THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO, KAMPALA

(CORAM: KATUREEBE, C.J; ARACH-AMOKO; MWONDHA; TIBATEMWA; MUGAMBA; BUTEERA JJ.S.C; TUMWESIGYE; AG JJ.S.C)

CONSTITUTIONAL APPEAL NO. 0l OF 2016

CHRISTOPHER MARTIN MADRAMA IZAMA::::::::::APPELLANT

VERSUS

ATTORNEY GENERAL::RESPONDENT

(An appeal arising from the decision of the Constitutional Court of Uganda at Kampala in Constitutional Petition No. 12 of 2008 decided by AUGUSTINE NSHIMYE, JA; REMMY KASULE. JA; ELDAD MWANGUSYA, JA; AWERI OPIO, JA; and EGONDA- NTENDE, JA dated 20* November 2015)

JUDGEMENT OF KATUREEBE, CJ

Background

This appeal raises questions about the employment rights of public officers within the law and the Constitution.

The appellant was first appointed into the Public Service of Uganda as a Pupil State Attorney. His letter of appointment spelled out not only the terms of his employment but also the laws governing his employment. This letter, annexture "A" to his petition, stated in part as follows:

> **"The appointment is subject to the Constitution of the Republic of Uganda, the Public Service Act and Regulations made thereunder, Public Service Standing Orders and Administrative Instructions made from time to time and the**

Pensions Act, Cap 281".

"I shall be glad if you will inform me in writing if you are prepared to accept this offer ..."

The appellant did accept the offer and started work in the Ministry of Justice. It must be assumed that he must have familiarized himself with the terms governing his employment before he accepted the same. Indeed in paragraph 21 of his affidavit in support of his petition, he cites his training as a lawyer to assert the various grounds upon which he alleges the Pensions Act to be inconsistent with the Constitution.

On 30th June 1992, the appellant was informed by letter from the Solicitor General that he had been confirmed in his appointment as a State Attorney and admitted in the Pensionable Establishment of the Public Service with effect from the date of his appointment on probation. His attention was "drawn to Standing Orders Chapter 1 Section 1 7 - 8 paragraph 4 to 8 which explains the effect of confirmation".

On 2nd February 1995, the appellant was informed by the Solicitor General of his promotion to Senior State Attorney. The letter, Annexture "C", stated in part:

"In all other respect your appointment will remain subject to the appropriate articles of the Constitution of the Republic of Uganda, the Public Service Act, and Regulations made thereunder, Public Service Standing Orders and Administrative Instructions made from time to time and the Pensions Act, Cap 281".

The appellant was subsequently promoted to the rank of Principal State Attorney. According to his affidavit, in 1998 the appellant applied for voluntary retirement under a voluntary retirement scheme introduced by Government, under which he would have been paid a lump sum package of 15

million Uganda Shillings. His application for retirement under that scheme was refused. Here he was now faced with two choices: to remain in service or to resign the office in the Public Service. He chose to resign in 1999, as he put it, to "try greener pastures elsewhere".

Upon his resignation, he states that he was not paid any allowance, benefit or gratuity for his service of about 10 years. No money whatsoever was transferred from the Public Service to his account in NSSF for the period of about 10 years that he served in Public Service. Therein lies his grievance; that he served for nearly ten years and received no benefit at all. At the time he was 37 years of age.

It is on that basis that he lodged the petition in the Constitutional Court alleging that the Pensions Act was inconsistent with the various articles of the Constitution that he cited.

In the petition, the appellant alleged that S. 9 of the Pensions Act was inconsistent with Articles 42, 44 (c), 126, 139 of the Constitution; that S. 10 of the Pensions Act was inconsistent with Articles 20, 21, 26, 29 (l)(e), 40 (1) (b) and (3) (c), 42, 45, 158 (1), 173 and 269 (3) of the Constitution; that S. 11 of the Pensions Act was inconsistent with Articles 20, 21, 40, 42, 158(1), and 173 of the Constitution; that S. 14 of the Pensions Act was inconsistent with Articles 20, 21, 29(l)(e), 40, 42, 44, 158(1), 173 and 269(3) of the Constitution; and that S. 18 of the Pensions Act was inconsistent with Articles 20, 21, 40, 158(1), 173 and 269(3) of the Constitution.

The other grounds in the petition were that the above cited provisions of the Pensions Act were inconsistent with Articles 20, 21, 29(l)(e), 40, 42, 44, 158(1), 173 and 269(3) of the Constitution in so far as they allow forfeiture of accumulated benefits of an employee in public service who voluntarily leaves service without having attained the statutory minimum age or for any other reason; that the Pensions Act is unconstitutional in so far as pension is quantifiable based on the period served in the public service but does not quantify the emoluments of a person who has served a shorter period than the statutory minimum for purpose of paying or transferring the accrued benefits to another retirement or social security benefit scheme such as under the National Social

Security (NSSF); that the act of the public service in not paying the petitioner any accumulated emoluments, retirement or other benefits upon his voluntary retirement and upon continuous service in the public service of about 10 years was discriminatory and contrary to the provisions protecting property rights, employee rights in the public service and was inconsistent with the rights of the petitioner under Articles 20, 21, 29 (1) (e), 40, 42, 44, 158

(1) , 173 and 269 (3) of the Constitution.

The Constitutional Court heard the petition, allowed it in part where even the Attorney General conceded that those particular provisions of the Pensions Act ousting the jurisdiction of the courts were unconstitutional. But in the main, the Constitutional Court dismissed the petition on all the other grounds. Hence this appeal.

Dissatisfied with the decision, the petitioner appealed to this Court against part of the judgment on the following grounds as laid down in the memorandum of appeal:

1. **That the learned Justices of the Constitutional Court erred in law when they held that section 10 of the Pension Act Cap 286 Laws of Uganda is not inconsistent with or in contravention of Articles 20, 21, 26, 42, 45, 40(l)(b), 40(3)(c), 158(1), 173 and 269(3) of the Constitution of the Republic of Uganda in the following particular grounds, namely that:**

    a. **The learned Justices of the Constitutional Court erred in law not to find prima facie and several grounds of discrimination and unequal treatment of civil servants under section 10 of the Pension Act on the basis of age, sex, social standing or other criteria. Specifically the learned Justices of the Constitutional Court erroneously held that age was not a category for consideration of discrimination of a person under Article 21(2) of the Constitution of the Republic of Uganda.**
    b. **The learned Justices of the Constitutional Court erred in law to hold that appellant's terminal benefits did not accrue and therefore his right to property was not infringed contrary to Article 26 of the Constitution of the Republic of Uganda**

through deprivation of property.

c. **The learned Justices of the Constitutional Court erred in law and fact in holding that no terminal benefits had accrued to the appellant in the facts of this case after a 10 year period of service in the public service by the appellant.**

d. **The learned Justices of the Constitutional Court erred in law in holding that the section 10 of the Pension Act did not infringe article 40(1) (b) of the Constitution of the Republic of Uganda which prescribe equal pay for equal work without discrimination.**

e. **The learned Justices of the Constitutional Court erred in law in holding that there was no infringement of the right to freely withdraw labour in the way section 10 of the Pension Act are (sic) applied contrary to article 40 (2)(c) of the Constitution**

f. **The learned Justices of the Constitutional Court erred in law in holding that the appellant's salary as a Principal State Attorney was not an expenditure on the consolidated fund and therefore there was no infringement of article 158 (1) of the Constitution.**

g. **The learned Justices of the Constitutional Court erred in law when they held that there was no punishment of the appellant through forfeiture of his accrued benefits without just cause inconsistent with article 173(b) of the Constitution of the Republic of Uganda on the ground that article 173(b) of the Constitution of the Republic of Uganda applied to disciplinary proceedings only.**

2. **The learned Justices of the Constitutional Court erred in law when they held that section 19 of the Pensions Act Cap 286 is not inconsistent with articles 20, 21, 26, 40, 158(1), 173 and 269(3) of the Constitution of the Republic of Uganda. The applicant relies on the grounds 1 (a)-(g) of the memorandum of appeal.**

