THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

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

CONSTITUTIONAL APPEAL NO.2 OF 2004

BETWEEN

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

AND

MAKERERE UNIVERSITY…… RESPONDENT

{Appeal from the decision of the Constitutional Court (Mukasa Kikonyogo, DCJ, Mpagi Bahigeine, Berko,Twinomujuni, and Kitumba JJ.A) dated 24th September 2003 in Constitutional Petition No 1 of 2003.}

JUDGMENT OF ODOKI, CJ

This is an appeal against the decision of the Constitutional Court dismissing the appellant's petition challenging the constitutionality of the respondent's policy and regulations which required the appellants and other members of the Seventh Day Adventist Church to attend scheduled lectures and sit tests and examinations on Saturday which is their Sabbath contrary to their fundamental beliefs. The central issue in this appeal is whether the respondent's policy and regulations contravened the appellant's freedom of religion and the right to education as guaranteed by the Constitution of Uganda.

Background to the Appeal:

The background to this appeal is as follows: The appellants were members of the Seventh Day Adventist Church who were at the material time students at the Makerere University, the respondent.

According to their religious beliefs, the Sabbath Day (Saturday) is a holy day of rest and worship and therefore no work including attending lectures and sitting tests and examinations, is permitted. Since 1997, the respondent had initiated a policy aimed at increasing access to University education which had led to large increase in number of students admitted and introduction of a variety of courses of study conducted both during day and evening as well as external programmes. Due to this policy, the respondent made regulations contained in the Freshers Joining Instructions issued to joining students, in which the students, including the appellants, were informed that the University programmes might run for seven days a week. They were also informed that since the University had students and members of staff from various religions backgrounds, the University might not meet the interests of a particular group, especially in the crucial areas of attendance of lectures and examinations. The students were urged to respond to their academic work in the academic unit even if it took place in their respective days of worship.

The appellants found difficulties in attending lectures and sitting tests and examinations on Sabbath day, and missed some of the programmes conducted on Saturdays, delaying the completion of their courses and even in some cases abandoning the courses. The appellants felt that the policy and regulations of the respondent interfered with their freedom of religion. They therefore started holding dialogue and negotiations with the respondent so as to be granted some accommodation. They requested for rescheduling of tests and examinations on days other than the Sabbath day or in the alternative, that special examinations be set for those who miss the tests or examinations held on Saturdays. They also suggested that they could be confined on Saturdays while other students were sitting examinations, so that they could sit the examinations later between

6.30 and 9.30 p.m.

The respondent was unable to accept this request due to the fact that it was a secular University which could not cater for particular religious groups, given its limited physical facilities and huge financial costs involved. The respondent indicated that it was already extending accommodation to the appellants by allowing them to retake the programmes they missed, including examinations when they were next offered. The appellants were dissatisfied with the response of the respondent. They brought a petition in the Constitutional Court under Article 137 of the Constitution, seeking mainly a declaration that the University's policies and regulations of scheduling lectures, mandatory tests and examinations on the Sabbath Day are inconsistent and are in contravention of Articles 20, 29 (1) (c), 30 and 37 of the Constitution, in respect of the appellants who profess the Seventh Day Adventist Faith.

In the petition, the appellants alleged that the Makerere University policies and regulations made under the authority of the University and Other Tertiary Institutions Act (Act 7 of 2001), which policies and regulations require students to attend classes, and take mandatory tests and examinations on any day of the week (including the Sabbath Day in the case of the appellants who believe in the Seventh Day Adventist Christian Faith), irrespective of the students' religious affiliations are inconsistent with and in contravention of Articles: 20, 29(1) (c), 30 and 37 of the Constitution of Uganda.

They alleged further that Makerere University scheduled the taking of mandatory examinations for the subject of ***"Introducing Law"*** (for the 1st and 2nd appellants) and ***"Legal Aspects of Planning"*** (for the 3rd appellant) on Saturday, 25th January 2003, which was their Sabbath Day and on which day they could not by reason of their faith and beliefs under the Seventh Day Adventist Christian Faith, take examinations. For the same reason, the 3rd appellant was forced to

miss a scheduled examination in the course of ***"Civil Procedure"*** in 2002 and therefore could not graduate, and was on this basis required to repeat the year. By reason of the foregoing, the appellants complained that they had suffered tremendous hardship and injustice and were entitled to legal redress.

The appellants contended that Makerere University is a public institution, and is obliged under Article 20 of the Constitution of Uganda to respect and uphold their inherent and fundamental rights and freedoms (which include the religious freedoms) as established under the Constitution.

They also contended that the respondent's policy of scheduling mandatory classes, test and examinations on the Sabbath Day infringed on their fundamental rights and freedoms to practise their religion and manifest their Sabbath faith, and the participation in the rites of their beliefs of the Seventh Day Adventist Christian Faith, as guaranteed under Article 29(1) (c) of the Constitution.

The appellants further contended that the effect of the policies of Makerere University of scheduling mandatory classes, tests and examinations on the Sabbath Day, imposed an unconstitutional burden on them, by virtue of their faith and undermined their constitutionally guaranteed right to education under Article 30 of the Constitution.

Furthermore, it was their contention that the University policy of

scheduling classes, mandatory tests and examinations on the Sabbath Day, imposed an unconstitutional burden and hardship on the appellants' constitutionally guaranteed right to practise, profess, maintain and promote their religion in community with others, under Article 37 of the Constitution of Uganda.

Lastly, the appellants contended that the inflexible conduct and attitude of the respondent with regard to them had occasioned severe hardship, loss and detriment to them for which harm they are entitled to declarations, legal redress and appropriate compensation in damages.

The appellants prayed for the following declarations:

(1) The Makerere University policies and regulations of scheduling lectures, mandatory tests and examinations on the Sabbath Day, are inconsistent with and in contravention of Articles 20, 29(1)(c), 30 and 37 of the Constitution in the case of your Petitioners who practise the Seventh Day Adventist Christian Faith.

(2) Makerere University violated the petitioners' constitutionally guaranteed rights under Articles 20, 29(1)(c), 30 and 37 of the Constitution.

They also prayed for the award of general and exemplary damages for the infringement of their Constitutional rights and costs of the petition. The petition was supported by the affidavits of the three appellants and three other members of the Seventh Day Adventist Faith.

The respondent filed an answer to the petition and admitted requiring students to attend classes, tests and examinations on any day of the week, but denied that the said requirement was inconsistent with

Articles 20, 29(1)(c) 30, and 37 of the Constitution. The respondent further denied that the scheduling of classes, tests and examinations on Saturday infringed on the fundamental rights of the appellants, nor did it impose an unconstitutional burden on the appellants. The respondent stated that it was a secular institution and the petitioners were admitted subject to the Joining Instructions that the University programmes might run seven days a week, and since the University had students and staff from various backgrounds, the University might not meet the interests of a particular group, particularly in the crucial areas of attendance of lectures or examinations. The answer to the petition was supported by several affidavits including, one by the Vice Chancellor of the University, Professor John Ssebuwufu.

At the hearing of the petition, in the Constitutional Court the two main issues were framed as follows:

1. Whether the respondent's regulations are inconsistent with and in contravention of Articles 20, 29(1) (c), 30 and 37 of the Constitution of Uganda in the case of the Petitioners.

2. Whether the respondent is entitled to claim a lawful derogation under Article 43 of the Constitution of Uganda.

The Constitutional Court answered both issues in the negative, and declined to grant the declarations sought. The appellants were dissatisfied with that decision and appealed to this Court on the following six grounds:

> ***"1. That the learned Justices of the Court of Appeal/Constitutional Court erred in law and fact when they held that the Respondent's policies and regulations in issue are not inconsistent with Articles 20 and 30 of the Constitution and that the Respondent was justified in requiring the appellants to sit examinations on their Sabbath.***
>
> ***2. That the learned Justices of the Constitutional Court/Court of Appeal erred in law and in fact and***

misdirected themselves on questions of law and fact when they held that the Respondent's policy and regulations that compelled the appellants to sit exams on their Sabbath or any day of the week between 7.00 a.m. in the morning and 10.00 p.m. at night is not inconsistent with and did not violate the Appellants human rights under Articles 20, 29(1) (c), 30 and 37 of the Constitution.

3. ***That the learned Justices of the Constitutional Court erred in law when they held that the Freshers Joining Instructions of the Respondents notifying the Appellants on joining the Respondent University that programmes would run seven days a week and that the Respondent would not be obliged to respect any day of worship was sufficient notice that absolved the Respondent of any further responsibility to uphold the appellants fundamental tenet of religion in respect of keeping a Sabbath on Saturdays when required to sit exams on that day and that the Appellants should have turned down the offer to join the Respondent at the beginning.***

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

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

proving justifiable derogation from any rights of the Appellants.

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

The Submissions of Counsel:

At the hearing of the appeal, the appellants were represented by Mr. Christopher Madrama assisted by Mr. Fredrick Sentomero and Mr. Nsubuga Ssempebwa. The Respondent was represented by Mr. Dennis Wamala.

Mr. Madrama for the appellants, argued grounds 2 and 4 together, and rest of the grounds separately. He argued ground 5 first, which dealt with the onus of proving justifiable derogation under Article 43 of the Constitution. I propose to deal with grounds 1,2,3,4 and 6first and handle ground 5 last.

In his submissions before us on ground 5, Mr. Madrama, learned counsel for the appellants, contended that the Constitutional Court erred in holding that the respondent did not have the burden of proving that the infringement of the appellants' rights was demonstrably justified in a free and democratic society.

Counsel argued that once the appellants had proved infringement of their rights, the burden shifted on to the respondent to establish a lawful derogation. He further submitted that the burden of proof is higher than in an ordinary civil case. He relied on the decision of ***R V Big M Drug Mart Ltd*** (1985) 18 DLR321, ***R V Oakes*** (1987) LRC (Const.) 477, and ***Charles Onyango Obbo & Another vs Attorney***

General, Const. App No 2 of 2002 SC.

Mr. Wamala, for the respondent, submitted that Article 43 provides a limitation on rights and freedoms based on public interest. He contended that their observance of the Sabbath Day would prejudice the public interest. He cited the case of ***R V Oakes*** (supra) and ***Charles Onyango Obbo*** (supra) as setting out the criteria for determining what limitations are reasonably justifiable in a free and democratic society.

