a case-by-case basis and tailored the legislation to conform with a result that would not involve***
>
> ***an unreasonable limit on the freedom of expression. I characterise this approach as "reading down". On the other hand the Court of Appeal struck out the offending parts of the section leaving it to Parliament to cure the defect by adopting an alternative that will conform to the Charter in its various applications. In these circumstances, assuming that the Court has the power to "read down" legislation, it is necessary to decide which is the appropriate remedy in this case. This Court has not decided whether the remedies of "reading down" it should not be exercised in this case… ".***

I was not able to ascertain from the report the wording of the Canadian Constitution in the event of a conflict or inconsistency between the Constitution and other laws. However, in Uganda I would think that whatever the language is "reading down" or "constitutional exemption" the impugned law is not to be declared void merely because one aspect of its application offends a provision of the Constitution. Otherwise the words 'shall be void to the extent of the inconsistency' are meaningless. Indeed this will be in conformity with Article 273(1) of the Constitution which provides that the operation of the existing law after the coming into force of the Constitution shall not be affected by the coming into force of the Constitution but the existing law shall be constructed with such modification, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

I would think that in the case before us, section 7 of the Witchcraft Act would be void in so far as it empowers the imposition of a torturous, cruel, inhuman or degrading treatment or punishment contrary to Article 24 of the Constitution. That modification would be necessary to enable other exclusion orders, which do not offend the Constitution to be made to carry out the legitimate objects of Parliament to remove people who practise witchcraft from the areas where they practise witchcraft presumably for their own protection and that of their victims.

Ground four of the appeal is to the effect that the Constitutional Court erred in law in holding that the effect of the banishment of the petitioner amounted to compulsory deprivation or acquisition of the petitioner's property contrary to Article 26(2) of the Constitution.

Mr. Cheborion submitted in effect that the exclusion order did not affect the ownership of the property by the petitioner. Article 26(2) talks of compulsory deprivation.

Mr. Emoru described the exclusion order as draconian and outdated. He equated the order to deportation, which had been found unconstitutional in the case of ***Ibingira and Other v Uganda*** (supra). Learned Counsel supported the finding of the Constitutional Court.

On deprivation of property Okello, J. considered the provisions of Article 26(2) of the Constitution and concluded:

> ***"Mr. Emoru contended that the loss by the deprivation as a result of exclusion order is also protected under this Article. I agree. "***

The learned Judge relied on two authorities. In his own words.

> ***"Society United Docks and Others v. Government of Mauritius; Marine Workers Union and Others*** v. ***Mauritius Marine Authority and Other above are on the point. Those two appeals were consolidated. In that appeal, the appellants were dock companies and stevedores who had over a long period been engaged to handle store and loading of sugar for export by the syndicate of sugar growers and millers who controlled Mauritius sugar export. The appellants used manual labour for loading and their method required sugar to be bagged. For technical advancement, the Government of Mauritius under arrangement with the syndicate and growers and millers built a mechanical 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 an appeal to the Privy Council, the Government contended that the appellant's 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 itself prevent the appellants 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. V. R (1979) 1 SCR 101."

Article 26(2) of the Constitution provides:

"(2) 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 of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(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"

In my view compulsory deprivation of property under this clause must mean total or complete deprivation. In the ***Mauritius*** case the deprivation was total, loading manually was replaced by mechanical loading, hence the deprivation. I have not been able to see the American case referred to.

In the case before us, however, there was no deprivation of property as such. The petitioner could not during the operation of the exclusion order enter that property. His family, if he had any, could use it. He could communicate with anybody on his property. He could indirectly use the land. If in those circumstances inability to enter the land amounted to deprivation I can see the possibility of a person sentenced to imprisonment for a team claiming that he or she had been deprived of his or her property or home, if you prefer, in violation of Article 26(2) of the Constitution! In my view ground four of the appeal would succeed.

Ground five of the appeal is to the effect that the Constitutional Court erred in law in holding that an exclusion order under the Witchcraft Act is unconstitutional and amounted to a threat to livehood which is a threat to life contrary to Article 22 of the Constitution.

I think this ground is wrongly worded as it would refer to any exclusion order made under section 7 of the Witchcraft Act. I have already dealt with this aspect of the matter in judgment in respect of ground three of the appeal, I would accordingly construe this ground as referring to the exclusion order made against the petitioner.

The order made by the trial Court against the petitioner was:

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

In my view, it was established that the effect of an exclusion order on the petitioner from his home was to deprive him of shelter, means of earning a living on his land and he had to look for alternative shelter and means of earning a livelihood. He could. succeed in these endeavours or maybe he would fail. I would agree that this was cruel and a threat to his life.

But in the instant case, I notice that the petitioner in effect pleaded guilty to the charge of practising witchcraft. After the third prosecution witness had given evidence, the record reads,

> ***"Accused: I am not asking her any questions. I have no witnesses to support me and I am changing my plea to that of guilty. Facts from PW1's read to accused and he confirms it to be correct. Accused convicted on his own plea of guilty".***

Part of the evidence of Bosco Olung-Oka (PW1) was as follows:

" ......I know accused, he is my paternal uncle. In November, **1995** *I came home, but before I came, my brother David Ongutu became ill, all medical examinations at Apapara (failed to?) discover his illness before I came home. My father Okao fell seriously ill. A vehicle was hired and he was taken to me at Lira: My mother Albertina Agol went to visit my father. She also was struck by serious illness. I took all the three to witchdoctor called Florence Bette. She came up to our home at Nabieso. On consultation, she said a wizard had taken charms to our home. We gathered all officials including Chief Nelson Olwa, LC I, Clan Chief Charles Omodo. The witchdoctor removed four charms and they talked disclosing they were brought by the accused from Masindi. The accused was present. He admitted having brought those charms, he also signed voluntarily in this book.*

> *Pros. - I am tendering the book as an exhibit, accused signed in three different books. The accused agreed to assist me pay witchdoctor's costs, one cow. Accused was escorted to Gombolola Headquarters with all these exhibits. Exhibits displayed:*

(1) A piece of charm taken at party of cattle Kraal on ground for killing cattle and I lost 5 h/c.

(2) This piece was removed from near a grave. It is taken (sic) to people's spirits.

(3) This was removed from a boy's house. It was taken to his

house to talk back some sugar cane bought from accused.

(4) This piece was removed from door of my parents. It is used to reduce or cool down anybody who thinks badly about him.

Accused had a good reputation earlier. He might have decided buy those things in old age. I am the person who pays his children's fees… ".

According to the record these were the facts put to the petitioner at his trial and he admitted them.

Two issues arise from these facts. Firstly it would appear that the exclusion over prohibited the petitioner not from entering his own home but the home of his victims. To that extent and with due respect, the Constitutional Court misdirected itself on the evidence. Ground five would accordingly succeeded.

Secondly on these facts can the petitioner now be heard to say that he did not understand the charge for vagueness in a separate action?
I should have thought that to prevent a multiplicity of actions, the petitioner should have raised these constitutional issues at the time of his trial.

For the foregoing reasons I would allow the appeal. I would set aside the declarations issued by the Constitutional Court and substitute therefor an order dismissing the petition. I would set aside the order for costs and substitute therefore an order for each party to bear its own costs here and in the Court below.

Having regards to all the judgements, it is the unanimous decision of this Court that:

(1) The offences relating to witchcraft are sufficient defined in section 2 and 3 of the Witchcraft Act and accordingly Article 28 (12) is not contravened.
(2) An exclusion order under section 7 of the Witchcraft Act does not amount to compulsory acquisition of property and accordingly such an order does not contravene Article 26(2) of the Constitution.

To the extent of these two holdings the appeal is allowed.

By majority, this Court holds that an exclusion order under section 7 of the Witchcraft Act is torturous, cruel, inhuman and degrading treatment or punishment and accordingly is in contravention of Articles 24 and 44 (a) of the Constitution. To that extent the appeal is dismissed.

Consequent upon those decisions the declarations issued by the Constitutional Court are hereby set aside. There is substituted therefore the following declaration,

> ***"That section 7 of the Witchcraft Act is void for inconsistency with Articles 24 and 44 (a) of the Constitution, in that it authorises the making of an exclusion order prohibiting a person from entering in his or her home, this treatment or punishment which is torturous, cruel, inhuman and degrading".***

Needless to mention the appellant is not entitled to immediate release.
He should serve the remaining prison sentence, if any.

It is further ordered that each party shall bear its own costs here and in the Court below.

Dated at Mengo this ……25th ….day of ….May…..1999.

S.W.W. WAMBUZI
CHIEF JUSTICE.

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE
<u>REGISTRAR, THE SUPREME COURT.</u>

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ. ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC).

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL ================================ APPELLANT

AND

SALVATORI ABUKI ================================RESPONDENT.

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala, (MANYINDO DCJ, OKELLO, MPAGI-BAHIGEINE, TABARO AND EGONDA-NTENDE JJ.) dated 13th day of June 1997 in Constitutional Case No. 2 of 1997).

JUDGEMENT OF ODER, J.S.C.

This is an appeal by the Attorney General of Uganda against the decision of the Constitution Court on a joint petition lodged by the respondents Salvatori Abuki and Richard Obuga in that Court. By the petition, the respondents sought declarations that certain provisions of the Witchcraft Act (Cap. 108 of the Laws of Uganda) are unconstitutional. By a majority decision, the Constitutional Court granted some of the declarations sought by the respondents. The present appeal is against that decision.

Seven grounds of appeal are set out in the Memorandum of appeal. Grounds one and seven are abandoned. The remaining grounds are to the effect that:

2. The above Honourable Judges erred in law when they held that section 3 of the Witchcraft does not define the offence of Witchcraft and therefore it contravenes article 28(12) of the Constitution.

3. The Honourable Judges erred in law when they held that a banishment order unconstitutional because it contravenes articles 24 and 44 of the Constitution which prohibit cruel, inhuman and degrading treatment.

4. The Honourable Judges erred in law, when they held that the effect of banishment of the respondents amounted to compulsory deprivation and acquisition of the respondents' property contrary to artic1e 26(2) of the Constitution.

5. The Constitutional Court erred in law when it held that a banishment order or exclusion orders under the Witchcraft Act are unconstitutional and amounted to a threat to livelihood, which is a threat to life contrary to article 22 of the Constitution.

6. The above Justices referred to in paragraph 1 of the Memorandum of Appeal erred in law when they held that banishment or exclusion orders contravened the Constitution because they were contrary to freedom to move and settle in any part of Uganda under article 29(2) of the Constitution.

I have had the benefit of reading in draft the judgment of Honourable learned Chief Justice. The facts of the case are well set out in that judgment. I shall not, therefore repeat them here. I agree with the learned Chief Justice that grounds two, four, and six of the appeal should succeed. In my view, however, grounds three and five should fail.

The views I have expressed in this judgment apply in so far as an exclusion order under section 7 of the Witchcraft Act may exclude a convicted person from his home. In the instant case a closer scrutiny of evidence appears to show that the respondent was excluded not from his home but from the home of other persons where he had allegedly practised witchcraft. But in another case where he was convicted with another co-accused, he was excluded from his home. This is an example of what orders can be made under section 7 of the Witchcraft Act. When the respondent was excluded from the home he had practised witchcraft in, that home was in the same village as his home was. The exclusion order made against him therefore had the effect of excluding him from his village. In the circumstances of this case that exclusion order, was for all practical purposes, in my view, the same as excluding the respondent from his home.