3. **Alternatively, but without prejudice to the above grounds, the learned Justices of the Constitutional Court erred in law when they did not find that the purpose and effect of sections 10 and 19 of the Pensions Act Cap 286 are inconsistent with and in contravention of articles 20, 21, 26, 42, 45, 40(1) (b), 40(3) (c), 158(1), 173 and 269(3) of**

the Constitution of the Republic of Uganda in so far as:

a) **Civil servants who have worked the same duration of time in the public service are not treated without discrimination or equally on the grounds of age in contravention of articles 21 and 40 of the Constitution.**

b) **The interpretation of sections 10 and 19 of the Pension Act as to allow forfeiture of accrued benefits after any period of service before clocking the age of 45 years saddles the freedom of a confirmed civil servant in the public service to withdraw his or her labour under article (40) (2) (c) of the Constitution for fear of forfeiture of accrued benefits.**

c) **Forfeiture of accrued benefits which calculated on the basis of the duration of service in all cases is an interpretation and application of law that contravenes the right to property and the right against deprivation thereof in contravention of article 26 of the Constitution.**

d) **Forfeiture of accrued benefits which would otherwise have been paid had the appellant clocked 45 years when he withdrew his labour altered the appellant's rights to his detriment contrary to article 158 (1) of the Constitution.**

e) **There was no just cause to interpret the law as to allow forfeiture of the appellant's terminal benefits and the act of the respondent's servants amount to a punishment without just cause in contravention of article 173(b) of the Constitution for withdrawal of labour before the age of 45 years.**

4. **The learned Justices of the Constitutional Court erred in law and procedure inconsistent with article 43 of the constitution which procedure shifted the onus of proof on the petitioner to justify grounds of the petition when the petition discloses a prima facie case of discrimination on the grounds of age and forfeiture of property rights and the burden was on the respondent to justify whether the laws and acts of the respondent's servants in denying the petitioner any terminal or due benefits after his voluntary withdrawal of labor was reasonably justifiable in a free and democratic**

society.

5. **The Attorney General did not justify whether the prima facie violation or infringement of the Appellant's fundamental rights and freedoms was justifiably reasonable in a free and democratic society.**

6. **The learned Justices of the Constitutional Court erred in law and in fact when they only related the impugned provisions of the Pensions Act to the petitioner's circumstances and not any civil servant in a public interest matter disclosed in the petition which challenges the law and the acts of the respondent's servants and thereby came to the wrong conclusions.**

7. **The learned Justices of the constitutional court erred on a matter of fact and law when they treated the appellant's claim for relief as a claim for pension whereas it is also a claim for accrued terminal benefits pegged on the duration of service in a permanent and pensionable office and failed to appreciate the right of an employee employed by the public service on permanent and pensionable terms to enjoy social security.**

The appellant prayed to court to allow the appeal, grant the declarations sought in the petition with full costs in this court and the court below. The appellant also sought consequential reliefs, namely, that the respondent's servants be ordered to compute the appellant's terminal benefits with effect from 1st January 2000 at the current salary rate of payment of a Principal State Attorney; that interest be paid on the amount from January 2000 at the rate of 20% p.a. till date of judgment; that interest is paid on the aggregate amount from the date of judgment till payment in full at the rate of 21% p.a.; that in the alternative, without prejudicial (sic), an order be made directing the appellant's current employer to take into account his period of service in the Ministry of Justice and Constitutional Affairs for purposes of his continuation of service in the judicial service as service to be reckoned for retirement purposes.

At the hearing, the appellant was represented by Businge Fred Kiiza while the respondent was represented by Patricia Muteesi Principal State Attorney.

Both Counsel for the appellant and for the respondent filed written submissions. Counsel for the appellant also filed submissions in rejoinder.

In discussing this appeal, I wish to start with analyzing the law. The Constitution is the supreme law of Uganda and any other law inconsistent with it is void to the extent of the inconsistency (Article 2). The Constitution establishes the public services of Uganda, and provides how those services shall be regulated. Article 171 on the establishment of offices states as follows:

> *"Subject to the provisions of this Constitution and any Act of Parliament the President may, after consultation with the appropriate service commission, establish offices in the public service of the Government of Uganda".*

Article 175 defines a "public officer" as any person holding or acting in an office in the public service. There is no doubt that the appellant was at all material times a public officer, subject to the relevant provisions of the Constitution and the laws regulating the public service.

As a public officer, the appellant could resign, if he so chose to, from the service. He did make that choice. Therefore Article 252 of the Constitution would come into play. Article 252 states as follows

> *"(1) Except as otherwise provided in this Constitution, any person who is appointed or elected to any office established by this Constitution may resign from that office by writing signed by that person addressed to the person or authority by whom he or she was appointed or elected.*
>
> *(2) The resignation of a person from any office established by this Constitution shall take effect in accordance with the terms on which that person was appointed or, if there are no such terms, when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorized by that person or authority to receive it.*
>
> *(3) For the purposes of clause (1) of this article, "office" includes the office of -*
> *(g) a public officer".*

To me, it is clear that the resignation of the appellant from the public service of Uganda would have to be governed by Article 252 of the Constitution.

On the other hand, had the appellant wished, he could have stayed in service and waited to retire in accordance with the law and claim his entitlement to pension and other terminal benefits. Then he would have been covered by Article 254 of the Constitution which states, in clause

(1) thereof, as follows:

"A public officer shall, on retirement, receive such pension as is commensurate with his or her work, salary and length of service The emphasis is added.

Clearly, the Constitution itself envisages that public officers shall earn a pension upon retirement.

Here, two important words call for clarification. The words "resignation" and "retirement" are crucial in the determination of this appeal.

According to Black's Law Dictionary, 8th Edition, resignation means:

> ***"Formal renouncement or relinquishment of an office. It must be made with the intention of relinquishing the office accompanied by an act of relinquishment.***[99]

This is taken from the principle <u>"resignatio est juris proprii spontanea refutatio - resignation is spontaneous relinquishment of one's own right".</u>

On the other hand, retirement is defined by the same Dictionary as follows:

"Retirement - Termination of employment service, trade or occupation upon reaching retirement age, or earlier at election of employee, self- employed or professional."

It will be observed that Article 254 uses the words "retirement" and "pension". It does not define the words, but again one seeks help from Black's Law Dictionary which defines "pension" as follows: - "Pension - Retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner."

One other provision of the Constitution that I should bring out at this stage is Article 274 which saves the laws in existence at the coming into force of the 1995 Constitution. The article states as follows:

> *"(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.*
>
> *(2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the*

coming into force of this constitution, including any Act of Parliament or Statute or Statutory Instrument enacted or made before that date which is to come into force on or after that date. ”

It is common ground that the Pensions Act, the Public Service Act, Regulations made thereunder as well as Government Standing Orders were made and in force before the coming into force of the 1995 Constitution. What we need to do now is to examine whether any provision contained therein is inconsistent with the 1995 Constitution as alleged by the appellant.

I wish to observe that we are dealing with a matter of a contract of employment. As earlier pointed out, there was an offer of employment on stated terms and there was an acceptance of that offer. Those terms indicate that the contract was also governed by statute. As is stated in Halsbury’s Laws of England Vol. 16 at para 1, "... although much of modern employment law is contained in statutes and statutory instruments, the legal basis of employment remains the contract of employment between the employer and the employee.” It is trite, however, that as much as there is freedom of contract, one cannot contract out of the law, let alone out of the Constitution. The gist of this appeal is that the terms of employment governing retirement or resignation from the Public Service as contained in the Pensions Act and Public Service Act and regulations thereunder are inconsistent with the Constitution.