Learned counsel for the respondent also submitted that the respondent had provided sufficient accommodation for the appellants, relying on the affidavit of Prof. Ssebuwufu, Vice Chancellor of the respondent. He cited the decisions in ***Commission Scolaire Regionale De Chamblay vs Bervegevin*** (1994) 2 SCR 529 and ***Central Okanagen Scarel District No 23 vs Renand*** (1992) 2 SCR 970 in support of his submissions.

In his submissions on ground one, Mr. Madrama, argued that the Constitutional Court erred in holding that the respondent's actions did not contravene the Constitution. He contended that the respondent failed in its constitutional duty under Article 20 of the Constitution to respect the appellants' right to freedom of religion by upholding their right to rest on the Sabbath. Learned counsel criticized the respondent's policy of requiring students to postpone examinations or forego their courses as an infringement of their right to freedom of religion. According to learned counsel, their right to freedom of worship and to manifest their religion, was violated.

Referring to the letter from the Vice Chancellor to the Seventh Day

Adventist Church, Mr. Madrama submitted that while it is correct to take into account the policy of the respondent, it was necessary to consider both its purpose and effect. It was his contention that even if there is a valid purpose, if the effect is adverse, the infringement would be held to be unconstitutional. Learned counsel cited the decisions in the ***Queen, vs Big M Drug Mart Ltd (others Intervening*** (1986) LRC (Const.) 332 and ***Re Chikweche*** (1995) 2 LRC 93 and ***Sherbet vs Verner*** 374 US 398, in support of his submission.

In respect of ground 3, Mr. Madrama argued that the Freshers Joining Instructions never amounted to a waiver or estoppel. He contended that there is no estoppel against a fundamental right and relied on the decision in ***Tellis and Others vs Bombay Municipal Corporation and Others*** (1987) LRC 35. It was his submission that in order for an action to amount to a waiver, the waiver must be as free and voluntary as possible.

On grounds 2 and 4, learned counsel for the appellants submitted that the Justices of the Constitutional Court erred in holding that giving the appellants an accommodation on Saturday would impose unbearable burden on the respondent. It was his contention that there was no evidence to support this finding. He argued that there were other options like sitting for examination in the evening of Saturday which was not considered by the Constitutional Court.

Finally, in arguing ground 6, Mr. Madrama submitted that the Constitutional Court failed to evaluate the evidence correctly. He contended that there was no evidence to support the finding that giving the appellants an accommodation on Saturdays like sitting examinations in the evening would impose an unbearable burden on

the respondent.
In reply, Mr. Wamala for the respondent submitted that the six grounds of appeal could be summarized under the two issues I have already stated above. Learned counsel pointed out that the appellants had narrowed down their complaint in the grounds of appeal to attending examinations, and have left out attendance of weekly tests which had been included in the petition.

Mr. Wamala's first submission was that not every infringement of a human right constitutes a violation of the Constitution. It was his contention that the test is whether there is substantial violation of the petitioners' right. He relied on the decision in ***Syndicat de Lenseignement de Champlain CSR De Chambly C Bergevia*** (1994) 2 RCS 526. He submitted that the appellants did not adduce any evidence to show that the alleged violation was substantial. He referred to the affidavit of Prof. Ssebuwufu where he stated that examinations were held within two weeks and each examination was held for three hours and contended that if the appellants are required to attend examinations for only three hours, the infringement is not substantial.

Secondly, Mr. Wamala submitted that the nature of the accommodation the respondent extended to the appellants was to retake the examinations after one year. He contended that the appellants had to prove that the infringement or limitation constituted an unconstitutional burden against them. The appellants had also to show the sincerity of their belief. Counsel relied on the ***Syndicat Case*** (supra). Mr. Wamala referred to the affidavit of Ms. Nakabango which explained the exceptions to the Sabbath rule. He

also referred to ***Exodus*****,** Chap. 20:8 and submitted that if the appellants are sincere, why did they want to be confined, instead of praying. Counsel submitted that when considering sincerity, one should not look at the validity but the sincerity of their claim.

Thirdly, Mr. Wamala contended that by signing the Freshers' Instructions, the appellants waived their Constitutional rights and cannot be seen to complain now. He cited the ***Syndicat Case*** (supra) which lays down the tests to be applied in determining the question of waiver, which he conceded are not settled.

The fourth argument was that Article 29(1) (c) is not absolute and is limited by Article 43 which provides that no person should prejudice the rights of others or the public interest. Mr. Wamala relied on the affidavits of Prof. Ssebuwufu and the President of the Students' Guild which demonstrated the likely prejudice to other students if the demands of the appellants were granted.

He also relied on the National Objectives and Directive Principles of State Policy, in the Constitution, Objective No 18 (2), which states that the State should give every person opportunity to attain the highest standards of education, and the University and Tertiary Institutions Act which has the objective of affording all students the right to higher education.

Before I consider these submissions I propose to outline the relevant Constitutional provisions, some general principles of Constitutional interpretation, the importance of Sabbath to the Seventh Day Adventist Faith, and the respondent's policy and regulations.

Relevant Constitutional Provisions:

Freedom of religion is guaranteed by Article 29(1) (c) of the Constitution which provides,

> ***"(1) Every person shall have the right to –***
>
> (c) ***freedom to practice any religion and Manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with this Constitution."***

This right is reinforced by Article 37 which provides,

> ***"Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others."***

The Constitution also in Article 7 which states, ***"Uganda shall not adopt a state religion."***

The right to education is provided for under Article 30, which states that, ***"All persons have a right to education."***

The Constitution provides in Article 20 that fundamental rights and freedoms are inherent and not granted by the State and must be respected and promoted by all organs of the State and all persons. Article 20 states as follows:

> ***"(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.***
>
> ***(2) The rights and freedoms of the individual and groups enshrines in this Constitution shall be respected, upheld and promoted by all organs and agencies of the Government, and by***

all persons."

The Constitution provides for a general limitation on fundamental rights and freedoms under Article 43 in these terms:

> ***"(1) In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.***
>
> (2) ***Public interest under this article shall not permit –***
>
> (a) ***political persecution;***
>
> (b) ***detention without trial;***
>
> (c) ***any limitation of the enjoyment of the rights and freedom prescribed by this chapter beyond what is acceptable in a free and democratic society, or what is provided in this Constitution."***

Under Article 2, the Constitution is the Supreme Law of Uganda and ***"if any other law or custom is inconsistent with any of its provisions, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void."***

Under Article 50 of the Constitution any person who claims that a fundamental right or freedom guaranteed under the Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation. Any person or organization may bring an action against the violation of another

person's or groups human rights.

Any person has a right to petition the Constitution Court for determination of any question relating to the interpretation of the Constitution under Article 137(3) which provides,

> ***"(3) A person who alleges that –***
>
> (a) ***an Act of Parliament or any other law or anything in or done under the authority of any law, or***
>
> (b) ***any act or omission by any person or authority***
>
> ***is inconsistent with or in contravention of a provision of this Constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."***

It is a well established principle of constitutional interpretation that a broad and liberal spirit is required for its interpretation. It is essential that a constitution is not interpreted in a narrow and legalistic way but generously, and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of constitutional rights. See ***R v. Big M. Drug Mart Ltd.*** (1985) 18 DLR 321.

There are also ample authorities for the proposition that a constitution should be interpreted as an integrated whole so that no single provision of the Constitution is segregated from others and considered alone, but that all provisions bearing upon a particular

subject are brought into view and to be interpreted so as to achieve the greater purpose of the constitution. See ***South Dokata V. North Caroline*** 192 US 268, 1940 448 at 465.

Importance of Sabbath to the Seventh Day Adventist Faith:

According to the faith of the Seventh Day Adventist Christians, the observance of the Sabbath is one of the Ten Commandments. This is spelt out in the ***Holy Bible*** in the Book of Exodus, Chapter 20 verses 8-11 as follows:

> ***"Remember the Sabbath Day by keeping it holy. Six days you shall labour and do all your work but the Seventh Day is a Sabbath to the Lord your God. On it you shall not do any work, neither you, nor your son or daughter nor your man-servant nor your main-servant nor your animals nor the alien within your gates. For in six days the Lord made the heavens and the earth, the sea, and all that is in them, but he rested on the seventh day. Therefore the Lord blessed the Sabbath Day and made it holy."***

According to the affidavit sworn by Dr. John B. Kakembo, the Executive Secretary to the Seventh Day Adventist Church, Uganda Union, the Sabbath observance is one of fundamental beliefs of the Seventh Day Adventist Church. In a text book entitled, ***What the Seventh Day Adventist Believe*** where the teaching of the Sabbath is contained in Chapter 19 at pages 245-266, it is stated that the Sabbath is central to their worship. It is a memorial of creation because God rested and was refreshed on the Seventh Day (Exodus:31:17) God also blessed the Sabbath and sanctified it.

With regard to observance of the Sabbath, the book states at page 263,

> ***"To remember the Sabbath Day, to keep it holy (Ex.20:8). We must think of the Sabbath throughout the week and make the preparations necessary to observe it in a manner pleasing to God. We should be careful not to so exhaust our energies during the week that we cannot engage in His Service on the Sabbath. Because the Sabbath is a day of special communion with God in which we are invited to joyously celebrate His gracious activities in creation and redemption, it is important that we avoid anything that tends to diminish its sacred atmosphere. The Bible specifies that on the Sabbath we should cease our secular work (Ex.20:18), avoiding all work done to earn a living and all business transactions (Neh.13:15-22)."***

The Sabbath begins at sunset on Friday evening and ends at sunset Saturday evening (See Gen.1:5) Scripture calls the day before Sabbath (Friday) – the preparation day – (Mark; 15:42) – a day to prepare for the Sabbath so that nothing will spoil its sacredness. On this day those who make the family's meals should prepare food for the Sabbath so that during its sacred hours they also rest from their labours (See Ex 16:23; Num 11:18).

Twinomujuni JA questioned the sincerity of the claim by the appellants that attending lectures or examinations on the Sabbath was not sincere, in view of Jesus teachings contained in Mark 3:23 where he said that the Sabbath was made for man and not man for Sabbath, and Mathew 12:1-3 where Jesus said, ***"It is lawful to do good on the Sabbath."*** However, the majority of the Justices of

the Constitutional Court did not question the appellants' sincerity, and I agree with them because religion is a matter of faith.