Under ground three Mr. Cheborion, learned Principal State Attorney, for the appellant, submitted that the banishment order was a lawful punishment. It is, therefore not unconstitutional since the Constitution provides for people to be punished under the law. The learned Principal State Attorney relied on the case of ***Rilley and Others v. Attorney -General of Jamaica & Another*** (1982) 2 All ER 469 for the proposition that even death sentence is constitutional if passed in accordance with the law. In the instant case the exclusion order is not cruel, inhuman or degrading treatment or punishment, which is prohibited by Article 24 of the Constitution. Exclusion order does not cause harm on the person concerned, so, it is not in human. The test is whether the punishment being objected to causes physical harm. Excluding a person from his source of food, reducing him into a beggar, cutting off a person's hand and making a person walk naked is not cruel. In the circumstances, it is submitted, section 7 of the Witchcraft Act does not contravene Articles 24 and 44 of the Constitution.

In reply, Mr. Emoru, learned counsel for the respondent submitted, that the rights protected under 24 are non-derogable under Article 44 of the Constitution. The words torture, cruel, inhuman or degrading in Article 24 are not defined. In the learned counsel's view, banishment order under section 7 of the Act fits into all of them. Banishment order puts the prisoner's life at risk. It is a threat to his life; denies him essential necessities for life, including shelter, food, access to work. A peasant who tills the land for survival needs land for all such necessities. Banished away from his land and home such a prisoner suffers mental torture of where to go, and lack of food becomes a physical torture. Although a banishment order is not automatic under section 7 of the Act, it is permissible and it can be made. The learned counsel drew a distinction between
imprisonment and banishment order in that a prisoner in prison is provided with necessities for life. For his submissions under this ground the learned counsel relied on the cases of ***Catholic Commission for Justice and Peace in in Zimbabwe v. Attorney General and Other*** _*(l992) 2 LRC 279*; ***Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State*** *(1991)(3) SA.76*; ***Tellis and Others v. Bombay Municipal Corporation*** *(1987) LRC (Const.) 351*; ***Francis L. Mullin v. Admin. Of Delhi Scale Pil 1981-97, 1959; and Ms. Shehlasia & Others v. Wapala All Pakistan Legal Decisions*** *(1994) SC.693*.

Article 24 of the Ugandan Constitution provides that:

> ***"24. No person shall be subjected to*** *any form of torture, cruel, inhuman or degrading treatment or punishment"*
> ***(The italics are added).***

It seems clear that the words italicised have to be read disjunctively. Thus read

the article seek to protect the citizens from seven different conditions.

i. Torture;

ii. Cruel treatment;

iii. Cruel punishment;

iv. Inhuman treatment;

v. Inhuman punishment;

vi. Degrading treatment;

vii. Degrading punishment.

Under Article 44 the protection from the seven conditions provided for in article 24 is non-derogable. For me, this means that the rights under article 24 are absolute.

The Court: order which the respondent challenged in his petition as being unconstitutional was made under section 7 of the Witchcraft Act. Section 7 provides:

> ***"7(1) A Court (including a Court which is empowered under section 9 of this Act to try cases under the Act) by which 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 the Act to impose, make an exclusion order in relation to such***

person.

(2) An exclusion order made under this section shall prohibit the person in respect of whom it is made from entering and remaining in, for such periods as may be stated therein, 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 circumstances of the case may seem expedient in relation to preventing the person in respect of whom the order is made contacting persons in the area from which he is excluded.

(3) An exclusion order may be made against a person for a period not exceeding 10 years on his first conviction or maybe made for life on his second and subsequent conviction. An exclusion order made in relation to a person sentenced to a term of imprisonment shall commence on the date of the expiration of his sentence"

The exclusion order made against the respondent said:

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

In the circumstances of this case there can be no doubt that the exclusion order banned the respondent from his home. In his affidavit filed with his petition he said that he has one hundred acres of land at home in his village. On the land, he has fruit trees, mangoes, oranges, sugar cane and a cassava plantation. It would appear therefore, that the respondent is a farmer of no small size. What are the consequences of the exclusion order against the respondent? The order was made under section 7 of the Witchcraft Act, the relevant provisions of which I have set out in this judgment. The task of this Court in this regard is to determine the constitutionality of section 7 of the Act. In discharging this task, the court, in my view, has to consider the purpose and effect of the Act. The decision in the Canadian case of ***The Queen v. Big Drugmark Ltd. (Others Intervening)*** 1996 LRC (Const.) 332 is relevant in this connection. In that case, 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, saying:

> ***"I cannot agree. In my view both purpose and effects are relevant in determining constitutionality; either unconstitutional purpose, or unconditional effect can invalidate legislation."***

The principle applicable is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to

achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked if not indivisible. Intended and actual effects have been looked to for guidance in assessing legislation's object and thus, its validity. See ***The Queen v. Big Mart Ltd.*** (1996) LRC (supra).

The purpose and effect principle was also applied in the American Supreme Court case of ***McGowan v. Maryland 366 US 420, 6 LED 393*** (1961).

In the view, consideration of the purpose and effect of a legislation in determination of the constitutionality of the legislation is necessary because the object of a legislation is achieved only by its practical application or enforcement. It is only what effect the application produces that the object of a statute can be measured. The effect is the end result of the object. I find these principles applicable to our determination of the constitutionality of the Witchcraft Act and orders, which may be made thereunder, such as the exclusion order made against the respondent.

The object of the Act as stated in the preamble is to make better provision for the prevention of witchcraft and the punishment of persons practising witchcraft.

This is a laudable objective, in my view, and must be welcomed. One of the effects of the legislation is to be seen in the conviction of the respondent for the offence of practising witchcraft and the exclusion order made against him. The effect of the order, in my view, is clear. Considering that the respondent who lives in a rural part of Uganda and appears to depend on his 100 acres of land for shelter, food,

economic and physical existence the order prohibited him from his home and land for 10 years. The prohibition, no doubt, deprived him of his shelter, food and other means of subsistence dependent on his land. It also deprived him of the company and services of members of his family if he has a family. Though such an order was not made in his case the Act empowered the Court to prohibit the respondent from coming into contact with other human beings in his home area. As results of the exclusion order made against him, the respondent may become a pauper, a destitute, shelterless and a beggar for food and other necessities for life. He may also be ostracised by people who know him in his village and elsewhere. In my view, the conditions resulting from the exclusion order in question were not only dehumanising but also threatened the respondent's very existence and his life.

The treatment or punishment prescribed by Article 24 of the Constitution are not defined therein. They must therefore, be given their ordinary and plain meaning. According to the Concise Oxford English Dictionary they have the following meanings;

"torture" the infliction of severe pain, especially as a punishment or a means of persuasion; severe physical or mental suffering; force out of natural position or state, deform, pervert,

"cruel" causing pain or suffering, especially deliberately, prevent.

"inhuman" brutal, unfeeling, barbarous; not of a human type; inhumanly.

"degrading" humiliating; causing loss of self-respect.

"treatment" a process or manner of behaving towards or dealing with a person;

customary way of dealing with a person.

"punishment" the act or an instance of punishing; the condition of being under punishment; the loss or suffering inflicted in this severe treatment or suffering.

As I have already said, the prohibitions under Article 24 are absolute. The State's obligations are therefore, absolute and, unqualified. All that is therefore, required to establish a violation of Article 24 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of Article 24 set out above. No question of justification can ever arise.

I shall now briefly look at some decisions, mostly outside our jurisdiction, in which what amounts to torture, cruel, inhuman or degrading treatment or punishment have been considered. The first one is the Zimbabwean case of ***Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*** *(supra).*

Catholic Commission for Justice and Peace in Zimbabwe, the applicant, was a human rights organisation whose objects are to uphold basic human rights including, inter alia, the right to life. In March, 1993 it was reported in a National Newspaper that the Minister of Justice, Legal and Parliamentary Affairs had announced that four men, all whom had previously been convicted of murder and sentenced to death, were soon to be hanged. At this time the four condemned prisoners had already spent between four and six years in the condemned section of Harare Central Prison, i.e. on death row. The applicant immediately sought and obtained from the Supreme Court a provisional order

interdicting the Attorney -General, the Sheriff of Prisons, the respondents, from carrying out the death sentences pending determination by that Court whether they delay in carrying out the death sentences breached s.15(1) of the Constitution of Zimbabwe and, if so, whether they should be permanently stayed. At the full hearing in the Supreme Court, the applicant claimed that by March 1993 the death sentences had been rendered unconstitutional due to prolonged and inordinate delays in carrying them out together with the harsh and degrading conditions which the condemned prisoners were subjected to during the confinement. The condemned prisoners each alleged on affidavit that, inter alia, they had lived in daily fear of being put to death during their period of incarceration and had been regularly taunted by prison officers of their impending hanging. The respondents acknowledged the existence of a ***"death row"*** phenomenon, the acute mental suffering and trauma endured by prisoners awaiting execution, but argued that such stress was unavoidable consequence of the death penalty, that it was always open to a condemned prisoner to request the Court to expedite execution; and that, in any event, the original punishment could not become tainted by post-conviction experiences.

The application was allowed, and death sentences set aside and substituted with sentence of life imprisonment. It was held that:

Prisoners did not lose all their constitutional rights upon conviction, only those rights inevitable removed from them by law, either expressly or by implication.

Accordingly a prisoner who was sentenced to death still enjoyed the protection of s.15(1) of the Constitution of Zimbabwe, which provides that ***"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment".*** The essential question which had to be considered in that case was

whether in the circumstances where it had been appropriate to impose death sentences to condemned prisoners supervening events could cause the carrying out of such sentences to constitute inhuman or degrading treatment contrary to s.15(1) of the Constitution of Zimbabwe. A prolonged delay in executing a sentence of death could make the punishment when it came inhuman and degrading. The proper test was what was the likely effect of delay on the prisoner, not the cause of the delay. Cause of delay was immaterial when the sentence was death as the dehumanising character of the delay was unaltered. In determining whether there had been a breach of s.15(1) of the Constitution the period the prisoner had spent in the condemned cell started with imposition of the death sentence as from then on he began to suffer the death row phenomenon. There was an unjustifiable delay. The question was whether delays of 52 and 74 months in demeaning physical conditions went beyond what was constitutionally permissible. These delays caused prolonged mental suffering and were inordinate when compared with the average length of delay in carrying out executions in Zimbabwe.

In ***Ex parte Attorney General, Namibia._ In Re Corporal Punishment Mohammed AJA*** 1991(3) SA 76 the question for determination by the Supreme Court of Namibia *was,* inter alia, whether the infliction of corporal punishment by or on the authority of any organ of the State contemplated in the relevant legislations and rules was unconstitutional, in particular was in conflict with Article 8 of the Constitution of Namibia.

Article 8(2)(b) of the Namibian Constitution provides:

> ***"No person shall be subjected to torture, or to cruel, inhuman and or degrading treatment or punishment."***

Under the Namibian Constitution the rights protected by Article 8(2)(b) are non-derogable. So the State's obligation is absolute. This is the same as in Article 24 is our Constitution. All that is therefore required to establish a violation of Article 24 is a finding that the particular stature or practice authorised or regulated by a State Organ falls within one or other of the seven permutations of Article 24 set out above; no question of justification can ever arise.

In ***Ex parte Attorney-General Namibia*** (supra) the Supreme Court of Zimbabwe said:

> ***"The question as to whether a particular form of punishment authorised by law can properly he said to be inhuman or degrading involves the exercise of a value judgment by the court. It is, however, a value judgment which requires objectively to be articulated and identified regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibian is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's Orthodoxy might appear to be today's heresy.***
>
> ***The provision of Art.* 8(2) *of Constitution are not peculiar to***

Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the Second World War. Exactly the same or similar Articles are to be found in other instruments. See for example Article* 3 *0/ the European Convention for the Protection of Human Rights and Fundamental Freedoms: Article* 1 (1) *of the German Constitution; and Article* 7 *0/ the Constitution of Botswana; Article* 15(1) *of the Zimbabwean Constitution. In the interpretation of such Articles there is a strong support/or the view that the imposition of corporal punishment on adults by organs of the State is indeed degrading or inhuman and inconsistent with the civilised values pertaining to the administration of justice and the punishment of offenders"

What was said in that case about Article 8(2) of the Namibian Constitution applies with equal force to Article 24 of our Constitution.