The Pensions Act in Section 10 provides as follows:

“10. Circumstances in which pension may be granted

(1) *Except as provided by such regulations as may be made under Section 3, no pension, gratuity or other allowance shall be granted under this Act to any officer except on his or her retirement from the public service in one of the following cases*

(a) *in —*

(i) the case of an officer in the public service on the 16th February, 1961, who on that

date had attained the age of forty-five years, at any time;

(ii) *the case of an officer in the public service who is in receipt of overseas addition or who was recruited by the Secretary of State or by the Crown Agents for Overseas Governments and Administrations on terms of service which did not include payment of inducement pay or overseas addition, or who is, or was on the 9th October, 1962, an officer eligible for vacation leave under paragraph 17(ii), (iii) or (iv) of section C of the Standing Orders for the Uganda Civil Service in force on the 16th February, 1961, or who has elected or is deemed to have elected not to accept the new terms of service contained in Government Establishment Instruction No. 4 of 1961, on or after attaining the age of forty-five years;*

(iii) *the case of an officer in the public service on the 16thFebruary, 1961, who attained the age of forty-five years not later than the 16th February, 1962, on or after attaining that age;*

(b) *in the case of a transfer to other public service, in circumstances in which he or she is permitted by law or regulations of the service in which he or she is last employed to retire on pension or gratuity; provided that if the other public service is superannuated service under the Federated Superannuation System for Universities or under a similar insurance scheme, he or she has retired on one of the grounds mentioned in paragraphs (a), (c), (d) and (e) or, if he or she was transferred to the other public service prior to the 16th February, 1961, on or after attaining the age of forty-five years;*

on the abolition of his or her office;

on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he or she belongs, by which greater efficiency or economy may be effected;

on medical evidence, to the satisfaction of the pensions authority, that he or she is incapable by reason of any infirmity of mind or body of discharging the duties of his or her office and that the infirmity is likely to be permanent; if he or she retires from the public service with the written consent of the President acting on the advice of the Public Service Commission, the Judicial Service Commission or, as the case may be, the Education Service Commission;

on retirement in circumstances not mentioned in the preceding paragraphs of this section, rendering him or her eligible for a pension under the Governors' Pensions Act, 1957, of the United Kingdom or any Act of the United Kingdom amending or replacing that Act, except that a gratuity may be granted to a female officer, in accordance with this Act, who resigns on or with a view to marriage or is required to retire on account of her marriage, notwithstanding that she is not otherwise eligible under this section for the grant of any pension, gratuity or other allowance.

Notwithstanding subsection (1), a pension, gratuity or other allowance shall be paid to an officer who retires on the attainment of the age of forty-five years if he or she has served for a continuous period of ten years or more.

(3) *Every officer shall retire from the public service on the attainment of the age of fifty-five; except that an officer who attains the age of fifty may, if he or she wishes, remain in the public service until he or she attains the age of fifty-five unless the appropriate authority, within six months after the officer attains the age of fifty, requires him or her to retire.*

(4) *For the avoidance of doubt, it is declared that the period of six months referred to in subsection (3) or any shorter period thereof shall be taken into account as pensionable service.*

(5) *Subsections (3) and (4) shall apply to officers who were in the public service at the commencement of the Pensions Act (Amendment) Decree, Decree No. 23 of 1973, on 9th*

November, 1973, and who were still in the public service at the commencement of the Pensions Act (Amendment) Decree, Decree No. 11 of 1977, on 1st July, 1977."

Section (10)(1) clearly states that any officer who has not retired shall not be paid any pension, gratuity or any other allowance but section 10 (2) exempts an officer from the provisions of section 10 (1) if that officer has attained the age of 45 and has served a continuous period of not less than 10 years.

The normal retirement period is given in section 10(3), which is not applicable in this case.

It would appear that the relevant provision that would have applied to the appellant would have been the above two provisions - i.e. if he had reached the age of 45 and served a continuous period of l0 years.

In the instant case, the appellant applied to retire from Public Service under the voluntary retirement scheme which request was denied. This was a Government Scheme where the officer would have been paid a lump sum of shs 15,000,000/= (fifteen million shillings only) upon voluntary retirement without pension. He chose to resign from his position as a Principal State Attorney. I have already dealt with the meaning of resignation and the effect thereof. The question is whether the appellant having resigned from Public Service was entitled to any other payments under the law and the Constitution.

In elaborating on the nature and effect of resignation, the South African court in the case of Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSSA), held that, "a resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract ... The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation."

The employment contract the public officer like the appellant and his employer i.e. Government entered is governed by the law as stipulated in the letter of offer and acceptance of the job.
As such, when a public officer resigns, he in turn forfeits any benefits that he/she would have been entitled to under the Pensions Act. Resignation is not envisaged, whether under the Constitution, the Pensions Act or indeed under the law of employment, to entitle the employee to terminal benefits beyond those stated in the employment contract.

I shall now move to specifically resolve the grounds of appeal. I intend to resolve grounds 1, 2 and 3 together; then grounds 4 and 5; ground 6; and ground 7 respectively.

Grounds 1, 2 and 3

Counsel for the appellant indicated that the thrust of ground one was in regard to the discriminatory [and] adverse nature, purpose, effect and application of section 10 of the Pensions Act on various rights of the appellant. Counsel submitted that the core issue was that section 10 of the impugned Act discriminated on the ground of age in that a person who has not clocked the age of 45 years when he/she leaves after 10 years of service, does not get paid any terminal benefits but a person who has served for a similar period of time and is 45 years of age or above not only gets paid terminal benefits but also the periodic and monthly pension.

Counsel further propounded the argument that as is the case with the private scheme, the National Social Security Fund (NSSF), the law envisages a benefit to accrue under the Pensions Act to a public officer from the date of assumption of duty from month to month for the entire duration of employment irrespective of the period served. Counsel took the argument further that such monthly accruals are regarded as property and, in the least, can be collected after the appellant attained the age of 45 years even after leaving service at an earlier age. Counsel further stated that because the contributions or promise to pay at the end is property, it cannot be forfeited merely by reason of withdrawal of service or labour which is a constitutional right under Article 40 (3) (c) of the Constitution. Counsel concluded that forfeiture in such circumstances would also infringe property

rights under Article 26 of the Constitution.

In reply, Counsel for the respondent submitted that the Constitutional Court correctly held that the different treatment of employees under different situations on the basis of age is not inconsistent with the Constitution. Counsel further stated that age is not one of the categories that are constitutionally defined as constituting prohibited discrimination under Article 21 of the Constitution.

Article 21 of the Constitution provides -

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

(2) *Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.*

It is true that equality before the law and freedom from discrimination are guaranteed particularly under the above provision of the Constitution. Nevertheless, exceptions are made by the very Constitution permitting preferential treatment to different categories of persons. Such exceptions are constitutionally justified and do not amount to discrimination. Derogation of rights can also be allowed under Article 43

(2) ***(c) of the Constitution if it is shown to be "acceptable and demonstrably justifiable in a free and democratic society."***

The provisions of the Constitution for affirmative action for marginalized groups are another example where the derogation is permitted.

The Constitutional Court, in its decision on this point, held:

"It is correct that women public servants who resign from the public service on account

of either getting married or simply on account of marriage are eligible to be considered for a pension notwithstanding that they have not attained the minimum threshold of 45 years of age or 10 years' service. This is indeed different treatment to other classes of public servants including the male public servants who may leave for the same reason or other reasons and female public servants who may resign for other reasons."

The Court further held that:

"... different treatment accorded to female public officers who resign on account of marriage may be in recognition of the unique status and natural maternal functions of women in our society together with the desire to protect the family which is noted in the National Objectives of State Policy 19 to be the natural and basic unit of society and is entitled to protection by society and the state."

The above holding by the Constitutional Court is further supported by Article 32 (1) of the Constitution which states as follows:

" Notwithstanding anything in this Constitution, the state shall take affirmative action in favor of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them."

The Constitution goes further to provide for affirmative action for women in Article 33 as follows:

(1) Women shall be accorded full and equal dignity of the person with men.

(2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.

(3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

(4) Women shall have the rights to equal treatment with men and that right shall include equal opportunities in political, economic, and social activities.