In ***Re Chickeche*** (1995) 2 LRC 93, it was held by the Supreme Court of Zimbabwe that freedom of conscience and religion had to be broadly construed to extend to conscientiously held beliefs whether grounded in religion or secular morality. The wearing of dreadlocks was symbolic expression of the beliefs of Rastafarianism which had the status of a religion in the wider and non-technical sense, or in any event was a system founded on personal morality. The Court was not concerned with validity or attraction of Rastafarian beliefs, but with the sincerity with which they were held, which in the case of the applicant was not in doubt. The appellants' manifestation of his religion by the wearing of dreadlocks fell within the protection of freedom of conscience afforded by S.19 (1) of the Constitution.

Therefore, the refusal by the Court to permit the applicant to take the oath of loyalty and of office as a preliminary to registration as a legal practitioner on the ground of his appearance had placed the applicant in a dilemma. He was forced to choose between adherence to the precepts of his religion which meant foregoing the right to practise the profession he had chosen, or satisfying an important edict of his religion in order to be able to practise and it followed that the judges ruling violated his constitutional right to freedom of religion under S.19 (1) (see ***R V M Drug Mart Ltd*** (1986) LRC Const. 332 at p 359.

The Court cited the dictum of Dickson CJ in the Canadian Case of

RV Big M Drug Mart Ltd (supra) at p.359, in which he stated,

> ***"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or refusal."***

Later at p.366 he added,

> "***Every individual is free to hold …… whatever religions beliefs by his or her conscience dictates provided inter alia, only such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs on opinions of their own."***

Dr J N Pandy writing on the effect of Article 25 (1) of the Constitution of India in his book entitled, ***The Constitution of India,*** p.197 states:

> "***Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs as conclusive to their spiritual well being but will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observations, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts by his religion***. (cited in ***Re Chikweche*** **(**supra) Page 99 – 100).

Respondents' Policy and Regulations:

Each academic year the respondent issues to students admitted to take various courses, a document known as ***"Freshers Joining Instructions."*** In the 1999/2000 and 2000/2001 academic years, the appellants received a similar document in which it was stated in bold letters:

> ***"Students are informed that University Programmes may run seven days a week. Since the University has students and members of staff from various backgrounds the University may not meet the interests of a particular group, particularly in the crucial areas of attendance of lectures and/or examinations. You are therefore urged to respondent to the academic work in your Academic Unit even if it takes place on the respective days of worship."***

The background to policy and regulations of the respondent were explained in a letter dated July 12, 2000 addressed to Dr John B Kakembo, the Executive Secretary of the Seventh Day Adventist Church, Uganda Union, by Prof. John Ssebuwufu, the then Vice Chancellor of the respondent University. The body of the letter reads:

> ***"RE: SEVENTH DAY ADVENTIST STUDENTS AND ACADEMIC ACTIVITIES ON SATURDAYS***

Thank you very much for your dated June 18, 2002 regarding scheduling of examinations on Saturday.

Prior to 1997, the University authorities used to try very hard to ensure that examinations were not scheduled at times, or on days of worship for the various religions denominations. Even then, in a few academic units, for example, in the faculty of Medicine, tests and some clinicals had to be conducted on

Saturdays and Sundays purely because of the nature of such academic programmes.

The University has since 1997 witnessed many positive developments including a big increase in the number of students admitted and the introduction on a wide variety of courses and programmes of study. The University now runs not only day classes but also afternoon, external and evening classes.

With such a complex system, many practice, norms and patterns of the University life have had to change to suit the new circumstances and realities in which the University has to operate. The University Senate and Management have, therefore, agreed that whilst individual religious beliefs have to be respected, academic activities can be scheduled on any or all the seven days of the week. The University Senate and Management have also agreed that academic activities can be schedule from 7.00 a.m. to 10.00 p.m. on any day.

If for religious or any other reason a student is unable to study or sit for examinations, he/she is free to request to withdraw from the University or to retake a particular course when such a course would be offered again. Under the Semester which the University now operates, special or supplementary examinations are not administered. In the circumstances, any Seventh Day Adventist Student who may not have sat for a particular examination, may apply to the respective Dean/Director to retake the course for such examination when it will be next offered again.

On its part, the University Management will continue to respect individual religious beliefs and the freedom of worship but where there are constraints, it is hoped that students and the general public will understand and support the University so that in the end " We Build for the Future."

In his affidavit in support of the answer to the petition, Prof. Ssebuwufu explained the objectives of the policy and regulations,

their effect, the efforts to accommodate the demands of the appellants, and the reasons why the appellants could not be exempted from the academic programmes conducted on the Sabbath. He explained that the policy was adopted taking into account the secular nature of the University with diverse religious backgrounds and with an attempt to make the University education accessible to a large student population. The policy had been communicated to the students including the petitioners, at the time of admission.

Prof. Ssebuwufu also explained that the effect of the policy was to increase the number of government sponsored students, provide education to a large number of evening, external or private students who could not attend day programmes due to their schedule of work. As a result of the policy the number of courses offered by the University has increased, and the University had been able to generate more revenue from private students to improve buildings and infrastructure to accommodate more students, and to recruit and retain more skilled staff.

The Vice Chancellor explained further in his affidavit the scope of accommodation extended to the appellants which included-

- change of courses and subjects in light of provided timetables;

- retaking of courses or examinations when unable to sit for examinations on weekends;

- attending lectures or tutorials on other days with students of different programmes held.

Prof. Ssebuwufu stated that the University could not offer special examinations for those unable to attend examinations on particular days due to religious considerations or other reasons because such a practice would create a variance in academic standards and would also increase the cost of education. It was also not possible to confine Seventh Day Adventist Students in a particular place on Saturdays and offer them examinations after Sabbath as this would be construed as sectarianism, impractical and unconstitutional. Other religious groups could also demand to be similarly treated.

The difficulties which would be experienced by the University if it agreed to provide the additional accommodation requested were stated by Prof. Ssebuwufu to include:

- Reduction in the number of students admitted.

- Reduction in the courses offered for evening programmes.

- Prolonging duration of certain courses leading to increase in cost of education.

- Inability to employ adequate number of qualified lecturers who can only teach on weekends.

- Inability to meet demands by staff for high wages which are subsidized by resources generated by fees from private students.

- Substantial reduction in revenue leading to decrease in student intake.

- University would be compelled to reschedule lectures, tests

and examinations in respect of various religious groups like Catholics, Anglicans, Bahais, Hindus, Moonies, etc.

Constitutionality of the Respondent's Policies and Regulations:

The appellants complained that the Justices of the Constitutional Court erred in holding that the respondent's policies and regulations in issue were not inconsistent with articles 20 and 30 of the Constitution and the respond was justified in requiring the appellants to sit examinations on their Sabbath. They also complained that the Justices of the Constitutional Court misdirected themselves when they found that the respondent's policy and regulations were not inconsistent with and did not violate the appellant's human rights under Articles 20, 29(1) (c) 30 and 37 of the Constitution.

It will be recalled that Article 20 imposes a duty on all organs and agencies of the government and all persons to respect uphold and promote the fundamental rights and freedoms of the individual and groups enshrined in the Constitution. Article 30 guarantees the right of education to all persons.

In dealing with the issue of religious freedom, Mukasa Kikonyogo DCJ said,

> "***It is correct as observed by counsel for the petitioners that the justification for the respondents is a public and secular institution and as such it has no duty to accommodate some beliefs based on religious tenements. It is no where stated in the respondents policy and regulations that the petitioner should give up their religious convictions and became secular. In my view, the respondents' policy is not inconsistent with Articles 20 and 30 of the Constitution. The case of Sherbert vs Verner (supra)***

relied on by counsel is not relevant to this petition."

The learned Deputy Chief Justice then held that the appellants were free to participate or not participate in the respondent's educational programmes held on Sabbath, and were not prevented from believing in and practising their faith. Therefore the said policy did not force the appellants to go against their conscience and did not violate their religious freedom.

The learned Deputy Chief Justice then concluded,

> "***The purpose and effect of the policy as clearly indicated in the affidavit evidence in support of the answer to the petition was inter alia to improve quality of education, enhance accessibility to education by more people and reduce the cost of education. It was not discriminatory as it was suggested by the petitioners. It was applicable to all the students many of whom had similar religious beliefs and convictions but accepted the programme. In this observation, I am fortified by affidavit evidence deponed to on behalf of the respondent by Professor Ssebuwufu in paragraph 3*** (supra***). There is no dilemma or Constitutional burden facing the petitioners as submitted by their learned counsel. They are not required to give up or forego their cardinal tenet of their religious belief that they must not work on Sabbath."***

Regarding the question of the right to education, the learned Deputy Chief Justice referred to the accommodation offered by the respondent and other options open to the appellants:

> ***"The respondent even gave them alternatives of taking the educational programmes when fixed on other days than Sabbath. They had that option but***

not to give up their religious beliefs. They had so many choices including transferring to other Universities or Institutions. No evidence of reprisal is adduced to prove that allegation and in my view it is not correct as contended by Mr. Kakembo Katende that the petitioners are suffering because of their firm religious conviction. If anything other students or groups may be exercising similar problems. The respondent has students and staff from various religious background and it is admitted it may not meet the interest of a particular group, particularly in the critical areas of attendance of lectures and examinations."

Mpagi-Bahigeine JA, referred to the University and other Tertiary Institutions Act, No 7 of 2001, under which the policy and regulations were made and said,

"It is material to note that the respondent's policies and regulations are made under the University and other Tertiary Institutions Act No 7 of 2001 with a purpose to provide for the establishment of the National Council for Higher education, its functions and administration and to streamline the establishment, administration and standards of Universities and other Institutions of Higher Education in Uganda; and to provide for other related matters.

The purpose and effect of the Act and regulations in as far as this petition is concerned are to be construed against the background of Article 7 of the Constitution which proclaims "Uganda shall not adopt a state religion" This Article therefore frees Ugandans from official dogma and leaves them to worship anything or nothing within Article 20, 29(11) (c) and 37. These stipulated that religious freedom has to be practiced "in a manner consistent with this Constitution" and in community with others. "It thus

gives religious equality but not immunity from observance of the law. Religious freedom is, therefore, not an absolute human rights."

The learned Justice then concluded,

"***Uganda therefore being a secular state, means that the respondent acting under Act No 7 of 2001 and the regulations thereunder is not_circumscribed by the variety of religions beliefs obtaining in the institution as deponed by the Vice Chancellor in his affidavit dated 7th May 2003."***

Berko JA, emphasised the intolerable burden that would be imposed on the respondent if it was to accede to the appellants demands:

"In my view to accede to the prayers of the petitioners and make the declarations they are seeking would place an intolerable burden on the University in perpetuity and make the smooth administration of the institution difficult. Therefore there is no way the University would know the number of interest groups that would make similar demands for special treatment."