In the Tanzanian case of ***Republic v. Mbushu and Another*** (1994) 2 LRC 335, it was held that the death penalty considered as a whole was cruel, inhuman and degrading punishment. This was notwithstanding the provisions of section 30(2) of Tanzanian Penal Code, which stipulated death penalty for certain offences. A punishment might be cruel, inhuman or degrading either inherently or because of the manner of its execution. Concepts like cruel, inhuman and degrading are not immutable but subject to evolving standards of decency that mark the progress of a maturing society.

I return now to the instant case. I have already referred in this judgment to effects and consequences of the exclusion order on the respondent. I have no doubt that the exclusion order violets the rights of the respondent protected by

Article 24 of the Constitution in that the exclusion order has order has subjected him to cruel, inhuman or degrading treatment or punishment.

The exclusion order, although it ~as made as part of a punishment authorised by section 7 of the Witchcraft Act, is unconstitutional as it contravenes Article 24 of the Constitution. In view of the provisions of Article 2(2) of our constitution, I find that section 7 of the Witchcraft Act is void, as it is inconsistent with Articles 24 and 44 of the Constitution. It is inconsistent because it authorised the making of exclusion orders, which as I have already said in the case of the respondent, was cruel, inhuman and degrading treatment or punishment.
It is the effects of the provisions of section 3(3) and 7 of the Witchcraft Act which I find to be unconstitutional, not the purpose of the section and that of the Act as a whole. As I have said before in this judgment, the purpose of the Act and therefore, of the sections 3(3) and 7, is to make better provisions for the prevention of witchcraft and the punishment of persons practicing witchcraft.

In the circumstances ground three of the appeal would fail,

My view on the remaining grounds of appeal areas follows:

Ground five: What I have said regarding ground three equally applies to ground five. The exclusion order made under section 7 of the Witchcraft Act amounted to a threat to the respondent's livelihood, contrary to Article 22(1) of the Constitution.

The Article states:

"22(1). No person shall be deprived of life

> ***intentionally except in the 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. "***

I find that the exclusion order, and therefore section of 7 of the Act, which authorised it, is inconsistent with Article 22(1) of the Constitution for the reasons I discussed under ground three of the appeal. Accordingly ground five would fail.

Ground four of the appeal.

I have had the benefit of reading in draft the judgment of Wambuzi, CJ. I agree with him that this ground should succeed. I have nothing useful to add in this connection.

Ground six, of the appeal.

Mr. Cheborion, the learned Principal State Attorney for the appellant did not argue this ground, because, he said the Constitutional Court does not appear to have made an order to the effect that the exclusion order violated the respondent's freedom of movement and to settle in any part of Uganda under article 29(2) of the Constitution. Mr. Emoru, learned counsel for the respondent, did not make any submissions under ground six either.

Consequently, I will not consider ground six of the appeal

Ground seven, of the appeal was abandoned.

In the result I would allow the appeal in part in accordance with my views and decisions on the grounds of appeal as stated in this judgment. I would set aside the

orders of the Constitutional Court and substitute them with an order declaring that section 7 of the Witchcraft Act is unconstitutional as permits exclusion orders to be made by Courts in contravention of Article 24, 44(a) and 22 of the Constitution. I would also award two thirds of the costs to the appellant here and in the Court below.

Dated at Mengo this ….25th…day of …May...1990

A.H.O. ODER.
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL
W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., TSEKOOKO, J.S.C, KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, J.S.C. AND MUKASA-KIKONYOGO, J.S.C.)

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL………………………………………………….APPELLANT

AND

SALVATORY ABULI…………………………………………………..RESPONDENT

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala (MANYINDO, D.C.J., G.M. OKELLO, J, MPAGI-BAHIGEINE, J, TABARO, J AND EGONDA-NTENDE, J.) dated 13th day of June 1997 in Constitutional Case No 2 of 1997)

<u>JUDGMENT OF TSEKOOKO, JSC.:</u>

I have had the benefit of reading in draft the judgment prepared by my Lord the Chief Justice and that of Oder, J.S.C. I agree with conclusions of the Chief Justice on grounds 2 and 4. As he has set out the facts I need not set out the same in detail in this judgment.

I have noted that one Richard Obuga, a co-petitioner of the present respondent died before the Constitutional Court disposed of the petition.

His petition abated upon his death before judgment was given in the Constitutional Court. It was therefore unnecessary to include the deceased's name on the Notice of Appeal and the Memorandum of Appeal.

Although I agree with the learned Chief Justice in his conclusions on grounds 2, I should state this in my own words. During his submissions on ground two, Mr. Cheborion, like some of

the learned Judges of the Constitutional Court, erroneously stated that the respondent was convicted of the offence of witchcraft. It is clear from the Act that the Witchcraft Act created the offence of practicing witchcraft and not an offence called witchcraft. I do not appreciate how this confusion arose since in the Magistrates' Court, the respondent was charged with, tried for and convicted of the offence of "practicing witchcraft" contrary to Section 3(3) of the Witchcraft Act.

The learned Principal State Attorney supported the reasoning and the decision of the learned Deputy Chief Justice who held that the offence of "Witchcraft" exists and is defined. That in order to ascertain the offence, Section 2, 3 and 6 of the Act should be read together. In other words the contentions of the appellant are that the meaning of the offence of practicing witchcraft are ascertainable by studying the Act especially its Sections 2, 3, and 6. He relied on **Seaford Court Estate Ltd. Vs. Asher** (1949) 2 K.B. 481 for the view that the Constitutional Court in deciding the petition should have considered the purpose for which the Witchcraft Act was made and therefore the Court should have given effect to that purpose. The learned Principal State Attorney cited a number of decided cases relevant to the defence of provocation in trials for murder and he urged us to take judicial notice of the existence of witchcraft by which he appears to imply that witchcraft is so prevalent that we should be aware of its existence and meaning.

Mr. Emoru, Counsel for the respondent, repeated arguments advanced in the Constitutional Court and contended that the requirements of Articles 28(12) and 44(a) of the Constitution were not satisfied because the offence of practicing witchcraft with which the respondent was charged and of which he was convicted is not defined. Counsel took us through the legislative history of the offence of practicing witchcraft and submitted that the present definition of witchcraft is vague and ambiguous. That the provisions of any penal law should be sufficiently clear to give notice to citizens of the conduct prohibited by law. For this proposition he relied on certain decided cases such as the Canadian decision of **Canadian Pacific Ltd. Vs. The Queen** (1996)2 L.R.C. 78 and **R. v. Zundel, 95 D.L.R.** 4th 202; 1992.

Article 28 of the Constitution relates to fair hearing of both Civil and Criminal cases.

By Article 28(12) –

> **"Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law"**

The expression **"unless the offence is defined"** is part of the causes of the contentions before us. If it is assumed that the expression requires precise definition to be given of every offence in this Country, then there is trouble because in many Statutes, including the Penal code, many offence are not precisely defined, e.g., the offences of Assault contrary to Sections 122, 227 and 228 of the Penal Code.

Relevant parts of these sections read as follows –

> **"122. (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years,…………………….**
>
> **227. Any person who unlawfully assaults another is guilty of a misdemeanor……….**
>
> **228. Any person who commits as assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years…………………….**

The charge sheet on which the respondent was prosecuted stated that statement of offence to be "practicing Witchcraft" contrary to Section 3(3) of the Witchcraft Act. Sub-section (3) reads –

> **"Any person who practices witchcraft or who holds himself out as a witch, whether on one more**

occasions, shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding five years".

Clearly the style of drafting the above provision is similar to that Applied in drafting Sections 122, 227 and 228 (supra).

It is clear from the provisions of sub-section (3) that the penalty for practicing witchcraft has been prescribed. But the sub-section itself does not define the offence of "practicing witchcraft".

Mr. Cheborion, urged us to get the definition of practicing witchcraft by reading the various Sections of the Witchcraft Act. On the other hand, Mr. Emoru contends that even if we read the whole of the Witchcraft Act, we cannot get the definition of the offence of practicing witchcraft. Counsel urged that because sub-section (3) does not define "practicing witchcraft" which is a supernatural matter, this Court should hold that Witchcraft as a supernatural matter defies definition and human understanding.

Does clause (12) of Article 28 require that every word or a group of words creating a criminal offence in any enactment should be precisely as in an English Dictionary?

Is that what is required by Article 28(12)? I think not. I think that clause (12) requires that an offence of practicing witchcraft as an offence does not exist in Section 3(3) or in any other Section of the Witchcraft Act as a whole? I think we can ascertain the definition first by reading Section 2 of the Act. Section 2 defines the word "witchcraft" as follows –

"For purposes of this Ordinance the expression "witchcraft" shall not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicine".

On the face of it, this definition is perhaps not satisfactory because it defines witchcraft by stating what is not witchcraft. However, that definition gives guidance. It shows that any act or conduct which is not within the definition stated by section 2 can be related to witchcraft.

By application of, or resort to, rules of statutory interpretation, we can ascertain whether or not the offence is defined.

We know for example that every Statute must be interpreted on the basis of its own language since words derive their own colour and content from the context and we know that the object of the Statue is paramount consideration. See **Lall vs. Jeypee Investment** (1972) E.A. 512 and **Attorney-General vs. Prince Ernest of Hanover** (1957) A.C. 436. Subject to constitutional requirements, in constituting a Statute, it is the duty of the Court to give full effect to the apparent intention of the legislature in so far as it is possible without straining the natural meaning of the words used: **R. vs, Makusud Ali** (1942) E.A.C.A 76. It is not proper to treat Statutory provision as void for mere uncertainty, unless the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless. **Fawcett Properties vs. Buckingham Country Council** (1960) 3 All E.R. H.L at page 507; **Salmon vs. Dancombe (1886), 11 App. Cas. 627 P.C. at page 634**.

For purposes of construction, the contexts of words which are to be construed includes not only that particular phrase or section in which they occur, but also the other parts of the Statute: **Inland Rev. Comm. Vs. Herbert** (1913) A.C. 326 H.L. at page 332.

I am satisfied that the meaning of "practicing witchcraft" is ascertainable first by reading the definition of "witchcraft" in Section 2 together with the provisions of Section 3 of the Witchcraft Act. by Section 3:-

> ***(1) "Any person who directly or indirectly threatens another with death by*** *witchcraft or by any other supernatural means* ***shall be guilty of an offence…………….***
>
> ***(2) Any person who directly or indirectly threatens to cause disease or any physical harm to another, or to any property of whatever sort of another by*** *witchcraft or by any other supernatural means* ***shall be guilty of an offence ………***

__(3) Any person who practices witchcraft or who holds himself out as witch, whether on one or more occasions shall be guilty of an offence.__

__(4) Any person who hires or procures another person to practice witchcraft or__ *who for evil purposes consults or consorts with another who practices* *__witchcraft or holds himself out as a witch shall be guilty of an offence……………………__*

__(5) (1) Any person, other than 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 than bona fide for scientific purposes or as a curio, shall be guilty of an offence…..”.__

I have underlined some words in the above provisions for emphasis.