(5) *Without prejudice to Article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.*

The appellant alleges that he was discriminated against on grounds of age and cites Article 21 of the Constitution.

To appreciate the full meaning of Article 21, I deem it necessary to reproduce it in full. It states as follows:

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

(2) *Without prejudice to clause (10) of this article, a person shall not be discriminated against on the ground of sex, race , colour ethnic origin , tribe, birth creed or religion, social or economic standing, political opinion or disability.*

(3) *For the purpose of this article, "**discriminate**" means to give different treatment to different persons attributable only or mainly to their respective description by sex, race, colour, ethnic origin, tribe, creed or religion social or economic standing , political opinion or disability.*

(4) *Nothing in this article shall prevent Parliament from enacting laws that are necessary for:*

(a) *Implementing policies and programmes aimed at redressing social, economic, educational ort other imbalance in society; or*

(b) *Making such provision as is required or authorized to be made under this Constitution; or*

(c) *Providing for any matter acceptable and demonstrably justified in a free and democratic society.*

(5) *Nothing shall be taken to be inconsistent with this article which is allowed to be*

done under any provision of this Constitution.

What amounts to discrimination has been defined under Article 21 (3) (supra)

The above provisions clearly show that age is not one of the parameters for determination of what constitutes discrimination. In any case, for any of the above named elements to amount to discrimination, it must be done outside the law and with a negative motive. As such, the argument by the appellant that he was discriminated against on the basis of age is not valid. Setting of a minimum age for accrual of pension or other terminal benefits cannot be said to be against either the provisions or the spirit of the law. Neither can resignation be substituted for retirement such that a person who resigns gets entitled to the benefits which the law bestows on a person who retires. What the appellant seeks to establish is that as long as one gets employed in a pensionable position, terminal benefits start to accrue and when he/she resigns or leaves employment for whatever reason, he/she is entitled to a calculation of what, he claims, will have accrued. If this is not done, then to him, he is being discriminated against as opposed to those officers who stay in service until they reach retirement age as stipulated in the law. This would be against public policy.

It appears to me that the appellant has failed to distinguish between what one is entitled to as a matter of contractual right and what one is eligible for under his contract of employment. In my view, the day the appellant finished his probation and was admitted to pensionable service he became eligible to pension and other terminal benefits if he served for the duration of the period stipulated in the Pensions Act.

The pension and other terminal benefits reached maturity and became payable entitlements as soon as the appellant reached the retirement criteria provided for in the law.

I am fortified in that a view by the case of PETER M. TERPINAS-VS- SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT - 722 F.2 D 1445 (9™ Cir.1984), cited by the appellant himself. The court in that case stated thus:

"By the terms of the plan, employer contributions to the pension fund represent deferred

compensation. Under California Law, an employee acquires a vested right to pension benefits when he has acquired the prescribed period of service.....

However, California law distinguishes between the vesting of pension rights and the maturing of pension benefits.....

A pension right is vested if the employer cannot unilaterally repudiate that right without terminating the employment relationship..... Maturing occurs only after conditions precedent to payment of the benefits have been satisfied. ”

By analogy, the law in Uganda with regards to pensions and other terminal benefits in the Public Service is that the Government runs a pension scheme for its Public officers.

After an officer has served a probationary period, usually two years as was the case with the appellant, he/she gets confirmed in service and is admitted to the pensionable scheme. He/She becomes eligible to pensionable entitlements upon meeting the retirement criteria stipulated in the law. If the officer resigns from the service, he /she thereby makes

a personal decision to forfeit what would have been his entitlements had he served to retirement.

I am in full agreement with the Constitutional Court that no entitlement of benefit had accrued to the appellant so as to amount to property that he was deprived of. The appellant's assertion that he exercised his right to withdraw his labour does not seem to take into account Article 40 (3) (c) which states that every worker has a right "to withdraw his /her labour according to law". It is for that reason that the Constitution provides in Article 252 that when a public officer resigns, his resignation takes effect in accordance with the terms on which that person was appointed. The appellant's letter of appointment, which he accepted, clearly stated that his employment was subject to the Constitution, Pension's Act, the Public Service Act and Regulations, the Public Service Standing Orders and Administrative Instructions. Those laws applied to his resignation.

This leads me to consider whether the appellant's claim would not offend the Public interest. The whole purpose of the government providing for pensionable entitlements to public officers is so that public officers who have served the stipulated period and reached the stipulated age do get help from the state to support them in their retirement. It calls for careful planning by the state. The number of officers is known, their ages also are known . This enables Government to plan and make provision for the payments to be made smoothly without disrupting the operation of Government.

The Public have an interest in the orderly way pensionable benefits are planned for and paid out to entitled officers. To allow the appellant's claim would mean that any time a public officer chooses to resign, he/she can walk out and demand to be paid. If this were to be allowed, it would cause chaos in public service and disrupt the orderly planning for pensions. In my view, this cannot be accepted in an orderly (democratic) society.

In the circumstances I am of the considered opinion that the Constitutional Court properly considered the appellant's contentions and reached the correct conclusions in this regard. I therefore find no merit in grounds 1, 2 and 3 of the appeal. They should fail.

Ground 4 and 5:

Counsel for the appellant, in his submissions, stated that the Court erred in not considering whether there was a prima facie infringement of the appellant's property rights and the onus of proof (sic). Counsel noted that there was no attempt at justification for infringement of the alleged property rights of the appellant (sic).

It is a general rule of constitutional interpretation that when considering the constitutionality of any legislation, its purpose and effect must be taken into account.[see ATTORNEY GENERAL -VS- SALVATORI ABUKI, CONSTITUTIONAL APPEAL NO.l OF 1998] If the purpose of an Act of Parliament is inconsistent with a provision of the Constitution, the impugned Act or section thereof will be declared unconstitutional. In the same way, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, the provision would be declared unconstitutional. The reason for this is that the Constitution is the supreme law of the land, and any other law inconsistent with it is null and void to the extent of that inconsistency. (Article 2 of the Constitution.)

There is a rebuttable presumption that every legislation is constitutional and the onus of rebutting this presumption rests on the person or persons challenging the constitutionality of such a legislation. Therefore, in the instant case, the burden lay on the appellant to satisfy the Court that the impugned provisions of the Pensions Act were inconsistent with provisions of the Constitution.

The argument for the appellant appears to be that once the appellant disclosed a prima facie case of infringement of his alleged property rights, the onus shifted to the respondent to justify such infringement. In my view this argument by Counsel for the appellant fails on two grounds. One is that on the material before the Constitutional Court and this court, the appellant never disclosed any prima facie case of infringement of his property rights. As already found above, no property in terms of terminal benefits accrued to the appellant upon his resignation. No deprivation could therefore be proved and, as such, no infringement of any property rights was proved. The second ground is that even if the appellant had disclosed a prima facie case of infringement of his alleged property rights, such would not occasion shifting of the onus of proof. That is not the law. The law is that in civil

proceedings, he who alleges must prove his/her allegation and the onus of proof lies upon the person making such an allegation to prove the allegation on a balance of probabilities. Disclosure of a prima facie case is not such proof as is required under the law. As such, there was neither shifting of the onus of proof upon the respondent nor a failure or even a requirement on the part of the Attorney General to justify whether the infringement was demonstrably justifiable in a free and democratic society. I find no merit in Grounds 4 and 5 of appeal and they accordingly fail.

Ground 6

Counsel for the appellant in his submissions submitted that the Constitutional Court restricted the matter in issue to the petitioner's circumstances and did not relate any of the impugned provisions of the Pensions Act to any civil servant in a public interest matter disclosed in the petition which challenged the law and acts of the respondent's servants and thereby came to a wrong conclusion.

I note that Section 10 of the Pensions Act applies to all public servants. The circumstances provided for in that provision of the law covers all categories of persons in public service. The age, the period of years of service and indeed the other requirements for accrual of pension or other retirement benefit as stipulated under the Act are specific and of general application. I have already discussed the issue whether it would be in the greater public interest to allow the appellant's claim. I am therefore unable to appreciate any merit in the appellant's argument in this regard. This ground of appeal also fails.