After quoting Article 43 of the Constitution, Twinomujuni JA observed that the appellants had to respect the rights of others in the enjoyment of their rights:

"While the petitioners are free to enjoy their rights and freedoms they must respect the rights and freedoms of others who do not practice the same religion or those of the University. The regulations in issue are non-discriminatory. They equally apply to all the people and necessary in order to run an

institution as Makerere University. They do not however, affect anyone who does not voluntarily choose to join the University. If I admit you to live in my house under specified conditions and you accept to do so, you will be held to be out of order if you subsequently attempt to replace the conditions with those which suit your own peculiarities. For these reasons I would hold that Makerere University regulations do not in any way violate or contravene the petitioners' constitutional rights of religion and education."

On her part Kitumba JA, underscored the fact that the appellants had a choice to join or not join the respondent and that the respondent's policy was intended and did secure accessible and high quality higher education. She observed:

"I would like to observe that the Respondent University is not the only University in the country. The petitioners freely choose to go to Makerere University and have therefore to abide by the conditions. The right to education provided by Article 30 of the Constitution does not in any way mean the right to attend the Respondent University at the students' own terms.

She held that the respondent's regulations did not contravene Article 20 of the Constitution because the objects of the Act as set out in Section 3 are stated as follows:

"The object of this Act are to establish and develop a system governing institutions of higher education in order to equate qualifications of the same similar courses offered by different institutions of higher education while at the same time respecting the autonomy and academic freedom of the institutions and to widen the accessibility of high quality

standard institutions to students wishing to pursue higher education courses. (Emphasis hers).

The learned Justice of the Constitutional Court then concluded that the respondent's policy was consistent with the Constitution. She stated,

> ***"In my view the evidence adduced especially in the affidavit of Professor John Ssebuwufu shows that the respondent's policy is in strict compliance with the Constitution. In his affidavit dated 7th May 2003, he avers, inter alia, that the practice of scheduling lectures, tests and examinations on any day of the week from 7.00 a.m. to 10.00 p.m. has yielded the following advantages:***
>
> (a) ***University education has been made accessible to large number of students including evening students;***
>
> (b) ***there has been an increase of the intake of privately sponsored students;***
>
> (c) ***the variety of courses offered has increased;***
>
> (d) ***the University has generated more revenue; and***
>
> (e) ***the cost of University education for students has become cheaper."***

I have quoted extensively from the judgments of the Justices of the Constitutional Court to demonstrate how each of them resolved the issue whether the respondent's policies and regulations, infringed the appellant's rights to education and freedom of religion. They all arrived at a common finding that the respondent's policies and

regulations were neither inconsistent with the Constitution nor infringed the appellant's rights. I am in general agreement with their reasoning and conclusion.

From the evidence of Professor John Ssebuwufu contained in his various affidavits, it is clear to me that the respondent was alive to its duty under Article 20 of the Constitution to respect the rights and freedoms of all its students, including those of the appellants. Its policies in expanding and academic programmes, and increasing students' intake were aimed at increasing access to University education in accordance with Article 30 of the Constitution. The appellants were not deliberately or discriminatorily denied the right to education or their freedom to religion. Indeed, the respondent took measures to accommodate the appellants special concerns by allowing them to retake examinations, which they had missed on account of their being held on Sabbath day. Consequently, the adverse effect on the rights and freedoms of the appellants was reduced. The appellants' rights and freedoms were affected in some measure by these policies and regulations, in order to protect the interests of others or the public interest in accordance with Article 43 of the Constitution.

It was submitted for the respondent that the interference with the appellants' rights was not substantial and therefore could not be said to have infringed their rights. Counsel relied on the case ***Syndicate Northcrest vs. Amstem*** (2004) 2 SCR 551 where it was stated at page 554,

> ***"Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered a court must ascertain whether there has been non-substantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter.***

However, even if the claimant successfully demonstrates non-trivial interference, religious conduct, which would potentially cause harm to or interference with the rights of others, would not automatically be protected. The ultimate protection of any particular charter right must be measured in relation to other rights and with a view to underlying context in which the apparent conflict exists."

In the present case the Constitutional Court found that interference with the appellants' right to education or the freedom of religion was non-substantial especially as the respondent accorded to them some measurable accommodation to enable them realize both their right to education as well as religious freedom. In my view the Constitutional Court came to the correct conclusion that the policy and regulations of the respondent did not violate the rights and freedom of the appellants, nor did they impose an unconstitutional burden on them. Accordingly, grounds 1, 2 and 4 should fail.

Duty to Accommodate:

It was submitted by counsel for the appellants in respect of ground 6 that the Justices of the Constitutional Court failed to evaluate the evidence correctly leading them to conclude that giving appellants more accommodation would impose unbearable burden on the respondent. Counsel argued that there was no evidence to support such a finding.

The principles relating to the duty to accommodate and the degree of accommodation were expounded in the cases of ***Syndicat 'Enseignement de Champlain vs. CSR Dechambly C Bergevin*** (1994) RCS 52, and ***Central Alberta Dairy Pool vs. Alberta (Human Rights Commission)*** 1990 2 SCR 489.

In ***Syndicate 'Enseignement de Champlain case*** (Supra) the Supreme Court of Canada was dealing with a case of religious discrimination of employees. The court observed that reasonable accommodation was an integral part of equality. The court said further that historically the duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the bona fide adoption of a work rule without any intention to discriminate. By providing reasonable accommodation to the affected workers, the employer could justify the adverse effect discrimination and thereby avoid liability for the unintended consequence of the rules of employment.

The extent of the duty to accommodate in cases of adverse effect discrimination was stated in the ***Syndicat Case*** as follows:

> ***"The duty in a case of adverse discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant short of undue hardship; in other words, to take such steps as may be reasonable without undue interference in the operation of the employers business and without undue expense to the employer."***

The factors to be considered in determining what constitutes reasonable accommodation were set out in the ***Central Albert Dairy Pool Case*** (Supra) at pages 520-21. Where it was said,

> ***"I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such appraisal. I***

begin by adopting those identified by the Board of Inquiry. In the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employers operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case."

The Court went on to observe that with regard to the factor of the morale of other employees, it requires a consideration in the effect of the reasonable accommodation on other employees. These factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situations presented in each case. It should be remembered that the duty to accommodate is limited by the words ***"reasonable"*** and ***"short of undue hardship".*** Those words do not constitute independent criteria. Rather they are alternate methods of expressing the same concept.

Although there was no allegation of discrimination in this case I am satisfied that the principles I have elucidated above apply with equal force to the present appeal. I find that the Justices of the Constitutional Court correctly evaluated the evidence relating to the issue of accommodation and came to the right conclusion that giving the appellants more accommodation would impose unbearable burden and hardship on the respondent. I agree with the

Constitutional Court that the respondent offered the appellants reasonable accommodation and that granting the appellants the extra accommodation requested would cause undue hardship and expense to the respondent as well as seriously affect the ability of the respondent to provide accessible, affordable , quality higher education to a diverse and multi-religious community. I therefore find no merit in ground 6, which should fail.

Waiver of Rights or Estoppel:

It was argued by counsel for the appellants that the appellants did not waive their rights because there is no estopped against human rights. Learned Counsel relied on the case of ***Tellis & Others Vs. Mombay Muncipal Corp & Others*** (1987) LRC (Const) 351, where the Supreme Court of India held that there is no estoppel against the Constitution. The Court observed that in petitions which were clearly maintainable under Article 32 of the Constitution the petitioners were not estoppel from raising their fundamental rights under the Constitution which was not only the paramount law of the land but the source and sustenance of all laws. The Constitution not only protected individuals, but also served the public interest. No individual could barter away the freedom conferred upon him by the Constitution and so any concession made in the proceedings (whether under a mistake of law or otherwise that he does not possess or have not injured any fundamental right) could not create an estoppel in those or any subsequent proceedings, nor could fundamental rights conferred by the Constitution be waived.

The Supreme Court further held that notwithstanding the fact that the petitioners conceded in the Bombay High Court that they had no

fundamental right to construct hutments on pavements and they will not object to their demolition after the 15th October 1981, they were entitled to assert that any such action on the part of the public authorities will be in violation of their fundamental right. How far the assertion regarding the existence and scope of the right claimed by the petitioners was well founded was another matter.

In ***Syndicat North Crest vs Amselem*** (supra), the Supreme Court of Canada observed that ***"whether one can waive a constitutional right like freedom of religion is a question that is not free from doubt:"*** The Court stated that in order to amount to a waiver if any, the waiver must be unambiguous, the waiver must be voluntarily and freely expressed with a true understanding of the true consequences and effects; and it must be explicit, stated in express, specific and clear terms.

In the present case, it is not disputed that the appellants were made aware of the respondents' policy and regulations. Even though, the appellants voluntarily accepted the terms containing in the Joining Instructions, they cannot be said to have waived their rights to education or freedom of religion. Nevertheless their rights were not infringed in contravention of the provisions of the Constitution. Ground 3 should therefore fail.

Establishing Justifiable Derogation/Limitation:

Ground 5 is vague, argumentative and repetitive of foregoing grounds of appeal and generally offends the rules for drawing up grounds of

appeal. It seems to me that the complaint here is in the manner in which the Constitutional Court considered the derogation or general limitation clause in the Constitution under Article 43.

In my view, learned counsel for the appellants' should have argued ground five after arguing the rest of the grounds because they addressed the first issue which was framed during the hearing of the petition namely, whether the respondent's policy and regulations are inconsistent with and in contravention of Articles 20, 29, 29(1) (c) 30 and 37 of the Constitution in the case of the petitioners.

In determining whether an action or law infringes a fundamental right or freedom, it is necessary to consider whether that action or law infringes upon or violates that constitutionally protected right or freedom. If the action or law is found not to infringe upon that right or freedom, then that action or law is consistent with and does not contravene the provisions of the Constitution guaranteeing that right or freedom.

However, if the action or law ***prima facie*** infringes upon or substantially interferes with a fundamental right or freedom, then the Court must consider whether the action or law can be justified or upheld upon the basis of the general limitation or derogation provision under Article 43 of the Constitution.