In Section 2, we are told of what is not witchcraft. The definition is not exhaustive of what is not witchcraft. The Section is followed immediately by sub-Sections (1) and (2) of Section 3. These two sub-Sections fairly describe the conduct relating to witchcraft and which conduct is prohibited by law. The prohibited conduct is contextual.

It is obvious that practicing witchcraft involves abnormal or unnatural behavior, on the part of an individual, or a suspect, intended for bad motives or aimed at satisfying supernatural beliefs or wickedness.

My reading of the five Sections (2 to 6 inclusive) of the Witchcraft Act leaves no doubt at all in any mind that the prohibited conduct includes practicing witchcraft. It is not necessary to define in the various Sections of the Act the word “witchcraft” in order to show the meaning of the offence of practicing witchcraft or other offences related to witchcraft.

From this analysis I think that within the context of S.3, the offence of practicing witchcraft is understood. In the circumstances, I think that the respondent had sufficient notice of the offence with which he was charged. This explains why he readily pleaded guilty to the charge after three witnesses had testified. His protestations that he did not plead guilty must be an afterthought.

In the result ground two of the appeal ought to succeed. The success of this ground raises the issue of the conviction of the respondent. The Constitutional Court quashed it. Is it restored now? I will revert to it later.

Grounds three, four and five can be conveniently considered together. The complaint in the three grounds is that the Constitutional Court erred when it held that the exclusion order imposed on the respondent is unconstitutional –

(a) because the order contravened Artists 24 and 44 (a) which prohibit cruel, inhuman and degrading treatment of punishment;
(b) because the order amounted to compulsory acquisition of the respondent's property because it contravened Article 26(2) of the Constitution;
(c) because the order amounted to a threat to livelihood which is a threat to life contrary to Article 22 of the Constitution.

It appears to me that there was during the trial of the petitioner a misunderstanding of the order made by the Magistrate Grade II. The Magistrate excluded the respondent from **"that home"** which in the context of the prosecution evidence especially of Bosco Olung Okao (P.W.1) and of Section 7(2) and (3) must mean the home where the offence was committed. This can be appreciated from a comparison of the two orders, the one made in respect of the respondent and the other made in respect of the deceased and his (deceased's) co-accused (Benayo Okello) in the separate criminal case against these two.

In the case of the respondent, the exclusion order reads as follows –

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

The evidence against the respondent as given by Bosco Okao (P.W.1) Alisandro Okao (P.W.2) and Albatina Agol (P.W.3) was to the effect that the respondent practiced witchcraft at the home of Alisandro Okao and Albatina Agol. Therefore the words "that home" in the order must mean the home where witchcraft was practiced.

In the case of the deceased and Okello his co-accused, the exclusion order stated that –

> **"……………………………………both accused persons are banned for ten years from their present homes……"**

Evidence against the two showed that articles of witchcraft were found in the homes of the two accused. Therefore, the order directed that they be banned from their ***"present homes".***

The two orders do illustrate the point that the banishment provisions in the Act can be applied by the Courts to bar a convicted person from his home, or his gardens or his land where it is alleged witchcraft has been practiced.

On the validity of the exclusion orders, Mr. Cheborion supported the decision of the learned Deputy Chief Justice. Mr. Cheborion submitted in respect of ground three that banishment is a punishment prescribed by law. Therefore its imposition was lawful. He cited **Riley v. Attorney General of Jamaica** (1982) 3 All E.R.469 in support. In his view the exclusion order does not contravene Articles 24 and 44 of the Constitution of the Republic of Uganda. Perhaps I should point out that the relevant Constitutional provisions of Jaimaca make **Rileys** case distinguishable in that our Article 24 is not qualified.

On ground 4, the learned Principal State Attorney submitted that the banishment order did not deprive the respondent of his property.

On ground 5, he contended that the exclusion order was not a threat to livelihood and that it does not contravene Article 22. The Principal State Attorney argued that because the respondent was a peasant, he would continue to exist as such peasant in any place other than his home or his land. The learned Principal State Attorney here suggests that an exclusion order would not cause any hardship on a peasant who is banished from his ordinary home because such a peasant can fit anywhere in Uganda and get on with the life of peasantry.

This logic is fallacious; certainly it has no regard for the provisions and spirit of clauses (1) and (2) of Article 21 of the Constitution, the supreme law of the land which declares that –

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

> ***(2) Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, birth or social or economic standing political opinion or disability".***

Under our Constitution the peasantry and the elite of society are equal.

Be that as it may, in his submissions, Mr. Emoru, for the Respondent, supported the decision of the majority Judges of the Constitutional Court with regard to the three complaints raised in Grounds 3, 4 and 5. He contended that once it is shown that Articles 24 and 44(a) of the Constitution have been violated, there can be no justification for the violation. That the banishment order is torturous, degrading, cruel and inhuman in effect. That it is a threat to the respondent's life because it denies and can deny him of his rights to shelter, land, food found on his land. To support his argument learned Counsel cited the Zimbabwe decision of ***Catholic Commission vs. Attorney-General*** (1993) 2, L.R.C. 279; ***Soering vs. United Kingdom*** (1989) 11 E.H.R.R. at page 439, ***Ex parte Attorney-General of Namibia, In re Corporal Punishment*** (1991) (30 S.A 76 page 76, ***Tellis & Others Bomba Municipal Corporation*** (1987) I.R.C. (ons.) 351 and ***Mulhir vs. Belhi Scale PIL*** 1981-97 page 1959 at page 1865.

I note and make distinction that in ***Riley*** case (supra) ***Soering*** Case(supra) and the ***Catholic Commission*** (supra), Courts were concerned with what is called the death row phenomena i.e. the suffering or the lingering death which condemned prisoners experience or contemplate while incarcerate in small cells pending execution.

In the case before us, after passing the sentence of imprisonment on the respondent, the Magistrate Grade II made the order, which I have already reproduce.

As I have explained the bargaining order related to the home of the victims. Notwithstanding that, it is evident that the respondent and Bosco Okao, Alisandro Okao and Albatino Agol, at whose homes witchcraft was practiced, have homes and live on the same village called Agwenyere. It can legitimately be argued that banning him from the homes of Bosco Okao, Alisandro Okao and Albatina Agol in effect bars his from going to his home. This is what the respondent stated in his affidavit which was not disputed.

The banishment order was made by virtue of the provisions of Section 7 of the Witchcraft Act. That section states in so far as is relevant that:–

> **(1) A court …………………………………………… may in addition to or in lieu of any other punishment which it is empowered under the ordinance to impose make an exclusion order in relation to such person.**
>
> **(2) An exclusion order made under this section shall prohibit the person in respect of whom it is made from entering and remaining in, for such periods as may be stated herein, a specified area including and surrounding the place in which the offence was committed".**

The full record of appeal to the Chief Magistrate is not part of the record before us. We only have the memorandum of appeal which shows that the appeal was against both conviction and sentence. Paragraph 2 of the memorandum of appeal, which states "All Quake Doctors are liars and implicate anybody anytime" points to dangers inherent in the Witchcraft Act.

Be that as it may, according to paragraph 11 of the affidavit of the respondent in support of his petition, the Chief Magistrate dismissed the appeal summarily and apparently arbitrarily before hearing it allegedly because the appellant (now respondent) had not filed the memorandum of appeal in time. I think that this is most prejudicial to the respondent.

Because of the potential to which s. 7 can be put, s. 7 has to be considered with due care.

The long title of the Witchcraft Act shows that the Act was enacted to make better provision for the prevention of witchcraft and the punishment of persons practicing witchcraft. The exclusion order provisions were introduced in the 1957 Act purposely to remove witches from places where they were alleged to have practiced witchcraft. But as it is clear from these proceedings, the effect of exclusion orders might not bode well. Manyindo, D.C.J, considered the issue of exclusion order thus:-

> ***"It is true that this sort of treatment is generally outlawed under Article 24 of the Constitution. It is 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 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".***

It does not appear that the attention of the learned Deputy Chief Justice was drawn to the provisions of Articles 2(2) and 273. In his view, the right of free movement can only apply if one has not committed an offence for which there is a prescribed sentence. He accepted the contentions of the Attorney General that the exclusion order is part of the sentence under the Witchcraft Act. It is therefore lawful under Article 23 of the Constitution. That in this case the exclusion order does not and take away the petitioner's property.

I have the greatest respect for the learned Deputy Chief Justice. I do not agree with his conclusion that Article 44(a) allows Courts to pass sentences which amount to torture, cruel, inhuman or degrading treatment or punishment. The respondent's arguments are to the effect that s.7(1) and (2) of the Witchcraft Act contravenes Article 24 which in my opinion absolutely forbids subjecting a person to torture or to cruel, inhuman or degrading treatment or punishment. Article 44(a) reinforces the provisions of Article 24.

The majority decision in the Constitutional Court was to the effect that Article 24 of our Constitution prohibits any torture or treatment or punishment which is inhuman and degrading. Indeed I would say the whole Court agreed in principle because in the passage I

have just quoted the learned Deputy Chief Justice said that the article generally outlaws such treatment or punishment. Further the majority decision held the view, with which I agree, that Article 44 prohibits derogation from the enjoyment of certain rights and freedoms including freedoms set out in Article 24 namely freedom from torture, cruel, inhuman or degrading treatment or punishment. Because of the provisions of Clause (2) of Article 2 and Article 273, Courts in Uganda cannot enforce a law which is inconsistent with the Constitution.

I am in full agreement with the learned Judges' view that in deciding whether the exclusion order and provisions of s.7 were in conflict with the Constitution or not, they had to consider the effect of the exclusion order. In my view in order to decide whether the exclusion order or indeed s.7 is or is not unconstitutional the issue is not so much the purpose which the order or s.7 was intended to serve as the effect it creates on the person against whom the exclusion order is made. The effect can have very disastrous consequences.

In Ex-Parte. Attorney-General, Namibia, in Re-Corporal Punishment the Supreme Court of Namibia was requested to determine whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is in conflict with any of the provisions of Chapter 3 of the Constitution of the Republic of Namibia and more in particular Article 8 therefore and, if so, to deal with such law as contemplated in Article 25(1) of the Namibian Constitution.

Mohamed, A.JA, of the Supreme Court of Namibia considered a vast network of legislation in Namibia which empowered imposition of corporal punishment by judicial, quasi-judicial and administrative organs of the State of Namibia. He reviewed many cases from other jurisdiction such as Zimbabwe, U.S.A., Canada and India. He considered Article 8(2)(b) of the Namibian Constitution. Paragraph (b) of clause (2) of that Article is identical with our Article 24 which reads as follows:-

> **"No person shall be subjected to torture, inhuman or degrading punishment or treatment"**

Mohamed, A.JA, held that corporal punishment inflicted by an organ of the State in consequence of a sentence directed by a judicial or quasi-judicial authority in Namibian is indeed a form of **"inhuman and degrading"** punishment which is in conflict with Article

8(2)(b) of the Namibian Constitution. Other members of the Court (Berker, C.J and Trengore A.JA) concurred.

The learned Judge observed with reference to Article 24(3) of the Namibian Constitution which is similar to Article 44(a) of our Constitution, that although the Namibian Constitution expressly directs itself to permissible derogation from the fundamental rights and freedom entrenched in Chapter 3 of that Constitution, no derogation from the rights entrenched by Article 8 is permitted. Mr. Emoru urged us to adopt the same view in this case. He is right. I know that the Supreme Court of Namibia in that case considered and struck down various pieces of legislation relating to corporal punishment. It may be argued that in the case of corporal punishment, there is inherent infliction of pain and suffering on the body of the victim which amounts to torture and cruel, inhuman and degrading treatment or punishment.