Ground 7

Counsel for the appellant submitted that the petition was not about pension monthly payments after payment of terminal benefits but was restricted to a claim of gratuity or benefits payable in a lump sum at the end of the service (sic).

In reply, counsel for the respondent submitted that the Constitutional Court correctly held that the appellant did not forfeit any retirement benefits because he had not attained the age threshold for his

retirement benefits.

In my view, terminal benefits are based in law and depend on the existing law and nature of the employment contract. Terminal benefits are computed after termination in accordance with the terms of service or a given contract. Unless the terms of the contract so provide, an employee who voluntarily resigns his or her employment is not entitled to terminal benefits because as already stated, resignation constitutes severance of all the entitlements under such employment. Retirement and pension under public service have specific provisions as already shown herein. These provisions do not in any way apply to the appellant. The appellant therefore cannot claim for terminal benefits where none had accrued to him under the law. The Constitution does not afford a right where none exists. I therefore find no inconsistency whatsoever in light of this clear and well laid position of the law. This ground of appeal must fail as well.

In conclusion, all the grounds of appeal raised by the appellant have been found to be without merit. The appeal therefore wholly fails. The judgment and orders of the Constitutional Court are upheld. As to costs, this being a matter of public interest I order that each party meets its costs.

As all the other members of the Court agree, the appeal fails and is hereby dismissed. We uphold the Judgment of the Court of Appeal. This being a matter of Public interest, each party shall meet their costs.

Dated this 14th day of February 2019

Bart M Katureebe

CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, C.J., ARACH-AMOKO, MWONDHA, TIBATEMWA-EKIRIKUBINZA, MUGAMBA, BUTEERA JJ.SC. TUMWESIGYE, AG. JSC)

CONSTITUTIONAL APPEAL NO: 01 OF 2016 BETWEEN

CHRISTOPHER MARTIN MADRAMA:: APPELLANT

AND

ATTORNEY GENERAL::RESPONDENT

[An appeal from the decision of the Constitutional Court at Kampala (Nshimye, Kasule, Mwangusya, Opio-Aweri and Egonda-Ntende, JJA) in Constitutional Petition No. 12 of 2008 dated 20* November 2015]

JUDGMENT OF TUMWESIGYE. AG. JSC

I have had the benefit of reading in draft the judgment of my Lord the Chief Justice Bart Katureebe.

I agree with his decision and the orders he has proposed.

Dated at Kampala this 14th day of February 2019

Jotham Tumwesigye

AG JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWONDHA; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; BUTEERA; JJ.SC TUMWESIGYE, AG. J.SC)

CONSTITUTIONAL APPEAL NO 01 OF 2016

CHRISTOPHER M. MADRAMA IZAMA::::::::::::::::::::::::::::::::APPELLANT

V E R S U S

ATTORNEY GENERAL::RESPONDENT

[An appeal from the decision of the Constitutional Court at Kampala (Nshimye, Kasule, Mwangusya, Opio-Aweri and Egonda-Ntende, JJA) in Constitutional Petition No.12 of 2008 dated 20th November 2015]

THE JUDGMENT OF BUTEERA, JSC

I have had the advantage of reading in draft the judgment of Katureebe, CJ. I concur with the judgment and the orders he proposes. I have nothing to add.

Delivered at Kampala this 14th day of February 2019

Hon. Justice Richard Butera

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CQRAM:KATUREEBE,CJ:ARACH-AMOKO:MWONDHA:TIBATEMWA; MUGAMBA: BUTEERA: JJ.S.C; TUMWESIGYE. AG. JSC

CONSTITUTIONAL APPEAL NO. 01 OF 2016

CHRISTOPHER M. MADRAMA IZAMA ::::::::::::::::::::::::APPELLANT

VERSUS

ATTORNEY GENERAL ::RESPONDENT

THE JUDGMENT OF MUGAMBA, JSC

I have had the opportunity to read in draft the judgment of Katureebe C.J. I agree with the decision and orders proposed therein.

Dated at Kampala this 14th day of February 2019

Hon. Justice Paul K. Mugamba

JUSTICE OF THE SUPREME COURT

THE REPURLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: Katureebe,CJ; Arach-Amoko, Mwondha, Tibatemwa, Mugamba, Buteera JJ.SC; Tumwesigye, Ag. JJ.SC)

CONSTITUTIONAL APPEAL NO. 0l OF 2016.

BETWEEN

CHRISTOPHER MARTIN MADRAMAIZAMA:::::::::::::::: APPELLANT

AND

ATTORNEY GENERAL::RESPONDENT

{Appeal arising from the decision of the Constitutional Court at Kampala (Nshimye, Kasule, Mwangusya, Opio-Aweri & Egonda-Ntende, JJA). Dated 20t'1 November, 2015 in Constitutional Petition No. 12 of2008}

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in advance the draft Judgment prepared by my learned brother, Hon. Justice. Katureebe, CJ, and I concur with his reasoning, conclusion and the orders he proposed.

Dated at Kampala this 14th day of February 2019

M.S. ARACH-AMOKO
JUSTICE OF THE SPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO, KAMPALA

CORAM: KATUREEBE CJ, ARACH AMOKO, MWONDHA, TIBATEMWA,

MUGAMBA, BUTEERA JJSC, TUMWESIGYE AG JSC
CONSTITUTIONAL APPEAL NO. 1 OF 2016

CHRISTOPHER MARTIN MADRAMA IZAMA.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

(An appeal arising from the decision of the Constitutional Court of Uganda at Kampala in Constitutional Petition No. 12 of 2008 before NSHIMYE, KASULE, MWANGUSYA, OPIO AWERI, EGONDA NTENDE JJA dated 20* November 2015)

JUDGMENT OF MWONDHA, JSC

I have had the benefit of reading in draft the judgment of my learned brother, the Chief Justice and I do agree with the conclusion that this appeal should fail, but with different reasoning on the constitutionality of age discrimination.

The facts of the appeal have been ably set out in the judgment, so I do not need to reproduce them here. I will first deal with the law as I understand it to be in relation to the facts of the case.

In the Constitutional Court, the appellant argued that Section 10(2) of the Pensions Act permits discrimination against categories of workers on grounds of age in that employees of the public service do not get the same treatment depending on whether they have clocked the statutory minimum age of 45 years or not. The appellant submitted that a person who has reached the age of 45 years or above would be entitled to gratuity or other benefits after leaving service but another person who could have served the same period and is below the age of 45 years would not be paid any accrued benefit, gratuity or other benefit if they leave the service and in fact it is treated as forfeited.

In answer to the appellant's argument, the Constitutional Court held as follows:

We wish to state that the only discrimination that is constitutionally prohibited is on account of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Age is not one of the categories that constitutionally define discrimination...

I respectfully disagree with the conclusion that age is not one of the categories that define discrimination under the 1995 Constitution and that the factors explicitly stated lock out all the silent factors not expressly stated in the definition of discrimination. Such a restrictive interpretation goes counter to the principles of constitutional interpretation.

In South Dakota Vs South Carolina 192, US 268, 1940, it was stated;

A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic, progressive and liberal interpretation and culture values so as to extend fully the benefit of the rights which have been guaranteed.

In Missouri Vs Holland, 252 US 416 (1920) the United States Supreme Court held as follows:

With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution..., we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

In **Richmond Newspapers, Inc Vs Virginia, 448 US. 555, 580- 81(1980),** Chief Justice Warren Burger (as he then was) of the United States Supreme Court held as follows:

Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, this Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees... Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit

guarantees...Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

The above authorities are of the United States but I find them highly persuasive in approaching the present appeal.

Article 21 of the Constitution provides as follows:

21. Equality and freedom from discrimination.

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

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) Implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) Making such provision as is required or authorised to be made under this Constitution; or

(c) Providing for any matter acceptable and demonstrably justified in a free and democratic society.

(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.