In Ground 5, the appellants in effect argue that the Constitutional Court erred in holding that the respondent did not have the onus of proving justifiable derogation from their fundamental rights under Article 43 of the Constitution. Having found that respondent's policies and regulations were not inconsistent with Articles 20, 29(1) (c), 30, and 37 of the Constitution, the Justices of the Constitutional Court held that the respondent did not have to claim a lawful

derogation under Article 43 of the Constitution. The learned Justices did not anywhere in their judgment misdirect themselves that the respondent did not bear the burden of establishing lawful derogation. Indeed the Justices of the Constitutional Court declined to consider the second issue, in view of their findings on the first issue.

The principles for establishing justifiable derogation or limitation on a fundamental right or freedom have been established in several Canadian and Ugandan cases. Notably of these are ***R.V. Big M. Drug Mart Ltd*** (1985) 18 DLR (4th Edn) 32 ***R.V. Jakes*** (1986) 26 DLR (4th Edn) 272 and ***Charles Onyango Obbo & Another Vs. Attorney General*** (Supra).

In ***R.V. Jakes*** (1986) 26 DLR (4th Edn) at 227, the Supreme Court of Canada laid down the principle of proportionality in determining whether the limitation is reasonably justifiable in a free and democratic society as follows:

> ***"First, the objective which the measures responsible for a limit on a charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' .V. Big M Drug Mart Ltd. (1985) 18 DLR (4th Ed) 321. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary at a minimum that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important. Secondly, once a sufficiently significant objective is recognised, then the party invoking Section 1 (the limitation clause) must show that the means chosen***

are reasonable and demonstrably justified; This involves a form of proportionality test. 'R.V. Big M. Drug Mart Limited' (Supra) although the nature of the proportionality test will vary depending on the circumstances, in which each case courts will be required to balance the interests of society with hosts of individuals and groups."

The Supreme Court went to identify three components of the proportionality test:

> ***"There are, in my view three important components of a proportionality test. First the measures adopted must be carefully designed to achieve the objectives in question. They must not be arbitrary, unfair, or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in the first sense should impact as little as possible the right or freedom in question: R.V. Big M Drug Mart Limited (Supra). Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the charter, right or freedom and the objective which has been identified as of sufficient importance."***

Those authorities establish that it is always necessary to determine whether the legislative objective is sufficiently important to justify hunting a fundamental right. It must be established that the impugned action has an objective of expressing a substantial concern of society in a free and democratic society. The courts have to strike a balance between the interest of freedom and social interest, using the three tests. Fundamental rights should not be suppressed unless they are pressing community interests, which may be endangered.

In determining what is acceptable and reasonably justifiable in a free and democratic society, it is necessary to apply the principles on a case to case basis because of the proportionality test, which calls for the balancing of different interests. In the balancing process, the relevant consideration will include:

(a) the nature of the right that is limited;

(b) its importance to an open and democratic society based on freedom and equality;

(c) the extent of the limitation;

(d) the efficacy and particularly where the limitation has to be necessary; and

(e) whether the desired ends could reasonably be achieved though other less damaging means.

Although the Justices of the Constitutional Court declined to consider the second issue framed at the hearing, they did in fact take into account the principle that the right to education and freedom of religion are not absolute and that in the enjoyment of their rights, the appellants must not prejudice the fundamental rights and freedoms of others or the public interest; as provided for under Article 43 of the Constitution.

It is my view that had learned Justices taken into account all the above principles, they would have come to the same conclusion that the limitations imposed upon the right to education and freedom of religion were justifiable in a free and democratic society.

The overriding object or purpose of the respondent's policies and regulation was an important and pressing social or community interest, namely to improve access to quality University education at reasonable costs for all Ugandans. The policy was not

discriminatory but was applicable to all students from various religious beliefs. The extent and effect of the interference in the enjoyment of the appellants' rights and freedoms was minimized by the reasonable accommodation extended to the appellants by the respondent. To exempt the appellants from the policy and regulations of the respondent or to grant them extra accommodation would impose unbearable burden on the respondent which would cause undue hardship and expense on the respondent.

The means adopted by the respondent to implement its policy and regulations were rational, fair and proportional to the objective to be achieved. In my view, the respondent adduced sufficient evidence, and discharged the burden which lay on it, to establish that any infringement on the appellants' right to education and freedom of religion was reasonably justifiable in a free and democratic society in accordance with Article 43 of the Constitution. Accordingly, ground 5 should also fail.

Disposition:

I would, therefore, uphold the decision of the Constitutional Court that the respondent's policies and regulations are not inconsistent with and in contravention of Articles 20, 29(1) (c), 30 and 37 of the Constitution of Uganda in respect of the appellants. I would also uphold the Court's decision that the respondent did not have to claim a lawful derogation in accordance with Article 43 of the Constitution. I would hold that if it had been necessary to establish a lawful derogation, the respondent had succeeded in establishing that it was entitled to claim it.

In the result, I would dismiss this appeal. I would make no order as to costs.

As the other members of the Court agree with this judgment and the

order I have proposed, this appeal is dismissed with no order as to costs.

Dated at Mengo this …… day of …….. 2006.

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT MENGO
CONSTITUTIONAL APPEAL NO. 2 OF 2004

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

1. **DIMANCHE SHRON**
2. **MOKERA GILPHINE ========== APPELLANTS**
3. **NANSEREKO LUCK**

VERSUS

MAKERERE UNIVERSITY ========== RESPONDENTS

[APPEAL FROM THE JUDGMENT OF THE CONSTITUTIONAL COURT AT KAMPALA (MUKASA-KIKONYOGO DCJ; MPAGI – BAHIGEINE, BERKO, TWINOMUJUNI AND KITUMBA, JJ.A) DATED 24/09/2003 IN CONSTITUTIONAL PETITION NO. 1 OF 2003]

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in advance the draft judgments prepared by their Lordships the learned Chief Justice and Katureebe, JSC. Both have given the

background to this appeal, set out the contentious matters and the grounds of appeal.

I entirely agree that there is no merit in this appeal. Makerere University, the present respondent, clearly warned all new students in advance about the fact of conducting lectures and examinations on all the days of the week. Each student as a fresher was made aware of these facts through the Freshers Joining Instructions at the commencement of the first year of admission to Makerere University. The appellants were aware of this from day one. The Freshers Joining Instructions were in conflict with their religious beliefs. Instead of opting not to join Makerere University, the appellant consciously chose to join and embarked on study knowing that by taking these steps, they thereby bound themselves to abide by the rules and regulations of Makerere University. Thy cannot therefore turn around in the course of their study to seek special treatment which treatment would tantamount to unwarranted disruption of vast Makerere University programmes. The respondent's evidence especially the additional affidavit of Prof. P. J. M. Ssebuwufu, demonstrate how far the respondent went to accommodate the needs of the appellants.

I find no merit in any of the grounds of the appeal. I would dismiss the appeal. I would make no order as to costs.

Delivered at Mengo this ..... day of ..... 2006.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJSC)

CONSTITUTIONAL APPEAL NO. 02 OF 2004

B E T W E E N

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

VERSUS

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

(Appeal from the judgment of the Constitutional Court at Kampala (Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine, Berko, Twinomujuni and Kitumba, JJ,A) dated 24-09-03, in Constitutional Petition No. 01 of 2003).

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgments prepared by my Lords the learned Chief Justice and my learned brother, Katureebe, JSC and I entirely agree that the appeal has no merit.

I only wish to add that the appellants were warned of the respondent's policy entitled ***'Makerere University Academic Registrar's Department Freshers Joining Instructions 1999/2000 Academic Years,'*** before joining the University. The policy states in bold letters as follows:

"Students are informed that University Programs may run seven days a week. Since the University has students and members from various religious backgrounds, the University may not heed the interests of a particular group, particularly in the crucial areas of attendance of lectures

and/or examinations. You are therefore urged to respond to the academic work in the faculty even if it takes place on respective days of worship."

The document warns each student joining the University as follows:

"NOTE: PLEASE DO READ THIS DOCUMENT AND UNDERSTAND ITS CONTENTS VERY WELL"

The appellants are all members of the Seventhday Adventist Christian faith. Apparently the cardinal tenet of their faith is based on the fourth commandment of God to be found in the book of Exodus Chapter 20:8 which states:

"Remember the Sabbath Day by keeping it holy. Six days you shall labour and do all your work, but the seventh Day is a Sabbath to the Lord your God. On it, you shall not do any work, neither you, nor your son or daughter, nor your man servant, nor your maid-servant, nor your animals nor the alien within your gates. For six days the Lord make the heaven and the earth, the sea and all that is in them, but he rested on the seventh day. Therefore, the Lord blessed the Sabbath Day and it is holy."

The appellants contend that because of this commandment, the University Freshers Joining Instructions 1999/2000, the University regulation which require students to attend lectures and take mandatory tests and examinations on any day of the week, including the Sabbath Day contravenes articles 20, 29(1)(c), 30 and 37 of the Constitution of Uganda. They therefore, prayed in their petition to the Constitutional Court that the regulation be declared null and void.

The Constitutional Court dismissed the petition.

Clearly the appellants joining the University were warned of the University Policy before joining but before commencing studies that it will conduct its programmes seven days a week. These regulations are not discriminatory. They apply to all the students in order to run the University. They do not affect any one who does not voluntarily choose to join the University. In my view, if the appellants accepted to join the University under specified conditions spelt out in the Freshers Joining Instructions 1999/2000 Academic Year, they cannot subsequently attempt to replace the conditions under which they were admitted with the conditions which suit their own religious beliefs. The University would rightly hold the appellants out of order, because they bound themselves to abide by the University regulations, which regulations do not violate their constitutional rights.

In the result, I would dismiss the appeal.

Delivered at Mengo this: - - - - - day of: - - - - - - - - - - - - - - - - - , 2006.

A. ***N. KAROKORA***
JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: ODOKI C.J., ODER, TSEKOOKO, KAROKORA, MULENGA KANYEIHAMBA AND KATUREEBE JJ.S.C.

CONSTITUTIONAL APPEAL NO. 2 OF 2004

BETWEEN

1. **DIMANCHE SHARON**

2. MOKERA GILPHINE :::::::::::::::::::::::: APPELLANTS

3. NANSEREKOLUCK

AND

MAKERERE UNIVERSITY ::::::::::::::::::::::::::::

RESPONDENT

[Appeal from the decision of the Constitutional Court (Mukasa-Kikonyogo DCJ, Mpaigi-Bahigeine, Berko, Twinomujuni and Kitumba JJ.A) at Kampala, in Constitutional Petition No.1/02, dated 24th September 2003.]

JUDGMENT OF MULENGA JSC.