However, I am persuaded that the reasoning in the Namibian case is applicable to a banishment order imposed by a judicial officer under section 7(1) and (2) of the Witchcraft Act. I am convinced that it is cruel to bar a man from access to his own home because of alleged practice of witchcraft. It is inhuman to bar a man from his own home and or land where he grows food. It is degrading to bar a man from his own home because a homeless person has no dignity in him. Moreover I think that perceptions about the practice of witchcraft cannot be the same now as in 1957.

In Shah vs. Attorney-General (No.2) (1970) E.A 523, the Constitutional Court of Uganda was concerned with the issue of deprivation of property without compensation. The court construed Article 8(2)(c) of 1967 Constitution. Jones, J, referred to that provision and opined that:

> **"Article 1 of the Constitution of the Republic states that the Constitution is the Supreme law of Uganda. No ordinary piece of legislation can affect the fundamental rights enshrined therein nor change it"**

In the present Constitution, its Article 2 is similar to Article 1 of Constitution of 1967.

I hold the same view. Articles 273(1) and 2(2) of the current Constitution subordinate the Witchcraft Act to the Constitution.

The impact of barring a human being from his area or gardens is to render him homeless and devastated. It is no answer that he can set up another home elsewhere and live like any other peasant.

When the Witchcraft Act was enacted in 1957, i.e., 42 years ago there were no constitutional provisions like Articles 24 and 44 in Uganda. Moreover, Article 273(1) of our Constitution requires that all existing laws conform to the spirit and letter of 1995 Constitution. This means that laws like Section 7(1) and 7(2) which are inconsistent with the constitutional provisions must give way to the new Constitutional order. In my view, therefore, the exclusion provisions sub-sections (1) and (2) are unconstitutional in that they are inconsistent with Article 24.

For reasons I have endeavored to give, I hold that grounds 3, fails.

There is an important aspect in the appeal before the Chief Magistrate. Since I hold that ground 2 succeeds, it means that respondent had a fair trial. Therefore the conviction stands.

Consequently this appeal succeed in part. I would vary the declarations issued by the Constitutional Court as follows –

(i) I would declare that Sections 2 and 3 of the Witchcraft Act are not void therefore Article 28(12) of the Constitution was contravened.

(ii) I would declare that the provisions of section 7(1) and (2) of the Witchcraft Act and exclusion orders there from are inconsistent with and contravenes Articles 24 and 44(a) of the Constitution.

Because of constitutional importance, of this case, I would order that each party bears his own costs, both here and in the Constitutional Court.

Delivered at Mengo this ….25th ………….day of …..May…… 1999.

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A

TRUE COPY OF THE ORIGINAL

W.MASALU MUSENE

REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ. ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC).

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL ================================ APPELLANT

AND

SALVATORI ABUKI ================================RESPONDENT.

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala, (MANYINDO DCJ, OKELLO, MPAGI-BAHIGEINE, TABARO AND EGONDA-NTENDE JJ.) dated 13th day of June 1997 in Constitutional Case No. 2 of 1997).

JUDGEMENT OF KAROKORA, J.S.C.

I have had the advantage of reading the judgment in draft prepared by Wambuzi C.J., and I do agree with him on the reasoning and conclusions on grounds 2, 4 and 5 and I have nothing useful to add. I, however, differ with his conclusion on ground 3.

The brief facts of the case are set out in the judgment of the Chief Justice and so I do not have to repeat them here.

Ground 3 on which I differ with learned the Chief Justice’s conclusion reads as follows:-

> ***"That the Honourable Judges erred in law when they held that a banishment order is unconstitutional because it contravened article 24 and 44 of the Constitution which prohibit cruel inhuman and degrading treatment."***

Mr. Cheborion, Principal State Attorney, appearing for appellant in support of the ground three heavily relied on the judgment of Manyindo D.C.J., and submitted that punishment cannot be cruel, inhuman or degrading if it is authorized by law. On this point, he contended that the banishment order was provided for by s 7 of the Witchcraft and therefore it is not unconstitutional. He contended further that freedoms of individuals are subject to limitations as provided under Article 23 of the Constitution.

He referred us to the case of ***Riley v A.G. of Jamaica & Anor.*** (1982)3 All ER 469 which dealt with whether delayed execution of death sentence was cruel, inhuman or degrading treatment. In that case the Court found no merit and held that the sentence was lawful under the Constitution. He contended that even if evidence had been adduced, which showed that exclusion order would lead to loss of livelihood, it would not be material because some punishment actually include confiscating property of persons convicted of certain offences. In the instant case it was contented for the appellant that there was no order removing the respondent's tools of peasantry of any. The respondent was not restricted from managing his property by proxy. In the circumstances, he submitted that the exclusion order did not contravene Articles 24 and 44(a) of the Constitution.

On the other hand Mr. Emoru, Counsel for respondent, forcefully submitted that the exclusion order under section 7 of the Witchcraft Act was inconsistent with Articles 24

and 44(a) of the Constitution and argued that he had submitted before the Constitutional Court that under Articles 24 and 44(a) of the Constitution on person should be subjected to torture, cruel, inhuman or degrading treatment or punishment. He submitted before this Court that once it was established that the punishment was cruel, inhuman or degrading, then it violated Articles 24 and 44(a) of the Constitution and consequently, it cannot stand.

On the question of whether the exclusion order made pursuant to provisions of section 7 of the Witchcraft Act contravened Articles 24 and 44(a) of the Constitution, it is necessary to reproduce provisions of the Act and of the Constitution in order to determine the issue.

Section 7 of the Witchcraft Act provides as follows:-

> ***"(1) A Court (including a Court which is empowered under Section 9 of this Act to try cases under the Act) by which 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 may be stated therein, the person in respect of 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 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 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. An exclusion order made in relation to a person sentenced to a term of imprisonment shall commence on the date of the expiration of his sentence."***

Article 24 of the Constitution provides as follows:-

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

Article 44(a) provides as follows:-

> **"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."**

The issue for determination now is whether or not the exclusion order made pursuant to provisions of section 7 of the Witchcraft Act offends the above Articles of the Constitution.

The trial Magistrate in ***Criminal case No. 114/95 Uganda v Binayo Okello and Richard Abuga*** (now deceased) had made an exclusion order banishing the two accused person from their homes where they had practiced witchcraft for 10 years after serving their prison sentences. However, in ***Criminal case No. 105/95, Uganda v.***

Salvatori Abuki the order was to the effect that he was to be banished for 10 years from (***that home***) where he had practiced witchcraft after serving his prison sentence.

It is, however, apparent from the trial Magistrates' record of proceedings that the respondent has practiced witchcraft in the home of his nephew, Bosco Okoa, PW1 Alisandro Okao, PW2, a brother of respondent and Alvatina Agol, PW3, all of Agwonyere village which is the same village that the respondent comes from. It could therefore be argued that banishing respondent from the home of PW1, PW2 and PW3 was in effect banishing him from living in his home area, because a home may not necessarily mean a house where one is living but could mean the type of family or home area one comes from.

In effect section 7 of the Witchcraft Act gives powers to the trial Magistrate to make an order excluding a person convicted of practicing witchcraft from entering and remaining in a specified area including and surrounding the place in which the offence was committed which may include a person's home including and surrounding the place in which the offence was committed.

Mr. Emoru, Counsel for respondent, submitted, and I agree, that after release from prison, the respondent would be faced with mental torture as to where he would live and how he would make ends meet. I agree that at least when he was in prison, he was provided with food, shelter and other necessaries of life unlike after his release, where he would find nothing like shelter, food and other necessities of life. He might get work and food, but all these would depend on luck and general attitude of the public in his area towards him.

Mr. Emoru for respondent referred us to the case of ***Catholic Commission for***

Justice & Peace in Zimbabwe v. AG. & Others (1993) 2 LRC 351; ***Exp. AG. Namibia in Re Corporal Punishment*** (1991) 35A 76 at page 86; ***Telliss & Others. v. Bombay Municipal Corporation*** & ***Others*** (1987) LRC (Const.) 351; ***Francis Caralie Mullin v. Administrator Union Territory of Dheli & Others AIR*** (1983) Sc. 746 for the proposition, that the fact that a person has been convicted does not mean that he has lost his constitutional right. I do agree that in this case the fact that the respondent had been convicted of an offence under the Witchcraft Act does not mean that he ceased to have human rights guaranteed under the Constitution which include right to have shelter, work on his land and means to eat and freedom to move anywhere in the Country.

There is no doubt in my mind the exclusion order made under section 7 of the Witchcraft Act prohibited the respondent from entering and remaining in his home village of Agwonyere for ten years after his release from prison. The effect of this order would, in my view, amount to cruel, inhuman, degrading treatment or punishment as it would deny him means of livelihood.

I can see that Manyindo D.C.J., more or less conceded that exclusion order is cruel, inhuman or degrading treatment in his judgment, but he contended in his judgment that it was a necessary evil when he held inter alia;

> ***"It is true that this sort of treatment and or punishment is 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............... 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 freedom specified therein except by a sentence of order of Court.

.... 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 sentences 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 USA and UK. They are a necessary evil………………… I think the real point is that in the Uganda of today no one except the Court of law, many punish a person in a manner that is cruel, inhuman and degrading. The exclusion order restricted the petitioners rights under Article **29(2)** ***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 think that the learned Deputy Chief Justice in the above passage, is conceding that the exclusion order runs counter to the provisions of Article 24 of the Constitution.

However, the contended that Article 24 must be read together with Article 23 which limits or restricts the liberty of an individual. He concluded by holding that Article 44(a) which provides that there shall be no derogation from the freedom from torture, cruel, inhuman or degrading treatment or punishment must mean that there shall be no derogation from the rights and freedoms specified therein except by a sentence or orders of Court.

I must, with all due respect, state that a close reading of Article 44(a) indicates that despite any provisions in this Constitution there shall be no law enacted authorising torture, cruel, inhuman or degrading treatment or punishment. Therefore, in my view, no Court of law is authorised by Article 23 to impose orders which infringe provisions of Article 44(a). The rights under Article 44(a) are non-derogable.

Therefore, needless to say that an exclusion order made pursuant to provisions of section 7 of the Witchcraft Act would have the effect of exposing the person banished to cruel, inhuman and degrading treatment or punishment, as he or she would by that exclusion order, be denied means of livelihood. In fact, in my opinion, section 7 which authorises a Court to make an order banishing that person, is unconstitutional as it gives a room to the Court to make an exclusion order banishing that person from his home area. In the circumstances, it is inconsistent with Articles 24 and 44(a) of the Constitution. Since under Article 2(1) of the Constitution, the Constitution is the Supreme law of Uganda, then pursuant to clause 2 of Article 2, that other law which is inconsistent shall to the extent of the inconsistency, be void.

In the result, ground 3 and ground 5 fail.

Therefore, this appeal partially succeeds. And in all fairness, each party shall meet its

own costs.
Dated at Mengo this ….25th ………….day of …..May…… 1999.

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A

TRUE COPY OF THE ORIGINAL

W.MASALU MUSENE

REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ. ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC).

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL ============================== APPELLANT

AND

SALVATORI ABUKI ==============================RESPONDENT.

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala, (MANYINDO DCJ, OKELLO, MPAGI-BAHIGEINE, TABARO AND EGONDA-NTENDE JJ.) dated 13th day of June 1997 in Constitutional Case No. 2 of 1997).

JUDGEMENT OF MULENGA, J.S.C.

This is an appeal from the Constitutional Court. It is preferred by the Attorney-General against a decision of that Court allowing a petition brought under Article 137(3) of the Constitution and issuing the declarations prayed for in the petition. The petition had been taken out by Salvatori Abuki the Respondent in the appeal, (jointly with a co-petitioner who died soon after commencement of hearing of the petition), challenging the validity of the Witchcraft Act Cap. 108, regarding offences created, and a punishment prescribed by, the Act.