Article 21 as stipulated above provides for equality and freedom from discrimination. Under Article 21(3), age is not expressly recognised as a criterion for discrimination. However, this does not mean that it does not exist. Indeed, the framers of the Constitution recognized that there are certain rights they may not have expressly provided for but nonetheless exist. In this regard, Article 45 provides as follows:

45. Human rights and freedoms additional to other rights.

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded

as excluding others not specifically mentioned.

In **Attorney General Vs Susan Kigula & 417 others Constitutional Appeal No.03 of 2006,** this Court accepted counsel for the respondent's submission in respect of mitigation where he had stated as follows:

The fact that mitigation was not expressly mentioned as a right in the Constitution does not deprive it of its essence as a right because the rights in the Constitution are not exhaustive. Mitigation is an element of fair trial.

Indeed, this Court in the decision said as follows

For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.

This was a clear indication in my view that fundamental rights and freedoms are not exhaustive in the Constitution.

In the same vein, the fact that non discrimination on the basis of age was not expressly mentioned as a right in the Constitution does not deprive it of its essence.

In their judgment, the learned Justices of the Constitutional Court failed to reconcile Article 45 with their holding that age is not a category used to define discrimination under Article 21(3) of the Constitution.

In P.K. Ssemwogerere & Another Vs Attorney General Constitutional Appeal No. 1 of 2002, this Court held as follows:

The entire Constitution has to be read together as an integral whole and no particular provision destroying the other, but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution.

In my view, the learned Justices of the Constitutional Court interpreted Article 21(3) of the Constitution in isolation of Article 45 and offended the above principle.

Article 45 is a forward looking provision designed to give the Constitution a durable character and the elasticity to wither through the dynamics and ever changing needs of society. The mantle falls upon the Courts to determine which rights are covered under Article 45. This exercise must be done judiciously by examining among others International Human Rights Instruments and human rights Constitutional developments in other Jurisdictions.

In Kenya, age is recognized as a criterion for discrimination.

Article 27(4) of the Kenya Constitution provides as follows:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. (Emphasis added)

In the United Kingdom, the Equality Act 2010 recognises age as a criterion for discrimination. In **Seldon Vs Clarkson Wright and Jakes (2012) UKSC** 16, the United Kingdom Supreme Court observed as follows:

Age is a relative newcomer to the list of characteristics protected against discrimination. Laws against discrimination are designed to secure equal treatment for people who are seen by society to be in essentially the same situation.

In light of these developments in other jurisdictions, I conclude that under Articles 21(1) and 45 of the Constitution of Uganda, no person is to be discriminated against on the grounds of age.

Section 10(2) of the Pensions Act provides as follows:

10. Circumstances in which pension may be granted

(2) Notwithstanding subsection (1), a pension, gratuity or other allowance shall be paid to an officer who retires on the attainment of the age of forty-five years if he or she has served for a continuous period of ten years or more.

As was stated in the **Seldon case (supra),** laws against discrimination are designed to secure equal treatment for people who are seen by society to be in essentially the same situation. The discriminatory aspects of Section 10(2) of the Pensions Act are not difficult to decipher, supposing a person joins public service as is mostly the case these days at the age of twenty seven and serves diligently for a continuous period of ten years until the age of thirty seven, are you going to deny him his retirement benefits simply because he is not forty five and yet the person who joined public service together with him while aged thirty five and served for a continuous period of ten years until the age of forty five will get his? This is clearly discriminatory.

Like all other rights, the right not to be discriminated against on account of age is not absolute.

Article 43 provides as follows:

43. General limitation on fundamental and other human rights and freedoms.

(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 freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution (Emphasis added)

The question to be asked therefore is whether under Section 10(2) of the Pensions Act, the 45 age requirement is in public interest and if so, whether it is acceptable and demonstrably justifiable in a free and democratic society.

In Charles Onyango Obbo and Andrew Mujuni Mwenda versus the Attorney General Constitutional Appeal No.02 of 2002,

this Court decided as follows:

The burden was on the appellants to prove that the state or somebody else under the authority of any law has violated their rights and freedoms to publish guaranteed under the Constitution. Once that has been established, the burden shifts to the state or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation. (Emphasis added)

As therefore rightly submitted by counsel for the appellant, once an infringement is proved, the onus shifts to the respondent to demonstrate that limitations on fundamental rights and other freedoms are justifiable.

Neither the appellant nor the respondent in their submissions address Court on the justifiability of the limitation in section 10(2) of the Pensions Act.

However, this being a Constitutional appeal, I took liberty to look at the circumstances under which age discrimination may be justifiable in other jurisdictions.

In the case of **European Commission Vs Hungary (C-286/12) 2012,** the European Court of Justice held as follows:

As regards the legitimacy of those objectives, it must be noted that the Court has already held that the aims that may be considered legitimate....and consequently appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age are social policy objectives, such as those related to

employment policy, the labour market or vocational training...

As regards the aim of standardisation, in the context of professions in the public sector, it must be noted....that in so far as such aim ensures observance of the principle of equal treatment for all persons in a specific sector and relates to an essential element of their employment relationship, such as the time of retirement, that aim can constitute a legitimate employment policy objective...

The aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high quality service, can constitute a legitimate aim of employment and labour market policy.

In Palacios de la Villa Vs Cortefiel Servicios SA (2009) ICR 1111 CJEU, the European Court of Justice held as follows:

The prohibition on any discrimination on grounds of age....must be interpreted as not precluding national legislation such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in their social security legislation for entitlement to a retirement pension under their contribution regime, where

- **the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and**

- **the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose**

The above authorities are not binding on this Court but are highly persuasive in adjudicating the issues at hand. The provisions of section 10(2) of the Pensions Act couch a legitimate employment policy of standardisation of retirement age in the public sector and are therefore justifiable but as stated earlier in

this judgment, the appellant never adduced evidence to demonstrate that discrimination on the grounds of age was not objectively and reasonably justified in the context of National laws by a legitimate aim relating to employment policy and the labour market. The employment policy does not stand in a vacuum; it has to be supported by evidence. The limitation to the appellant's rights in section 10(2) of the Pensions Act is in public interest and is demonstrably justifiable in a free and democratic society in that regard.

The appeal would fail and each party shall bear its own costs.

Dated at Kampala this 14th day of February 2019

MWONDHA
JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, C. J; ARACH-AMOKO; MWONDHA; TIBATEMWA - EKIRIKUBINZA; MUGAMBA; BUTEERA; TUMWESIGYE, JJSC)

CONSTITUTIONAL APPEAL NO. 01 OF 2016 BETWEEN

CHRISTOPHER M. MADRAMA IZAMA..... APPELANT

AND

THE ATTORNEY GENERAL..... RESPONDENT

(Appeal from the decision of the Constitutional Court of Uganda, at Kampala before Hon. Justices: Nshimye, Kasule, Mwangusya, Opio-Aweri and Egonda- Ntende, JCC in Constitutional Petition No. 12 of 2008 dated 20th November 25 2015.)

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA

I have had the benefit of reading the judgment of my learned brother Hon. Justice Katureebe, CJ and agree with him that the appeal be dismissed.

I specifically agree with his analysis and conclusion that:-

(i) No entitlement of benefit had accrued to the appellant so as to amount to property that he could be deprived of.

(ii) The appellant's right to withdraw his labour according to Article 40 (c) was not infringed.

For reasons I articulate in the judgment, I also find that the differentiation on the ground of age for purposes of accessing gratuity and other benefits on early retirement is **not** unconstitutional. I have based my decision on an analysis of the applicability of two principles to the impugned section: the analogous ground test and the legitimate purpose test. My discussion is also guided by the principle that what the

law prohibits is not discrimination *per se* but rather unfair discrimination.

I have, in discussing the concepts, dealt with the holding of the Constitutional Court that the only discrimination prohibited by the law is that which is based on grounds listed in **Article 21 (2)** of the **Constitution.** That since age is not mentioned as one of the grounds in Article 21 (2), the Constitution does not prohibit discrimination on the basis of age.