I had the advantage of reading in draft the judgments of the learned Chief Justice Odoki and my learned brother Katureebe JSC. I agree with both that this appeal ought to fail and should be dismissed with no order as to costs. Makerere University, the respondent, as a secular educational institution has the right to make regulations that it considers necessary for discharging its statutory obligations and achieving its objectives. Its policy to increase student intake and to initiate a variety of courses led to the introduction of a regulation that requires students to attend lectures and take mandatory tests and examinations on any day of the week. The policy and the regulation neither prevent students from practicing their religions; nor deprive or deny any student the right to education. The appellants, who profess the religious faith of Seventh Day Adventists, joined the University with full knowledge that under the said regulation they would be required to attend lectures and take mandatory tests and examinations on any day, including the Sabbath

day. In my view, the admission of the appellants into the University did not create or impose on the respondent any constitutional obligation to adjust its programs to conform to the appellants' religious practices. When subsequently the respondent failed or refused to make special arrangements for the appellants to sit the tests or examinations scheduled for the Sabbath day outside the official hours, it did not thereby violate their freedom to practice their faith as they prefer. The appellants had the choice to join the University and adjust their religious practices to abide by its regulation; or to pursue their education where they could adhere to their strict observance of the Sabbath.

DATED at Mengo this day of 2006

J.N. Mulenga,
Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM:

ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, KATUREEBE, J.J.S.C

CONSTITUTIONAL APPEAL NO.2 OF 2004

BETWEEN

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

AND

15 **MAKERERE UNIVERSITY**

::::::::::::::::::RESPONDENT

[An appeal from the judgment and decision of the Constitutional Court (Mukasa Kikonyogo, .C.J, Mpagi-Bahigeine, Barko, Twinomujuni and Kitumba, J.J.A) in constitutional petition No--------- dated 24th September, 2003.]

JUDGMENT OF KAYEIHAMBA, J.S.C

I have had the benefit of reading in draft the judgment of Odoki, the learned Chief Justice and of my learned brother, Katureebe, J.S.C, and I agree with them that this appeal ought to be dismissed for the reasons they have given.

I would make no order as to costs.

Dated at Mengo this ---------- day of ---------- 2006.

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT MENGO

CONSTITUTIONAL APPEAL NO 2/2004

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

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

AND

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

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

JUDGMENT OF KATUREEBE, JSC.

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

The appellants are Seventh Day Adventists Students at Makerere University, the respondent. They contend that the policy and regulations of the Respondent requiring the appellants to attend lectures and sit examinations on Saturdays violate their constitutional rights to religion in so far as it compels them to "work" on the Sabbath Contrary to their religious belief. The Constitutional Court dismissed their petition, hence this appeal.

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

between the appellants and members of their Faith on the one hand and the officers of the Respondent on the other hand showing an attempt to resolve the matter amicably.

The Respondent contends that it is a secular public university which does not favour any particular religion. It says that in order to carry out its legal mandate of expanding university education and making it available to as many people as possible at the lowest cost possible, the university formulated the policy that the core activities of the University, like teaching and examinations, would take place on any day of the week including Saturdays and Sundays. Regulations were then formulated to implement this policy. This information was made available to all persons intending to join the university through the Joining Instructions and letters of admission sent out to students. The Respondent 's position was that the appellants could be accommodated by allowing them to re-take any missed examination at the next sitting when that examination would be offered, but it could not allow the appellants to sit at different times from other students as this might compromise the integrity of the examination results. It would also lead to extra costs.

When the Parties failed to reach amicable resolution, the appellants filed a Petition in the Constitutional Court. They alleged that the Policy of the Respondent and its regulations requiring the appellants to attend lectures and sit examinations on Saturday (Sabbath) violated their constitutional rights and was inconsistent with Articles 20,

29(1) (c) and 30 of the Constitution. The Constitutional Court heard the petition and considered affidavit evidence filed by both parties and dismissed the petition by unanimous decision. Hence this appeal

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

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

1. **That the learned Justices of the Court of Appeal/Constitutional Court erred in law and fact when they held that the Respondent policies and regulations in issue are not inconsistent with articles 20 and 30 of the Constitution and that the Respondent was justified in requiring the appellants to sit examinations on their Sabbath.**

2. **That the learned Justices of the Constitutional Court/Court of Appeal erred in law and in fact and misdirected themselves on questions of law and fact when they held that the Respondent's policy and regulations that compelled the appellants to sit exams on their Sabbath or any day of the week between 7 am in the morning and 10.00 p.m**

at night is not inconsistent with and did not violate the appellants human rights under articles 20, .29(1) (c), 30 and 37 of the Constitution.

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

4. **That the learned Justices of the Constitutional Court erred in law and in fact when they held that the policy of the Respondent requiring students to sit exams on the Sabbath irrespective of their religion, did not give rise to an unconstitutional**

burden on the appellants that violated their freedom of religion by virtue of a fundamental tenet of the Adventist Christian Faith.

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

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

Mr. Madrama argued, grounds 1, 3 separately, then grounds 2 and 4 together and finally ground 6 separately.

In respect of ground 5, counsel submitted that the learned Justices of the Constitutional Court misdirected themselves in fact, law and procedure when they held that the respondent did not have the burden to prove that there was justification to derogate from observance of the rights and freedoms guaranteed by the constitution and therefore bring itself into the ambit of Article 43, of the constitution. He argued that the Justices misdirected themselves as to the application of Article 43, and cited the decision of this Court in the case of ***CHARLES ONYANGO OBBO -Vs- ATTORNEY GENERAL,*** Constitutional appeal No.2 of 2002 in support. He also cited the Canadian case of ***THE QUEEN -Vs- OAKES, [1987] LRC 477*** which had also been relied upon by the Constitutional Court.

In respect of ground 1, counsel submitted that the Justices of the Constitutional Court were wrong to hold that the respondent did not infringe Article 20 of the Constitution. He submitted that Article 20(2) puts a heavy burden on institutions like the respondent to uphold human rights, and the respondent had totally failed to do so. He further submitted that the court ought to have taken into account the effect of the policy and regulations of the respondent on the religious freedom of the appellants, which was to force them to work (attend lectures and sit examinations on the Sabbath) contrary to their faith. He cited the Canadian

case of ***THE QUEEN -Vs- BIG M DRUG MART LTD [1986*]** **LRC** (Const) P.332, as authority for the proposition that in determining the constitutionality of a law, both the purpose and effect of such law on individual rights must be taken into account. In that regard he also cited the case of ***ATTORNEY GENERAL -Vs- ABUKI AND ANOTHER*,** particularly the Judgment of Oder, JSC which also considered the Canadian case of **QUEEN -Vs- BIG M DRUG MART** (Supra). He also cited the Zimbabwean case of ***Re CHIKWECHE [1995] 2LRC 93.***

In arguing ground 3, Counsel submitted that the Justices were wrong in law to hold that the appellants had waived their rights by joining the respondent University knowing as they did that lectures and examinations were offered seven days a week, and that the appellants were therefore estopped from claiming violation of their rights. Counsel cited the ***Indian Case*** of ***TELLIS AND OTHERS -Vs BOMBAY MUNICIPAL CORPORATION and OTHERS [1987] LRC 351****;* and also the Case of ***SYNDICATE NORTHCREST -Vs- AMSELEM [2004] 2 SCR 550*** as authority for the proposition that constitutional rights could not be waived.

In respect of grounds 2 and 4 counsel submitted that the Justices were wrong to find that the policy and regulations of

the Respondent were not inconsistent with Articles 20, 29(1)(c), 30 and 37 of the constitution and for failure to find that those regulations constituted an unconstitutional burden on the appellants by requiring them to sit examinations and attend lectures on Sabbath. He argued that freedom of religion included the right to manifest religion through practice, which would be infringed if the appellants had to sit examinations and attend lectures on the Sabbath. Counsel further submitted that court was wrong to question the sincerity of the appellants' beliefs. He cited the ***Drug Mart Case*** *(supra)* in further support of his argument.

On ground 6, counsel submitted that the learned Justices did not properly evaluate the evidence so as to find that the respondent could and should have accommodated the appellants. Had the Justices properly evaluated the affidavits of the appellants in rejoinder, they would have found that the respondent should have accommodated the appellants. Counsel, in conclusion, prayed that this Court should set aside the judgment of the Constitutional Court, and make declarations that the respondent's policy and regulations are inconsistent with the Constitution, and that that the appellants are entitled to accommodation and to make orders accordingly.

For the respondent, Mr. Wamala commenced his submissions by first arguing that grounds 3, 4,5 and 6 were defective in so far as they did not contain the unanimous holdings of the justices of the Constitutional Court. To him, the learned Justices did not hold that the respondent's Joining Instructions were sufficient notice that absolved the respondent from observing fundamental rights as alleged in ground 3 of appeal, nor did the Justices hold that the

respondent did not have the onus to prove derogation as per Article 43 of the Constitution, as alleged in ground 5 of appeal. He further argued that the Justices did not hold that accommodating the appellants on the Sabbath day would adversely affect the majority.

He contended that all the six grounds of appeal can be summarised into one ground, i.e. whether the respondent's policy and Regulations are inconsistent with and in contravention of Articles 20, 29(1) (c),30, 37 and 43 of the Constitution, and whether the respondent is entitled to claim lawful derogation under Article 43.

Counsel submitted that not every infringement of a fundamental right constitutes an unconstitutional act. The test is the "substantial burden" i.e. whether an infringement constitutes a substantial infringement. He cited the ***SYNDICATE*** case *(supra)* particularly pages 584 and 585 paragraph 3. He further argued that rights are not absolute. To amount to a violation of the Constitution, the violation must be substantial. He argued that one needs to show the sincererity of one's beliefs to be able to claim a violation of such beliefs. He submitted that in so far as the appellants had signed the admission instructions form of the respondent, they waived their constitutional rights and cannot claim violations of these rights by the Respondent. He referred us again to the ***SYNDICATE*** case (supra) at pages 597, 598 and 599.

In summarising his submission on the first part of the question he had posed, counsel submitted that the regulations were not unconstitutional. He submitted that

the Constitution had to be looked at as a whole. Articles 29(1) (c), 20 and 37 are not absolute, and regard had to be had to the prejudice that would be occasioned to other students. In that regard, he relied on the affidavits evidence of the Vice Chancellor and the Guild President, and cited Objective 18 of the National Objectives and Directive Principles of State Policy of the Constitution and section 3 of the Universities and Tertiary Institutions Act in support of his argument.