The facts, pleadings, and issues in the case, are ably set out in the judgment of

My Lord the Chief Justice which I had advantage of reading in draft. I need not repeat them here. It is sufficient to say that Salvatori Abuki and his deceased co-petitioner were separately tried for, and convicted of, offences under the Witchcraft Act. They were each sentenced to a term of imprisonment, and in addition, to an exclusion order under section 7 of the Witchcraft Craft, which prohibited each from entering and remaining in an area specified in the exclusion order.

This appeal, like the petition it arises from, revolves around two broad questions. The first is whether the offences created under the Witchcraft Act, comply with or contravene Article 28(12) which requires that a criminal offence be defined, and the penalty for it be prescribed by law. In its judgment, the Constitutional Court answered that question in the following two declarations, namely that:

> ***"1. The sections interpreting witchcraft, that is sections 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 offered a fair trial as the offence was unknown. Articles* 28(12) *and 44(a) of the Constitution were contravened"***

On this question, I respectfully agree with the learned Chief Justice that the offences relating to witchcraft, which are created under the Witchcraft Act, are sufficiently defined, so as to meet the requirements of Article 28(12) of the Constitution. I have nothing useful to add to his reasons for arriving at that conclusion. I would, therefore,

with all respect to the Constitutional Court, hold that the Court erred to issue those two declarations, I agree that the 2nd ground of appeal ought to succeed.

The second broad question relates to the exclusion order with is prescribed under section 7 of the Witchcraft Act, and which was imposed on the Respondent. It is, whether the exclusion order is inconsistent with, or in contravention of any provision of the Constitution. At the outset, I have to say that there are two distinct aspects to the question, but in the proceedings the distinction tendered to be blurred. On the one hand, there is the aspect of the law; namely, the provisions of section 7 of the Witchcraft Act, which prescribe the exclusion order as a form of punishment. The other aspect to the question is the Court order made by the trial Magistrate which "banned" the Respondent from a specified home for 10 years. Needless to say that if that law is unconstitutional, then the Court order made, or any other act done, under its authority would also be unconstitutional. However, it does not follow that the reverse in necessarily true. The provisions of a statute can be prima facie consistent with the Constitution and yet, one Court order made under authority of that statute contravenes the Constitution, while another does not. I will illustrate this point later in this judgment.

The decision of the Constitutional Court, which seems to be its answer to the question, and which is subject of attack in the 3rd, 4th, and 5th grounds of appeal, is embodied in the third declaration issued by the Constitutional Court in accordance with the majority opinion as follows:-

> ***"3. The exclusion order is unconstitutional because it threatens 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 Article 26 of the Constitution as well. "

Despite the phrasing of this declaration, which seems to refer to only the particular Court order made against the Respondent, I am inclined to take it as intended to cover both that particular court order, and the exclusion order as a mode of punishment prescribed by the Witchcraft Act. Only in that context, in my view, would the declaration be in line with the pleadings, the framed issues, the holdings of the learned Judges of the Constitutional Court and Counsel's submissions to this Court. Thus in the Amended Petition filed in the Constitutional Court on 7.4.97, it was alleged, so far as relates to this question:

"1 *(a)* ***that the Witchcraft Act, Cap. 108 Volume IV Laws of Uganda, is inconsistent with the Constitution for it:***

(i)...

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

(b) that the Magistrate Grade II of Aduku Magistrates Court in convicting the petitioners under the Witchcraft Act, sentencing them, and excluding them from their home areas after serving the sentence, and the Chief Magistrate in dismissing their appeals and confirming

the said convictions, sentences and exclusion order, 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)....... 24, 44, 26,** ***29(1)(b)- (c) and 29(2)"***

In conclusion the petitioners prayed the Constitutional Court that it may, inter alia:

"(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).....24, 44, 26 and 29(1) (b)- (c)

In the answer to the Petition, so far as relates to this question, it was pleaded that the exclusion orders (banning the petitioners from their respective homes) did not contravene the Constitution ***"since the exclusion order is a penalty of a prescribed offence consistent with article 28(12) of the Constitution. "***

The issue arising from the pleadings, (though regrettably not recorded by their Lordships in identical words) was in essence framed thus:

"Whether the Witchcraft Act, and in particular the provision

for exclusion order in section 7, infringes or is inconsistent with Articles 24~26(2), 29(2) and 44 of the Constitution."

Finally in each of the judgments of Okello J. (as he then was), Bahigeine J., (as she then was), Taboro J., and Egonda-Ntende J., there is a holding various expressed, that the exclusion order prescribed by s.7 of the Witchcraft Act is inconsistent with, or in contravention of: one or other of the Articles of the Constitution. It is in light of the two aspects, starting with the first, that I shall consider the relevant grounds of appeal.

The appellant criticises the Constitutional Court in relation to the declaration reproduced above, in the 3 rd ground for holding that the banishment order contravenes Articles 24 and 44; in the 4th ground, for holding that the banishment order against the Respondent, in effect, amounted to compulsorily depriving him of property contrary to Article 26(2); and, in the 5th ground, for holding that a banishment order amounts to a threat to life.

In his submissions to this Court, Mr. Cheborion, Principal State Attorney for the Appellant, supported the minority judgment as a whole, and in particular on the 3rd ground opted to adopt the reasoning of Manyindo DCJ in the minority judgment, which, in a nutshell, was that a penalty does not contravene Articles 24 or 44 of the Constitution as long as it is imposed by order of a Court of law.

This is what the learned deputy Justice said:

> ***" ....the (Magistrates' Court) 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 is 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 depriJ.1e an individual of such liberty. And also 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 anq freedoms specified therein except by a sentence or order of Court." (**Emphasis added).*

After observing that to hold otherwise would render unconstitutional other penalties which the Constitution authorises, such as death, imprisonment and forced labour, the learned Deputy Chief went on to say"

> ***"Clearly the Constitution does recognise 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 treated with kid gloves. They must expect to receive sentences that fit the offence they have committed. The sentences 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 necessary evil. That is why the framers of our Constitution retained them. I think the real point is that in the Uganda of today no one, except the Courts of law. may punish a person in manner that is cruel. inhuman and degrading. "*** **(Emphasis added) .**

Mr. Cheborion submitted that the view of the learned Deputy Chief Justice is supported by the Privy Council decision in ***Riley v. Attorney-General of Jamaica** (l982)* 3 All ER 469. However, he further contented that in the instant case the penalty in question, namely an exclusion order, is not cruel, inhuman or degrading as it does not cause physical or mental suffering. In his view, an exclusion order even compared more favourably with a sentence of imprisonment.

In my opinion, with the greatest respect to the learned Deputy Chief Justice, and the learned Principal State Attorney, the foregoing reasoning is erroneous right from its premise, namely subjecting the provisions of Article 24 to those of Article 23. It is true that in Article 23, which is the article for protection of the right to personal liberty, the Constitution *"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."* However, that "permit" does not empower Courts of law to pass sentences or orders that are cruel, inhuman or degrading. The sentences and orders referred to in Article 23(1)(a) are in respect of criminal offences which, pursuant to Article 28(12), have to be prescribed by law (expect those in respect of contempt of Court). In prescribing the sentence and orders which may be imposed in respect of any criminal offence, every legislative authority is in effect restrained by Article 24, not to prescribe any penalty that would subject the person convicted of that offence *"to any form of torture, cruel, inhuman or degrading treatment or punishment."* Similarly, a Court deciding on the sentence to impose on anyone for contempt of Court, is likewise restrained.

Secondly *Riley v. Attorney-General of Jamaica* (supra), relied upon by Mr. Cheborion, is clearly distinguishable. In that case the constitutional provision

under consideration was qualified, whereas the one under consideration in the instant case is absolute. In the Jamaica case, what was considered was section 17 of the Constitution of Jamaica, which provided in sub-sections (1) and (2) as follows:

> ***"(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.***
>
> ***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this***
>
> ***section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day. "***

The appointed day was 6th August 1962, Jamaica's Independence Day. The punishment in question was the death penalty, which had been a lawful punishment in Jamaica since 1864. It was clearly within the exception in sub-section (2). In contrast, Article 24 of the Constitution of Uganda is not subject to
any qualification or exceptions. It simply states:

> ***"24. No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment day. "***

The prohibition of such treatment and punishment is absolute. It is instructive, in my opinion, to recall that the 1967 Constitution of Uganda in Article 12, similarly provided for protection from inhuman treatment but with a qualification in clause (2)

which provided:

> *"(2). Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any punishment that was lawful in Uganda immediately before 9th October* **1962. "**

When the current Constitution was framed and promulgated on 8th October 1995, that provision was deliberately omitted. That alone, in my view should leave no doubt in anyone's mind about the intention of the framers of the Constitution to make the prohibition absolute. Therefore, while the Privy Council's decision in **RILEY'S** case (supra) may have been strong persuasive authority in Uganda prior to the 1995 Constitution, it is today irrelevant and inapplicable. With effect from 8th October 1995, validity of any punishment prescribed by existing law ceased to depend on its existence prior to Uganda's independence. The validity depends on conformity with the Constitution.

I respectfully agree with the learned Deputy Chief Justice that provisions of the Constitution should be read together. That however does not detract from the duty of the Court to give full meaning to each separate provision. Upon reading the whole Chapter Four of the 1995 Constitution on PROTECTION AND PROMOTION OF FUNDAMENTAL AND OTHER HUMAN RIGHTS AND FREEDOMS" it is evident that some of the rights and freedoms are absolute while others are subject to limitations and qualifications. The right to human dignity and freedom from inhuman treatment protected under 24 is among the former, while the right to personal liberty is among the latter. In interpreting those provisions, therefore. it is erroneous to transpose the limitations or

qualifications on the right of personal liberty onto the freedom from inhuman treatment.

Thirdly Article 44 which prohibits derogation from four specified freedoms and rights, is also in absolute terms. It provides:

> **"44.** ***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 01' punishment.***
>
> ***(b) ....***
>
> ***(c) ....***
>
> ***(d) ....***

This prohibition is directed, without exception to everyone capable of causing or effecting derogation from observance, respect and/or enforcement of the freedoms and rights specified in the Article. It applies not only to the lawmakers but also to those who interpret, apply, or enforce the law. A subjective view that some of the penalties, still on our statute books, which are inflicted daily by the Courts of law, are cruel or inhuman may be understandable. However, that cannot be a basis for the contention that the Courts of law are excepted from the clear prohibitions under Article 24 or 44 of the Constitution. If any existing law prescribes a penalty which is inconsistent with Article 24, or any other provision of the Constitution, it is liable to be interpreted in accordance with Article 273 which provides in clause (1) thus:

> ***"(1) Subject to the provisions of this Article, the operation of the existing law after the coming into force of this***

Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution. "

The Witchcraft Act is such *"existing law"* having been enacted in 1957. Its provisions therefore have to be construed in a manner that conforms with the 1995 Constitution. The contention that the exclusion order is lawful because it is a punishment authorised by law per se cannot be sustained.