The analogous ground test

I respectfully defer from the decision of the Constitutional Court that absence of a ground in Article 21 *necessarily* means that discrimination on the said ground cannot be challenged as unconstitutional.

In addressing the constitutional court's holding, I have taken cue from two persuasive authorities: **Eric Gitari vs. Non-Governmental Organisations Co-ordination Board** & **4 others**[1] from Kenya and **AG vs. Unity Dow**[2] from Botswana.

In **Eric Gitari vs. Non- Governmental Organisations Coordination Board & 4 others** the brief facts of the case are that the petitioner, Mr. Eric Gitari, sought to register a non-governmental organization (NGO) whose main objective was to focus on human rights violations regularly perpetrated against gay and lesbian people in Kenya.

The respondent, tasked with coordinating and regulating NGO activity in Kenya, rejected the petitioner's application is due to the NGO's name being undesirable because it included references to gays and lesbians.

Mr. Gitari filed a suit in the High Court against the Board for declaratory relief, arguing that the failure to recognize the NGO was a violation of his and other people's constitutionally guaranteed right to assemble. He prayed for an order of mandamus to force the respondent Board to register the NGO.

Gitari argued that in seeking to register the NGO, he was exercising his constitutional right as established under **Article 36 of Kenya's Constitution** (freedom of association) to enable him address the plight of homosexuals, bisexuals and transgender persons in society. It was his

1 **[2015] eKLR.**
2 **(1992) BLR 119.**

contention that Article 36 entrenches

freedom to associate for "every person" and does not distinguish between different categories of people.

The relevant part of **Article 36** of the Kenyan Constitution provides as follows:

(1) *Every person has the right to freedom of association, which includes the right to form, join or participate in the*

activities of an association of any kind.

(2).....

(3) Any legislation that requires registration of an association of any kind shall provide that — (a) registration may not be withheld or withdrawn unreasonably; ....

The respondent on the other hand argued that the petitioner's proposed NGO was focused on destroying the cultural values of Kenyans, and must therefore not be allowed. Furthermore, the respondent argued that the absence of sexual orientation as a ground for

discrimination in Article 27 (4) of the Constitution was a basis for rejection of the petitioner's application to register the proposed NGO.

The Court addressed the petition by answering the following two questions:

(i) whether LGBTIpersons have a right to form associations in accordance with the law; and

(ii) if the answer in (i) is in the affirmative, whether the decision of the Board not to allow the registration of

the proposed NGO because of the choice of name is a violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

Article 27 of the Kenyan Constitution provides as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.* ...

(4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

In answer to the issues, the Court held that:

> **Article 20 (1) of the Constitution provides that the Bill of Rights applies to all persons. There can be no argument that the term "every person" in Article 36 properly construed excludes homosexual persons. There was nothing to indicate that sexual orientation is a matter that removes one from the ambit of protection by the Constitution.**
>
> **As a society, once we recognize that persons who are gay, lesbian, bisexual, transgender or intersex are human beings however reprehensible we may find their sexual**

orientation, we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity. Therefore, the petitioner fell within the ambit of Article 36 of the Constitution, which guarantees to all persons the right to freedom of association. (My emphasis)

The Court further held that:

The absence of sexual orientation as one of the prohibited grounds in Article 27 (4) does not assist the Board or give the state free reign to discriminate against people. Whilst the Article does not explicitly state that sexual orientation is a prohibited ground of discrimination, it prohibits discrimination both directly and indirectly against any person on any ground. The grounds that are listed are not exhaustive - this is evident from the use of "including" which is defined in article 259(4)
(b) of the Constitution as meaning "includes, but is not limited to". Therefore, the word "including" in Article 27 (4) does not make the listed grounds closed rather it is subject to interpretation to include such grounds as the context and circumstances demonstrate are a
ground of discrimination. (My emphasis)

The import of the decision of the Kenyan Court is its holding that although the Constitution does not explicitly prohibit discrimination on the basis of sexual orientation, such discrimination was unconstitutional on the ground that gays and lesbians had to be accorded all the human rights guaranteed by the Constitution to all persons, by virtue of their being human in order to protect their dignity.

I note that although Article 27 of Kenya's Constitution can be distinguished from Uganda's Article 21 in that the latter does not use the word "including", the Kenya Court also held that, even if Article 27(4) had not been phrased in the broad language that prohibits discrimination against any person on any ground, the Court would have to look at the Constitution holistically, and would find that the principles of equality, dignity and non-discrimination run throughout the Constitution like a golden thread. Indeed I note that Kenya's Article 27 opens with a clause which provides that the right to equality before the law is due to every person. Similarly, Article 21 of the Uganda Constitution opens with a clause which entitles all persons to equality before and under the law as indicated later in this judgment. And as is with the Kenyan constitution, "the principles of equality, dignity and non-

discrimination run throughout the Ugandan Constitution like a golden thread."

But perhaps more relevant is the decision of Botswana's 30 Court of Appeal in **AG vs. Unity Dow (supra)** where discrimination on the basis of sex was declared unconstitutional although it was not one of the grounds specifically mentioned in the constitutional provision which defined and prohibited discrimination.

I note that Section of the Botswana Constitution is in *pari materia* with Article 21 of Uganda Constitution which defines discrimination. I also note that just like the Botswana Constitution does not mention sex, the Uganda Constitution does not mention age in the provision prohibiting discrimination. However, both the High Court and the Court of the Appeal of Botswana held that discrimination against women for purposes of entitlement is to pass on citizenship to their children was unconstitutional.

In the said case, Unity Dow a female citizen of Botswana applied for an order in the High Court of Botswana to declare Sections 4 and 5 of the Citizenship Act of Botswana unconstitutional. Dow was married to a male citizen of the United States of America. Prior to their marriage in 1984, a child was born to them in 1979, and during the marriage two more children were born in 1985 and 1987 respectively. In terms of the laws in force (the Citizenship 25 Act), the child born before the marriage was a Botswana citizen, whereas the children born during the marriage were not citizens of Botswana and therefore aliens in the land of their birth.

The relevant provisions of Sections 4 and 5 of the Citizenship Act provided as follows:

Section 4(1) A person born in Botswana shall be a citizen of Botswana by birth and by descent if, at the time of his birth -

(a) his father was a citizen of Botswana; or

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

Section 5 (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth -

(a) his father was a citizen of Botswana; or

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

Unity Dow contended that Sections 4 and 5 of the Citizenship Act offended the Constitution in that whilst a male Botswana citizen can pass his citizenship to his children born in wedlock, she as a woman could not do so. She also contended that in the circumstances, she was being subjected to degrading treatment which is prohibited by the Constitution.

On the other hand, the Attorney General contended that since discrimination on the basis of sex was not mentioned under Section 15 of the Constitution, it was not a breach of the Constitution.

Section 15 of the Constitution provides that:

"(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons, is attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The High Court Judge held *inter alia* that:

> **Section 4 of the Citizenship Act is discriminatory in its effect on women ... the effect of Section 4 is to punish a female citizen for marrying a non-citizen male. For this the respondent is put in an unfavourable position. ...**

The Attorney General was dissatisfied with the High Court judgment and appealed to the Court of Appeal.

On appeal, the Attorney General argued that since Section 15 of the Botswana Constitution which defined discrimination did not include sex as one of the grounds for discrimination, the Citizenship Act did not contravene the Constitution.