On the second part of the question, i.e. whether there was a justifiable derogation under Article 43, Counsel submitted that based on the affidavits of the Vice Chancellor and the Guild President, there was evidence that the interest of the public would be adversely affected. He cited ***Black's Law Dictionary*** for the definition of **"*public interest*",** and ***THE QUEEN Vs- OAKES [1987] LRC 472*** for the proposition that the standard of proof of the need for derogation is by preponderance of probabilities and not proof beyond reasonable doubt. Counsel contended that there was need to balance and weigh the competing provisions of the Constitution, i.e. the right to education versus the right to religion. He further contended that one had to apply the proportionality test, and the measure adopted had to be carefully designed to achieve the public objectives. In counsel's opinion, the measure must not be unfair, arbitrary and based on irrational considerations. He submitted that the affidavit of the Vice Chancellor showed that all the criteria had been met, and therefore there was justifiable derogation under Article 43. He also cited the ***Onyango***

Obbo case *(supra)* in support of his argument.

Counsel further submitted that under the circumstances, the respondent had offered sufficient accommodation to the appellants. To accommodate them further as they wished would create a heavy burden on and adversely affect the operations of the respondent in terms of rationalising examinations, extra expenses and costs. He cited the case of ***COMMISSION SCOLAIRE REGINALE DE CHAMBLY-Vs-BERGEVIN [1994] 2 S.C.R (CANADA)*** 526, at pages 544 - 545.

In reply, Mr. Madrama argued that the case of ***SYNDICATE*** *(supra)* had been quoted by counsel for respondent out of context in respect of ***sincerity*** of belief and of waiver of rights. He submitted that the instant case was one where waiver could apply. The admission form given to students was not signed by them so there could be no explicit waiver. He referred to the ***Tellis*** *case (supra), and also the* ***Syndicate case*** *at page 579 - 580, 583 and 584***.** He denied that the grounds of appeal were defective in any way. The appellants were entitled to be admitted into the respondent as a public institution and they should not be denied entry because of their beliefs. He cited section 28(1) of the Universities and Tertiary Institutions Act which allows admission of all students.

This case raises a very important issue relating to the need to balance observance of human rights of the individual, and the public interest. I agree with learned counsel for the respondent that the question in this case is whether the respondent's policy and regulations were inconsistent with and in contravention of Articles 20, 29(1)(c), 30, 37 and 43 of the Constitution, and whether the respondent was entitled to claim a lawful derogation under Article 43. In my view, all the six grounds of appeal filed by the appellant actually revolve around that question. Indeed at the hearing of the Petition in the Constitutional Court, the above question was framed as issues number one and two. The third issue was abandoned and the fourth issue related to remedies.

Counsel spent considerable time arguing ground 5 to the effect that the Justices of the Constitutional Court had misdirected themselves in law and fact in holding that the respondent did not have the burden to prove that it was entitled to derogation under Article 43. He contended that the onus was on the respondent to prove that any derogation claimed had to be demonstrably justifiable in a democratic state. In the light of the criticism of the Court by counsel for the appellants, it is necessary to examine what the learned Justices actually stated on this point.

In her lead Judgment, Mukasa-Kikonyogo, DCJ, stated:

> "***The Policy was applicable to all students and groups of various time. The policy was not intentionally directed at the Petitioners but to benefit the majority student population. Moreover, it is trite that human rights and freedoms must be enjoyed within limits as provided under Article 43 of the Constitution***".
>
> "***Article 43(1) provides:***
>
> "***In the enjoyment of the rights and***

freedoms prescribed in this chapter, no person shall prejudice the fundamental or other Human Rights and freedoms of others or the public interest."

"Human rights, hence, are not absolute but enforceable within reasonable limits. It is worth while noting that the respondent has to plan and cater for all religious denominations based on different tenets. The University would find it difficult to implement its objectives if it were to give exemptions to all of them. Hence Professor Ssebuwufu in his affidavit evidence in paragraph 9 (supra) which has not been contravened deponed, inter alia, that the University cannot grant the petitioners' request which includes offering "special examinations to those students who are unable to attend examinations on particular days due to religious considerations or for any reason because such practice would create a variance in academic standards and further lead to an increase in the cost of education."

It would appear to me that the learned Deputy Chief Justice did address the concerns of Article 43 and seemed to be satisfied with the affidavit evidence of the Vice Chancellor, justifying the need for derogation under Article 43. I do not see any holding in her judgment to the effect that the respondent did not have the onus to prove the need for lawful derogation . I accordingly hold that there was no misdirection of any nature on this point by the DCJ.
In her judgment, Mpagi-Bahigeine, JA states at page 12:

"It is incumbent upon the Petitioners to show that they are entitled to the remedies they seek on the grounds that their fundamental and human rights have been infringed by the

respondent's policy. However, the respondent must show justification for a lawful derogation from such fundamental rights. This must be within the ambit of article 43 (2)."

The learned Justice then cites the case of ***R -Vs- Oakes*** *(supra)*. This shows that the learned Justice addressed her mind to the issue of burden of proving justification for a derogation under Article 43. But she later found that there was "no inconsistency between the respondent's *policy and the impugned articles, the respondent does not have to seek to be covered under a lawful derogation under article 43."*

Again I see no misdirection by the learned Justice on this issue as claimed by the learned Counsel for the Appellants. The learned Justice made a finding that the policy of the respondent was not inconsistent with the impugned Articles, and there was therefore no used to invoke Article 43.

In his Judgment, Twinomujuni, JA, at page 15 also cites Article 43 and also finds that:-

"***Makerere University regulations do not in any way violate or contravene the Petitioners Constitutional rights of religion and education."***

Having answered the first issue in the negative, Twinomujuni, J.A, did not think that the respondent needed to claim the protection afforded by Article 43. In her Judgment, Kitumba, J.A, also addressed the issue of Article 43 at page 17, but having found that the policy and regulations of the

respondent were not inconsistent or in contravention of Articles 20, 29(1)(c), 30 and 37, of the Constitution, the learned Justice, held that the question of lawful derogation did not arise.

Counsel for the Appellant cited the case of ***Onyango Obbo and R –Vs- Oakes*** *(supra).* I agree with the holdings in those cases which is to the effect that a person seeking to show a lawful derogation must prove that the circumstances exist that justify the derogation. But in my opinion, one must start with proof by the petitioners that their rights have been infringed by the respondent. The respondent then would have the burden to prove a justification for a lawful derogation.

In this particular case, the learned Justices found that the appellants had failed to prove that the policy and regulations of the Respondent were inconsistent with the named Articles of the Constitution and therefore the case did not call for the need to prove derogation by the respondent. Learned Counsel pointed to some ***Orbita dicta*** in the judgments which, he asserted, indicated that the learned Justices had found that the rights of the appellants were affected. Counsel used the word **“affected”** and seemed to imply that it had the same meaning as **“infringed.”** The proper word and what ought to be proved by evidence is

"infringement" of the rights**. Black's Law Dictionary 6th Edition** defines ***"infringement"*** as *"a breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right."* Merely "*affecting*" the rights would not do. The Judges found as fact that there was no infringement. This is the finding that Counsel should have attacked. He failed to do so.

In the circumstances, I find that ground 5 has no merit and must fail.

I now turn to ground 1 which in my view presented a more substantive issue. Counsel argued that the learned Justices were wrong to hold that the respondent did not infringe Article 20 of the constitution. What the Justices held actually was that the policy and regulations of the respondent were not inconsistent with or in contravention of Article 20 (2). It is necessary to quote the exact wording of the Article for better appreciation of its import.

Article 20 (2) states as follows:

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

The Constitutional Court did spend considerable time considering this Article. Mukasa-Kikonyogo, DCJ in her Judgment states this:

> ***"On Article 20 of the Constitution, I appreciate the submissions of Counsel on the effect of the Petitioners' rights. It is true the respondent has a duty to accommodate the Seventh Day Adventists students minority but on condition***

that the policy on the Petitioners' rights under Article 20 of the Constitution is not prejudicial to other people's rights in the University. Article 20 (2) imposes an affirmative constitutional duty on the respondent to respect, uphold and promote the religious beliefs of the Petitioners and other members of their faith. I do not agree that on the evidence on record the respondent forced the Petitioners to participate in the respondent's educational programmes on Sabbath day."

In my opinion, Article 20 (2) cannot and should not be looked at in isolation of the rest of the Constitution. I agree with Kitumba, JA, in her judgment where, while citing the ***Tinyefunza -Vs- Attorney General case***, she states that the various provisions of the Constitution must be read together for purposes of harmony, completeness and exhaustiveness in interpreting it. Both she and the other Justices go to great lengths to show this practice in construing Constitutional instruments.

Furthermore, the appellants had to prove that the respondent had refused or failed to respect, uphold and promote the right to religion of the appellants. According to evidence on record the respondent is a secular public institution. It had certain duties pursuant to its Charter and the Universities And Other Tertiary Institutions Act. The policy of the respondent to utilize all the seven days of the week for teaching and examinations was meant to improve

the quality of education and to expand the intake into the University so as to give as many people as possible a chance to access university education at as reasonable a cost as possible. The respondent went to great lengths to inform the appellants and the public at large about this policy, and to emphasize that anyone joining the University, would be expected to attend lectures or sit examinations on any of the days of the week. The appellants joined the University well knowing this position. This was attested by affidavits of the appellants themselves and of the Vice Chancellor of the University, Prof. Ssebuwufu. In his affidavit dated 7th May 2003, the Vice Chancellor also outlined the alternative possible measures that could be put in place to accommodate the appellants and others who may have difficulties in attending lectures or sitting examinations on Saturdays. He stated in paragraph 7 thus:-

"The University has made alternative provisions to such as of its students who may not be able to attend lectures and or examinations on a given day or time of the week in the following ways:-

(a) "Students are offered an opportunity at the time of admission, to change course and or subjects in light of the provided timetables. The new students (freshers) are granted an option, where possible, to offer courses with the most convenient timetable.

(b) Students who may be unable to sit an examination held on weekends or at any time of the week in a particular semester are allowed to apply to their respective deans/directors to

retake the course and or examination when it is next offered.

(c) Students who are unable to attend lectures and or tutorials held on a particular day or time of the week are not restrained from attending the same lectures/tutorials with students of different programmes held on another day or at another time during the semester."