Having said all that, I still have to consider whether the Constitutional Court erred, as contended by the Appellant, in holding that the exclusion order prescribed by the Witchcraft Act, contravenes the stated provisions of the Constitution or any of them. To my mind the act of rendering a human being homeless is both inhuman and degrading. A clear distinction in behaviour between the human being and the wild animal, is that the human lives in a home while the beast lives in the wilderness. In my opinion, throwing a person out of his/her home or habitat, to roam and live at large, is to dehumanise and degrade such person. I think the dramatic illustration of this, is the daily pitiful sight, not only in Uganda, but the world over, of persons displaced from their homes, whether by natural disasters or human engineered conflicts. Such people are not only traumatised by their experiences, but they are debased by the fact of being tom from their homes, because a home is the anchor of human dignity. Whether by the multitudes or individually, being made homeless is dehumanising and degrading. In as much as, and to the extent that the provision of s.7 of the Witchcraft Act authorises the making of an exclusion order rendering a person convicted under the Act, homeless, that provision of the Act is inconsistent with Articles 24 and 44(a) of the Constitution. I would therefore, hold that the 3rd

ground of appeal ought to fail.

I am however in agreement with the submission that the exclusion order does not contravene, and is not inconsistent with, Article 26. The right protected under the Article is named in clause (1) of that Article as Ha *right to own property".* The protection provided in clause (2) *is* that (an owner of property shall not be) *compulsorily deprived of property, or any interest in, or right over, property of any description,* except upon specified conditions being satisfied. Sub-section (2) of section 7 of the Witchcraft Act prescribes the scope of an exclusion order, as:

> **"(2)** ***An exclusion order made under this section shall prohibit, for such periods as may be stated therein, the person in respect of 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 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 excluded."***

It is not in dispute that exclusion order could be made prohibiting the person affected from entering and remaining in his home or other property for a period. However an exclusion order cannot be made to deprive the person of ownership of, interest in, or right over, the property. The maximum effect of an exclusion order, in that regard, is to interrupt his physical occupation of the home or property, the same way a term of imprisonment interrupts a prisoner's occupation

of his home. In my opinion the Privy Council decision in ***Societe United Docks v. Mauritius*** (1985) 1 All ER 864, relied upon by Mr. Emoru, Counsel for the Respondent, is distinguishable from and not applicable to the instant case. The ***Mauritius*** case comprised of two appeals. In the first appeal it was claimed that an Act of Parliament which granted to a corporation it created, monopoly of the business of handling export sugar at the port, infringed the appellants' right to property because it deprived them of the business and goodwill without compensation. The immediate cause of the appellant being put out of business was because they used manual methods of handling the export sugar, but the new corporation with the monopoly, would not engage the services of the appellants because it opted for mechanical methods. The Privy Council accepted the claim that the appellants were deprived of property in the business, but dismissed the appeal on the ground that the constitutional protection did not extend to loss of business resulting from technological advancement.

Similarly, in addition to my view that the exclusion order does not deprive the affected person of ownership of, interest in, or right over property, I would also hold that the constitutional protection for the right to property under Article 26(2) extends to total loss but does not extend to interruption of occupation or use of property resulting from a sentence of Court or any other lawful cause. His ownership of, interest in, and right over the home remain in him. In the second appeal, a Government Minister, purportedly acting under authority of a statute, directed the Port Authority not to implement an arbitration award in favour of the appellants, who were employees of the Port Authority. The Privy Council held that directive to be in contravention of the constitutional right to property, because it was seeking to deprive the appellants of the arbitration award which was property within the Constitutional protection. For the reasons I have stated, I would hold that the 4th ground of appeal ought to succeed.

In view of my holding on the 3rd ground, and the remedy I propose I do not find it necessary to consider the 5th ground. The 1st, 6th, and 7th grounds of appeal were abandoned.

Before concluding I would, for illustration of what I mentioned earlier in this judgment, contrast the Court orders made by the Magistrates' Court against the Respondent and his co-petitioner whose petition abated by reason of his death. The Respondent in this appeal was convicted of practicing witchcraft on several reasons. According to the evidence, the Respondent had brought "charms" from Masindi and installed them in the home of the victims. It is evident, therefore, that the offence was committed in the home of his victims. As noted earlier in this judgment an exclusion order relates to an area including and surrounding the locus where the offence was committed. In the instant case, after convicting the Respondent and sentencing him to 22 months imprisonment, the trial Magistrate ordered:

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

Needless to say that the expression "that home" is equivocal. Although in the Constitutional Court it appears to have been understood to mean the Respondent's home, I am unable to construe it as such, seeing that the offence was not committed in the Respondent's home. I think it means the victims' home. If then, my understanding of the Magistrate's order is correct, then the exclusion order made by Court against the Respondent can hardly be described as inhuman or degrading. The respondent was not thereby rendered homeless. In the case of the deceased petitioner, however, which was tried by the same Magistrate the Court order was unequivocal. There were two persons convicted, on one count of possession of articles used in witchcraft, and on the second count

of practicing witchcraft at a stated school. The articles in respect of the first count had been found in their respective homes. The exclusion order made by Court was:

> ***"According to the existing provisions of the law, both accused are banned for ten years from <u>their present homes</u> after their sentence."***

In view of my holding on rendering a person homeless, I would have had no difficulty in holding that second Court order as an inhuman and degrading punishment.

The Respondent's case" however, demonstrates that not all exclusion orders need be inhuman, or degrading. Even if it be assumed that the expression *"that home"* was a slip of the pen, and that what intended was *"his home"* it is possible to visualise circumstances where a Court could make an exclusion order that does not contravene Article 24 or any other provision of the Constitution. The impact of this comparison is to show that the exclusion order prescribed under section 7 of the Witchcraft Act is capable of being applied in a manner that contravenes provisions of the Constitution as well as in a manner that does not contravene any provision of the Constitution. It has been suggested that in those circumstances the Court should declare that the provision of the Act is valid and that only a Court order, which applies it in a manner inconsistent with the Constitution, would be invalid. Mr. Emoru, however, argued that the entire provision in section 7 of the Witchcraft Act has to be invalidated on the ground that it authorises the making of a Court order that contravenes the Constitution. He contended that if the Court took the other view, namely that the provision is valid and only Court orders which contravene the Constitution should be invalidated, the Court would be intruding in the domain of the legislature. In support of his submission, he cited the

decision of the Supreme Court of Canada in *Osborne v. Canada (Treasury Board)* (1991) 82 D.L.R. (4th) 321. What was in issue in that case was validity of section 33(1) of the Public Service Employment Act of Canada which prohibited Federal Public Servants from *"engaging in work"* for or against a candidate or political party. Actions were taken out against the Public Service Commission, for declarations that section 33 of the Act was void by reason of its conflict with the guarantee of freedoms of expression and freedom of association, found respectively in s.2(b) and s.2(d) of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada confirmed that section 33(l) conflicted with provisions of the Charter but went on to consider the appropriate remedy. In the judgment, to which the majority members of the Court concurred, Sopinka J says this at p.344:

> *"This is a case in which I have concluded that section 33 in many of its applications exceeds what is necessary to achieve the admittedly valid Government objective of maintaining the neutrality of the civil service. In a number of cases to which the section applies the restriction is a justifiable limit on freedom of expression and, had it been limited to these, would have been unassailable. In these circumstances, where there exists a less restrictive alternative, the question arises as to whether the over breath should be cured by the legislature or by the Court. In this case **Walsh.J.** (trial Court) chose to cure the defect rather than leaving it to Parliament. He dealt with the respondents on a case-by-case basis and tailored the legislation to conform with a result that would not involve an unreasonable limit on the freedom of expression. I characterise this approach as "reading down." On the other hand, the Court of Appeal struck out the offending parts of the section leaving it to Parliament to cure the defect by adopting an alternative that will conform to the Charter in its*

various applications."

After noting the linkage between the so called *"reading-down"* approach to presumption of constitutionality the learned Judge continues at p.346 to say:

> ***"The policy of restraint reflected in the presumption of constitutionality arose out of the traditional respect by the judicial branch for the supremacy of the legislative branch. Interpreting a Statute by reading it in accordance with the presumed intention of the legislators was regarded as less of an invasion of their domain by the Court. In selecting an appropriate remedy under the Charter, the primary concern of the Court must be to apply the measures that will best vindicate the value expressed in the Charter and to provide tire form of remedy to those whose rights have been violated that best achieves that objective. This flows from the Court's role as guardian of the rights and freedoms, which are entrenched as part of the supreme law of Canada. The court is given an express mandate to declare invalid a law which by virtue of s.52 of the Constitution Act* 1982 *is of no force or effect to the extent of its inconsistency with the Charter. There is no reason for the Court to disguise the exercise of this power in the traditional garb of interpretation. At the same time the Court must be sensitive to its role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the Charter. "***

Finally turning to the legislation under consideration the learned Judge at p.347

says:

> ***"The language of s.33 is so inclusive that Walsh J. declined to provide any general definition of its scope but rather preferred to deal with the activity of each of the plaintiffs individually in measuring the restriction imposed by the section against the Charter. The number of instances in which the operation of the section would otherwise have been in breach of s. 2(b) of the Charter is extensive............. To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament. In my opinion it is Parliament that should determine how the section should be redrafted and not the Court. Apart from the impracticality of a determination of the constitutionality of the section on a case-to-case basis Parliament will have available to it information and expertise that is not available to the Court.***

I have said, earlier in this judgment, that this court has to interpret the statutory provisions in the Witchcraft Act, in accordance with Article 273 of Constitution with a view to promote the values expressed in the 1995 Constitution. I am persuaded that the approach adopted in ***Osborne v. Canada*** (Treasury Board) (supra) will greatly assist in the exercise and I will apply it to the instant case. As I see it I have two options. The first option is to construe section 7 of the Witchcraft Act as if it does not authorise the making of an exclusion order, which would contravene any provision of the Constitution. That is the approach Sopinka J. calls *"reading down"* a statute on the presumption that the legislature cannot intend to make a law that contravenes the Constitution. Under that option only Court orders of exclusion which contravene the Constitution would from time to time be declared invalid. The second option is to

construe the provision to its full extent and hold that in as much as, and to the extent that, it authorises contravention of the Constitution, it is void under Article 2(2) of the Constitution. The two options however have to be viewed as complimentary to each other rather than mutually exclusive. In ***Osborne v. Canada (Treasury Board)*** (supra at p.346 h), Sopinka J put the point thus:

> ***"By reason of the diverse and novel problems which it will be called upon to redress, the Court must maintain at its disposition a variety of remedies as part of its arsenal. Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature. The same result may on occasion be obtained by resort to the constitutional exemption......... In such circumstances I see no particular virtue in resorting to the language of presumption in order to disguise what is to all intents and purposes a remedy. When the values of the Charter are not sacrificed thereby, it is preferable to express deference to the legislature as a factor in fashioning the remedy rather than engaging in a fictitious analysis that attributes to the legislature an intention that it did not have."***

In my considered opinion, for the following reasons, the first option would be inappropriate in the circumstances of this case. In the first place applying the presumption of constitutionally to the law in question would be moving from the realm of theory to fiction. At the time the *"exclusion order"* was enacted into

law in 1957 the constitutional protection of human dignity through prohibition of inhuman and degrading treatment and punishment did not exist in Uganda. It cannot be rationally said, therefore, that when enacting the provision in section 7 of the Witchcraft Act, the legislature had the intention not to enact a law that would contravene a constitutional provision that was to be enacted 38 years thereafter. Secondly it appears to me that the scope of operation of the provision namely, prohibiting the convicted person from entering and remaining in and around the area where the offence was committed, is so circumscribed that to *'read down"* the provision in order to eliminate from it the offending aspect, would rid the provision of its real substance. An exclusion order under which the convicted person would still be at liberty to live in his home would hardly serve the purpose for which it was instituted as a punishment. Whether the purpose was to protect the person from the wrath of the community of the area, or to protect the community from that person's evil practice, it would be defeated. In my view, if the exclusion order, as defined in the Witchcraft Act, is to be rid of the offending aspect and still remain an effective mode of penalty, it would require restructuring. Thirdly I have taken into account the cadre of Courts that ordinarily have to apply the law in question, namely Courts presided over by lay. Magistrates Grade II and Ill. It is they that would have to tailor or design, on a case-to-case basis, exclusion orders which do not contravene any provision of the Constitution, a feat for which, in my view, they are ill equipped. For these reasons, I think it is more appropriate to leave it to Parliament to restructure the provision in a manner that would ensure that it cannot be construed as authorising contravention of the Constitution.