This evidence clearly shows that the respondent did not fail or refuse to respect, uphold or promote the rights of the appellants. It is clear that the respondent was alive to the concerns of the appellants. Genuine attempts were made to accommodate them. I therefore cannot agree with Mr. Madrama's submission that the respondent failed to observe Article 20(2) in all respects, or at all.

The other limb of Counsel's argument was that the effect of the policy and regulations is what ought to be considered. He submitted that the effect was to compel the appellants to sit examinations on Saturday thereby making them either to do work on the Sabbath and stand condemned by God, or miss the examinations and lose their studies which put a very heavy and unconstitutional burden on them. He argued that the appellants had to miss exams and yet there was no guarantee that the examination when next offered would also not be on Sabbath. This had meant in some cases that students have had to stretch their courses beyond the period the course would normally take. He cited the

Drug Mart Case, the Abuki Case and the Chikweche Case, *(supra) in support.*

The learned Justices also considered the above cited cases. So they addressed their minds to the issues and decisions therein. At page 12 of her judgment, Mpagi – Bahigeine, JA, had this to say.

> ***"Both the purpose and effect of the policy impugned must be examined to determine its validity or invalidity. Purpose and effect are indivisible to the animation of the regulation or law – See The Queen –Vs- Big M Mart (Ltd) (1986) LRC 332 where the applicable test was laid down;***
>
> ***"Both purpose and effect are relevant in determining constitutionality: either an unconstitutional purpose or an unconstitutional effect invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are clearly linked, if not indivisible. Intended and actual effect have often to be looked to for guidance in assuming the legislation's object and thus its validity."***

Having thus considered the **Big M Mart case**, the learned Justice went on to hold that the respondent's policy and regulations, both in purpose and effect had not violated the

appellants' rights. I agree and would go further to quote the words of Chief Justice Warren of the USA in the case of **Braunfeld –Vs- Brown** quoted in the Drug Mart Case at page 357:

> ***"Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterised as being only indirect. <u>But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden</u>."*** *(emphasis added).*

In my view the above statement is relevant to the instant case. In his affidavit, the Vice Chancellor stated how the policy of offering lectures and examinations on any day of the week has helped expand student intake, reduced costs and improved the quality of education. He has stated how setting separate examinations for the appellants might adversely affect the respondent by compromising the integrity of the examinations, how it would lead to higher costs, etc. Clearly, much as there might be some burden on the appellants, it was outweighed by the need to promote

the public interest by furthering the secular objectives of the respondent. In my view, the stated objective of the respondent to expand University intake at as low a cost as possible to the students as a whole is sufficiently substantial to warrant overriding the concerns of the appellants. In the ***Drug Mart*** case at page 369 ***Dickson, J*** states:

> ***"Once a sufficiently significant government interest is recognised then it must be decided if the means chosen to achieve this interests are reasonable – a form of proportionality test. The Court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question."***

I have no doubt in my mind that the means adopted to achieve the University's objectives were reasonable given the background and the accommodation that was offered to the appellants. This case is to be distinguished from the ***Abuki case*** where the measures complained against were the banishment of the petitioner from his home, his land and family, which no doubt imposed an unconstitutional burden on him. Here, the appellants have been admitted into the University and are not being asked to leave the university because of their faith. They are instead being allowed to extend their stay by taking the missed examinations at a later time.

In the circumstances, I agree with the findings of the Justices

of the Constitutional Court that the policy and regulations of the respondent were not inconsistent with or in contravention of Article 20(2) of the Constitution. Therefore ground 1 of appeal also fails.

On ground 3, Counsel argued that the Justices of Appeal had misdirected themselves in law and fact in holding that the appellants, by accepting to join the respondent had thereby waived their right to freedom of religion. He submitted that waiver could not apply in the matter of enjoyment of a fundamental human right. He cited the **Syndicate Case** *(supra).* The issue here is whether there can legally be a waiver of fundamental rights. In the **Syndicate case**, the court observed at page 597:

> **"*Whether one can waive a Constitutional right like freedom of religion is a question that is not free from doubt*"**

Later at page 598, it states:-

> **"*Second, by its very nature, waiver of any right must be voluntary, freely expressed and with a clear understanding of the true consequences and effects of so doing if it is to be effective.*"**

Again at page 600 it is stated:-

> **"*Third, at a minimum, waiver of a fundamental right such as freedom of religion if possible at all, presumably need not only be voluntary; it must also be explicit, stated in express, specific and clear terms. Not only would a general prohibition on constructions, such as the one in the declaration of co-ownership, be insufficient to ground a finding of waiver, but arguably so would any document lacking an explicit reference***

***to the affected charter right.*"**

Considering the facts of this case, can it be said that the appellants waived their right to religion or to education?. In her judgment, at page 17, Mukasa-Kikonyogo, DCJ had this to say:

> **" *I wish to emphasize that, the provisions of Article 30 notwithstanding, University Education is not compulsory and is not obtainable only from the respondent. The petitioners had an option to join other Universities and other tertiary institutions. With regard to the alleged unconstitutional burden, the respondent's policy did not prohibit the Petitioners or hinder them from practicing, or believing or participating in any religions activities. The policy did not hinder any promotion of their creed or religion in Community with others under Article 37*"**

At page 18, the learned DCJ, goes on to state:

> **"*I am unable to agree, as suggested by the petitioners, that they have suffered any damage as a result of the respondent's, inflexible conduct. On the other hand, the respondent has had a dialogue with the petitioners and other members of their faith on the policy, with a view to finding a possible solution to the respondent's problem, but the petitioners did not consider the alternatives offered to them satisfactory. The respondent's policy complained of by the petitioners was fair and its students including the petitioners voluntarily joined the University……..the provisions of the constitution allegedly violated by the respondent, must be considered together with those of the rest of the students population. <u>The effect of the respondent's policy did not impede the observance of the petitioners</u>***

religions principles. There was no threat or academic detriment to the petitioners ……if any it was self imposed because the petitioners had a choice, it was up to them to take the offer or reject it." (emphasis added).

In my view the learned D.C. Justice properly addressed herself to the law and the facts of the case and I see no misdirection on her part. Articles 20, 29 and 30 of the Constitution must be read together with article 43. It is pertinent to set out the provision of Article 43(1).

> ***"In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the Public interest" (emphasis mine).***

Objective XVIII of the National Objectives and Directive Principles of State Policy, which are supposed to help us interpret the Constitution states, *inter alia*, as follows:

(i) ***"The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible".***

(ii) ***Individuals, religious bodies and other non-governmental organisations shall be free to found and operate educational institutions if they comply with the general educational policy of the country and maintain national standards."***

The right to education which is enshrined in Article 30 must be looked at in the context of the above principle. The

Universities and Other Tertiary Institutions Act, under which the respondent's policy and regulations are based, must also be looked at in that context. The affidavit evidence of Prof. Ssebuwufu clearly brought out how the policy has positively affected the objective of giving greater access to university education to more citizens than before and at reasonable cost. This, to me, is the type of "*public interest*" that the framers of the Constitution had in mind in enacting Article 43(1). Although "*public interest*" is not defined in the Constitution, one may find an instructive definition in **Black's Law Dictionary 6th Edition**:

> "***Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected Interest shared by citizens generally in affairs of local, state or national government.***"

In my view, the policy of the respondent was meant to serve an important public interest pursuant to the requirements of the Constitution and the law. The appellants seem to imply that their own rights must be enjoyed irrespective of the negative effects that may have on the public interest, i.e. irrespective of the implications for the integrity of the examinations, the costs to the respondent or the overall costs to the other students. They do not accept the accommodation offered to them by the respondent. In my view article 43(1) was alive to this type of situation so that the appellants ought to have known that their enjoyment of their right to religion or to education was not absolute. It had to take into account the rights of others as well as the public interest.

It is in that context that the learned Justices of the

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

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

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

***conscience*".**

On the facts and evidence of this case, I do not see that the appellants were being coerced into anything. They were being reminded that they knew about the policy of the respondent, who was offering them some accommodation so that they could still practice their faith.

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

> "***Freedom of religion…….consists of the freedom to undertake practices and …… beliefs, having a nexus with religion, in which an individual demonstrates her or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religions obligation, requirement or precept to invoke freedom of religion. It is the religions or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection. The state is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious***

requirement, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief and the court's role is to ensure that a presently asserted belief is in good faith, neither fictions nor capricious, and that it is not an artifice. Assessment of sincerity is a question of fact that can be based on criteria including testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religions practices."(emphasis mine).

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

an affidavit in reply to show that in the Bible there were exceptions to work on the Sabbath, given by Jesus Christ himself. It is this Bible that Twinomujuni JA, quoted, in his judgment, to show that indeed the Bible does contain exceptions to the rule that no work should be done on Sabbath.

In my view, the Constitutional Court should have accepted the affidavit in rejoinder of Dr. Kakembo whereby he explained away, according to the Seventh Day Adventists beliefs, the supposed exceptions as not being exceptions within their faith. Court cannot tell the appellants what they should believe. It is what they believe that is important, and I am satisfied that in this case the sincerity of that belief was not under criticism. In any event references to the Bible did not affect the outcome of the case since the Justices held that the policy and regulations of the respondent were not inconsistent with or in violation of Articles 20, 29 or 30 of the Constitution for reasons other than sincerity of belief.

It is important for the appellants and other members of society to appreciate that the rights and freedoms of the individual in respect of religion or education enshrined in the constitution are not absolute. They are enjoyed within certain acceptable limitations envisaged within the Constitution itself, and also in the context of a person's own

duty to the society. At a time when there is a stated national objective to give more citizens access to university education at affordable costs, and when there is clear evidence that the policy of the respondent is promoting that objective, there is need to balance the rights of individuals with the national good or public interest so that reasonable accommodation is accorded to both concepts . It is not in the public interest for a person to emphasize his or her own freedom or right irrespective of how this impacts on the rest of society. To say that examinations be held between 7.30 p.m and 9.00 p.m which is the time for evening classes, as stated in the affidavit of Irankunda, but without taking into account what happens to those classes, or how this switch will affect the university administratively or costwise, is in my view, not being cognisant of the public interest. In my opinion the Constitutional Court was right to believe the affidavit of the Vice Chancellor in that regard. Therefore grounds 2 and 4 of the appeal ought to fail.

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

I have already covered some aspects of this ground. The court considered the affidavits of the appellants alongside the affidavits filed by the respondent, particularly the affidavits of the Vice Chancellor whose evidence, court

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

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

Dated at Mengo this ……1st……day of……August. …….2006.

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Bart M. Katureebe
Justice of the Supreme Court