In ***Ibingira v. Uganda*** (1966) EA 306 the Court of Appeal for East Africa declared that the Deportation at least so far as it purported to affect citizens of Uganda. contravened section 28 of the 1962 Constitution which protected the fundamental freedom of movement and to that extent was void. The Court did

not deem it necessary as a remedy to nullify the entire provision presumably leaving it to apply to non-citizens though no firm decision was so expressed. Be that as it may, I think the circumstances in that case are distinguishable from those in the instant case. As I have just said in the instant case an elimination of the offending aspect in section 7 of the Witchcraft Act would leave the provision virtually without its substance, whereas in the case of the Deportation Ordinance the *"cleansed'* provision would still be substantially effective.

Mr. Emoru submitted that the *"exclusion order"* had outlived its purpose. I don't think that this is a matter for the court to determine. Parliament is more suited to either modify that mode of punishment or get rid of it altogether.

In the result I would allow this appeal only in part. I would set aside the declarations issued by the Constitutional Court and substitute therefore, a declaration that:

Section 7 of the Witchcraft Act is inconsistent with the Constitution and to that extent order that is an inhuman and degrading punishment in contravention of Articles 24 and 44 (a) of the Constitution.

I would agree that each party should bear its own costs in this Court and in the Constitutional Court.

Dated at Mengo this ...25th .....day of ...May...1990.

A.N MULENGA
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A

TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE

REGISTRAR, THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ. ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJSC).

CONSTITUTIONAL APPEAL NO. 1 OF 1998

BETWEEN

ATTORNEY GENERAL ============================== APPELLANT

AND

SALVATORI ABUKI ==============================RESPONDENT.

(Appeal from the judgment and decision of the Constitutional Court of Uganda at Kampala, (MANYINDO DCJ, OKELLO, MPAGI-BAHIGEINE, TABARO AND EGONDA-NTENDE JJ.) dated 13th day of June 1997 in Constitutional Case No. 2 of 1997).

<u>JUDGEMENT OF KANYEIHAMBA, J.S.C.</u>

I have had the advantage of reading the judgment in draft of Wambuzi C.J. and I am in agreement with his reasoning and conclusions on grounds 2, and 4 of this appeal and I have nothing useful to add. However, I differ with the learned Chief Justice on ground 3 and partly on ground 5 of the appeal.

The facts of the case and the circumstances leading to this appeal have been clearly set out in the judgment of the Chief Justice and I need not repeat them in my judgment.

Suffice to say that there were seven ground of appeal enumerated in the Memorandum of Appeal before this Court. However, at the commencement of the appeal, Counsel for the appellant indicated that he was abandoning grounds 1, 6, and 7 and amending ground 2.

Ground 3 was framed as follows:

> ***"That the Honourable Judges erred in law when they held that a banishment order is unconstitutional because it contravenes Article 24 and 44 of the Constitution which prohibit cruel, inhuman and degrading treatment."***

Article 24 is imperative and it provides,

> ***"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment."***

Article 44 provides:

> ***"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 m from slavery or servitude***
>
> ***(c) the rights to fair hearing***
>
> ***(d) The right to an order of habeus corpus."***

The Uganda Constitution entrenches every provision in it, in that the simplest and non-controversial clauses therein can only be amended, if at all, by two thirds majority of members of Parliament on a Bill proposed for the amendment of the Constitution on the second and third reading of that Bill. The more entrenched provisions of the Constitution may not be amended by the two-thirds majority of members of Parliament unless in some cases, such majorities are supported by a majority of the people in a referendum or in others, a majority of two thirds of District Councils.

Article 24 is doubly entrenched by Article 44 to the extent that it is unalterable. In other words there are no conceivable circumstances or grave facts by which the rights protected in Article 44 can ever be altered to the disadvantage of anyone even if that person has been charged or convicted of a serious offence. Parliament may not pass any law whose provisions derogate from Article 24. Courts cannot pass any sentence that derogates from the same Article.

In support of the judgment of the learned Manyindo, D.C.J., in the Court of Appeal, counsel for the appellant, Mr. Cheborion, the learned Principal State Attorney, submitted that since the banishment order was a punishment imposed by a court of law and in accordance with the existing law, it could not be held unconstitutional or considered cruel, inhuman or degrading, since it is authorized by law. Such an argument is fallacious and dangerous for it implies that whatever is provided for by law or an Act of Parliament can never be declared unconstitutional or a violation of the rights and freedom which that Constitution guarantees and protects.

Whereas I am satisfied that the learned Deputy Chief Justice was right in his findings and decisions on the other grounds of appeal, he was, with great respect, in error, when in his judgment on the substance of ground 3 before this Court he held,

> ***"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 of order of Court.***

In my opinion, even an Act passed unanimously by Parliament and any judgment of any Court, whatever its position in the hierarchy of the Courts' system, which derogated from Articles 22 and 44 is unconstitutional and, therefore, null and void.

I am persuaded by the pertinent submission of Mr. Emoru, Counsel for the respondent, that section 7 which provides:

> ***"(1) A Court/including a court which is empowered under section 9 of this Act to try cases under the Act, by which 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 the Act to impose, make an exclusion order in relation to such person."***

is cruel and inhuman punishment.

The appellant in this appeal was convicted of practicing witchcraft and then sentenced to a term of imprisonment. In my opinion, it is cruel, inhuman and degrading that during the term of punishment, the prisoner should continue to suffer under the cruel mental torture of thinking and contemplating where he or she will be or what will

happen to the family and property on release when he or she has to go into banishment once again as another punishment for uncertain future. In consequence, a person who has served sentence of imprisonment should not be required by law or any order of Court to suffer another punishment. A banishment order would be contrary to the provisions of Article 24 and 44 of the Constitution and therefore null and void.

With regard to ground 5, I agree with the learned Chief Justice that an exclusion order as such does not constitute a deprivation of property or threaten life but in so far as it is human, I do differ with the learned Chief Justice. I can see no appreciable difference between and exclusion order and a banishment order, they are bot in conflict with the provision of Article 24 and 44 and therefore unconstitutional.

In passing, it should also be noted that a banishment order which is not accompanied by supervision or prohibition of the practices of witchcraft in the village, area and district where the person banished will live, exposes the people of that village, area or district, to the risk of the person banished practicing witchcraft there. It is certainly unfair that one area, the home of the convict, should be cleansed of the practice of witchcraft while the other unsuspecting area where he or she may end up should be put at risk from the same practice. Thus, the additional punishment of exclusion after conviction and sentence of imprisonment for witchcraft is not only cruel and inhuman, it is irrational and unfair. For the reasons I have given, ground 3 of the appeal is dismissed. In all other aspects of this appeal I am in agreement with the learned Chief Justice. This appeal therefore succeeds in part.

In the result, I would allow this appeal in part. I would set aside the declarations issued by the Constitutional Court in so far as they relate to ground 2 and 4 of the

appeal but uphold their findings and orders on ground 3 and on ground 5 in so far they refer to an exclusion order, being inhuman. I would order that each party pays its costs.

Dated at Mengo this …25th …. Day of ….May….1999.

DR. G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A

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JUDGEMENT OF MUKASA-KIKONYOGO, JJC.

I have had the benefit of reading in the draft the Judgment of Wambuzi CJ. I agree with the reasons for his findings on the grounds of the Memorandum of Appeal argued, except on ground 3 and ground 5,

With respect, I hold slightly different views on issues raised in both these grounds. Grounds 3 of memorandum of Appeal read:-

> ***"That the Honourable Judge erred in law when they held that a banishment order was unconstitutional because it contravenes***

Articles 24 and 44 of the Constitution which prohibits, cruel, inhuman and degrading treatment or punishment."

As observed by the learned Chief Justice in his judgment it is possible under the provisions of section 7 of the Witchcraft Act to make an exclusion order not affecting the home of the person against whom it is made. But, normally exclusion orders have the effect of prohibiting the persons against whom they are made from entering and remaining in their homes and land. There is no doubt such action would amount to cruel and inhuman punishment in that such persons would be sent away empty handed. The law does not make provisions for giving them food, bedding and shelter. I reject the submissions of the learned Counsel for the appellant that exclusion orders of that type do not fall under category of punishments which cause suffering to the person concerned physically and mentally. In my view they do. They cause anxiety and make a person destitute and homeless.

As long as the provisions of **Section 7 of the Witchcraft** Act may be enforced in contravention of **Articles 24 and 44 of the Constitution**, the Court of Appeal in my view was justified in reaching the decision it did on this issue. This ground should, hence, fail.

We regard to the fourth ground of the memorandum of Appeal namely that:-

> ***"The Honourable Judges erred in law when they held that the effect of the banishment of the petitioner amounted to compulsory deprivation or acquisition of the petitioner's property Contrary to Article 26(2) of the Constitution."***

I do not ascribe to the view which holds that inability to enter a home or land by a person against whom an exclusion order is made similar to a sentence of imprisonment

did not amount to compulsory deprivation. In my view deprivation by a sentence of imprisonment is not comparable to that which may be imposed by an exclusion order under **The Witchcraft Act**. A person serving a sentence of imprisonment and his property should be kept in safe custody. The law and human rights require that a prisoner is provided with the necessaries of life, like food and shelter.

On the other hand, a person against whom and exclusion order to deprive him of access to his home and land,
Is made, is forced to leave his home and land. He has to live elsewhere. However, the petitioner in the present case does not fall in this category. The order of banishment for 10 years will not deprive him of access to his home and land. He is denied access to the home and land of some other person. However, with respect, I do not ascribe to the view held by the learned Deputy Chief Justice that an exclusion order banishing a person from his home and land is a temporary inconvenience. There is no guarantee that such a person will return to his home.

Be that it may, in the present case, the banishment order did not amount to compulsory deprivation or acquisition of the petitioner's property contrary to Article 26(2) of the Constitution. This ground must succeed too.

Regarding the fifth ground which is to the effect that the Constitutional Court erred in law in holding that an exclusion order under the Witchcraft Act is unconstitutional and amounted to a threat of life contrary to **Article 22 of the Constitution**, for the reasons given under ground 3, ground 5 must also fail. As far as I am concerned it is immaterial that the Court like in the instant case can make an exclusion order which may not contravene the constitution. My problem with **section 7 of the Witchcraft Act** is that it empowers a Court to make exclusion orders, which may offend the Constitution. A case in point is to be found in the present record of proceedings. The

same court that made the exclusion order against the petitioner made one against his co-accused whose appeal abated due to his death, which had deprived him access to his home and land. Such an order would be unconstitutional in my view.

This appeal succeeds in part. Since in the present case the life of the petitioner was not threatened with deprivation of access to his property, a general declaration should be made to the effect that section 7 of the Witchcraft Act is unconstitutional. It contravenes the provisions of Article 24 and 44(a) of the 1995 Constitution. With regard to the remaining grounds apart from ground 3 and 5, the appeal succeeds. Hence, the declarations made by the Court of Appeal thereunder should be set aside. I would order each party to bear its own costs.

Date this ...25th …. Day of …. May …. 1999.

LAETITIA E. M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT.

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REGISTRAR, THE SUPREME COURT