In addressing the Attorney General's argument, the Court of Appeal held as follows:

> **The fact that sex was not mentioned did not mean that discrimination, in the sense of unequal treatment, was not proscribed within that Section. The right expressly conferred by Section 3 could not be abridged by Section 15 merely because the word "sex" was omitted from the definition of "discriminatory" in the Section. A fundamental right conferred by the Constitution on an individual could not be circumscribed by a definition in another Section for the purposes of that other Section.**
>
> **Consequently, Section 15 which specifically mentioned and dealt with discrimination therefore, did not confer an independent right standing on its own. The omission of the word "sex" from the definition of the word "discriminatory" was neither intentional nor made with the object of excluding sex-based discrimination. The words included in the definition were more by way of example than as an exclusive itemization. (My emphasis)**

The import of the two authorities is that grounds listed in a Constitutional provision prohibiting discrimination are not exhaustive. A person can successfully challenge discrimination on a ground not specifically mentioned in the relevant provision. Nevertheless, this is not to say that any ground can be brought within the loop. I opine that when an individual challenges discrimination on the basis of a ground which is not specifically mentioned in the Constitutional provision prohibiting discrimination, what the Court should determine is: whether the unmentioned ground is analogous to the grounds which are specifically mentioned.

To be analogous means being similar to or capable of being compared to something else with similar characteristics.[1] In **Harksen vs. Lane NO and Others** [2] the South African Constitutional Court held that for a ground to be analogous to those specifically listed in the provision prohibiting discrimination, it must have a similar relationship and impact with those listed.

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1 US Legal, Inc.

2 **1998 (1) SA 300 (CC).**

I opine that in the context of Uganda, as it is with Kenya, for a ground to be analogous to those specifically mentioned, it must be proved that discrimination on the basis of that ground would violate the specific groups' right to human dignity. I opine that the principle underlying the discrimination prohibited by the Constitution is rooted in the universally accepted definition of **Human Rights** as rights inherent to all human beings, rights accruing to a human being by virtue of their being human.

Article 21 of the Uganda Constitution provides as follows:

> **(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.**
>
> **(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.**
>
> **(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.**

My considered opinion is that the philosophy underlying the discrimination prohibited by Article 21 is that such differentiation would violate the dignity of an individual or group to which the differentiation applies. I premise this reasoning on the fact that equality of persons before and in the law is part of the foundation of our constitution an

this right is accorded to each and every individual by virtue of being a human being.

Prohibition of discrimination on the basis of sex, race, colour, tribe, ethnic origin, disability (grounds mentioned in Article 21) is based on the fact that belonging to such a particular group confers neither inferior nor superior status as opposed to persons belonging to a group different from yours. Belonging to a particular group does not make one less of a human being. Yet discrimination based on such grounds would infer inferiority and thus degrade the (human) dignity of persons discriminated against.

Discrimination on the basis of political opinion, creed or religion and such other grounds would also violate other fundamental rights such as the right to freedom of thought, freedom of conscience, freedom of belief, freedom of association etc. - rights which go to the core of a human being.

Can it be said that the different treatment between employees aged 45 and those below 45 years of age, for purposes of entitlement to pension on "early retirement" violate the dignity of individuals in the lower age bracket? Can it be argued that the differentiation goes to the core of who they are as human beings?

It must also be emphasized that it is a trite principle of law that every statutory provision is presumed constitutional.

Consequently a citizen challenging the constitutionality of a statutory provision has the burden to prove its unconstitutionality. Where a petitioner challenges

discrimination on the basis of a ground not specifically mentioned in the provision prohibiting discrimination, the complainant has the burden of proving that the ground in issue has the potential to impair the human dignity of the group 'discriminated' against or affect them seriously in a manner comparable to that of people discriminated against on the basis of grounds specifically mentioned in the law.

In other words, there is no presumption that the ground in issue is analogous to what is specifically prohibited. **(Harksen vs. Lane NO and Others (Supra))**

The question which then follows is: has it been proved that the different treatment between employees aged 45 and those below 45 years of age, for purposes of entitlement to pension on "early retirement" violate the dignity of individuals in the lower age bracket? Can it be said that differentiation on the basis of age within the context of Section 10 of the Pensions Act is analogous to setting different entitlements

between men and women; between individuals of different races, colour, ethnic origin or tribe; between members subscribing to different creed or religion; between individuals belonging to different social or economic standing or between individuals holding different political opinion?

It is only if we answer the above questions in the affirmative that it can be said that age is analogous to the grounds mentioned in Article 21 (2). If it can be shown that age is analogous to the listed grounds, then the differentiation on the basis of age, a ground not mentioned in Article 21, would be illegitimate.

However application of the analogous ground test does not in itself resolve the matter. The next level involves application of the principle that what the law prohibits is not discrimination *per se* but rather unfair discrimination. This is closely linked to the legitimate purpose test.

The legitimate purpose test.

A discriminatory piece of law and/ or differential treatment can be upheld as constitutional if it is narrowly tailored to serve a legitimate purpose and if it satisfies the proportionality test. The proportionality test requires that the aim or reason behind the discrimination must be fairly balanced against the disadvantage the group discriminated against will suffer because of the discrimination. If discrimination is justified, it does not count as unfair and unlawful discrimination.

The question I must therefore answer is: *Does the requirement that a person employed by government must attain a specific age before he can be entitled to pension serve a legitimate purpose*?

I answer this in the affirmative and agree with Katureebe, CJ that the impugned provision enables government to effectively plan and budget for its citizens. The legislation is therefore a proportionate means of achieving a legitimate aim and thus the discrimination is justifiable.

I now return to the analogous ground test. I am unable to come to a finding that the appellant in the instant case demonstrated that the differentiation between persons aged below 45 and those aged 45 years and above, by the

Pensions Act, impaired the human dignity of individuals in the lower age bracket. I am unable to conclude that the differentiation goes against a quality intrinsic to their humanity as a group.

Furthermore, age is not a category which is permanent. All people transition from one age category to another. Consequently, no individual would be permanently disadvantaged by the impugned provision as would be in the instance of discrimination on most of the grounds listed in Article 21 of Uganda's

Constitution.

Differentiation between men and women in the Pensions Act.

I must also comment on the decision of the Constitutional Court in regard to the different treatment between men and women in Section 10 of the Pensions Act - differentiation on the basis of sex.

The relevant part of **Section 10 (1)** of the **Pensions Act** provides that:

> **a gratuity may be granted to a female officer,**
>
> **in accordance with this Act, who resigns on or with a view to marriage or is required to retire on account of her marriage, notwithstanding that she is not otherwise eligible under this section for the grant of any pension, gratuity or other allowance.**

A reading of the above Section clearly shows that men cannot take advantage of the Section to resign before attaining 45 years of age on account of marriage.

The appellant briefly submitted that the above provision is discriminatory on the basis of sex which is prohibited by **Article 21 (2)** of the **Constitution.** The Article provides that:

> **... A person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.**

The essence of the appellant's contention was that whereas positive discrimination in favour of women is allowed by the Constitution, payment of gratuity or pension to women who choose to retire on account of marriage before attaining the age of 45 years while men cannot enjoy similar treatment is not justifiable.

In regard to the above submission, the Constitutional Court held as follows:

> *"... different treatment accorded to female public officers who resign on account of marriage may be in recognition of the unique status and natural maternal functions of women in our society together with the desire to protect the family which is noted in the National*

objectives of State policy 19 to be the natural

and basic unit of society and is entitled to protection by society and the State. ”

I note that in arriving at the conclusion that the impugned provision was justifiable and not unconstitutional, the Constitutional Court based its reasoning on **Article 33 (3) of the Constitution which provides that: “the State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.”**

However, I note that whereas the impugned section discriminates between men and women on the basis of marital status, the constitutional provision is concerned with women’s maternal functions and not with their marital status. There is no doubt that marriage and maternal functions are not synonymous. The absurdity of the relevant part of Section 10 (1) of the Pensions Act would come out more clearly if an unmarried woman with children opts to resign before attaining 45 years of age in order to fulfill her maternal responsibilities. Would she forfeit pension? The provision also leads to the question:

what happens to a man who chooses to resign in order to take care of his children?

The answer to both questions is found in the judgment of the Constitutional Court which held as follows:

“It is correct that women public servants who resign from the Public Service on account of either getting married or simply on account of marriage are eligible to be considered for pension notwithstanding that they have not attained the minimum threshold of 45 years of age or 10 years’ service. This is indeed different treatment to other classes of public servants including the male public servants who may leave for the same reason or other reasons and female public servants who man resign for other reasons ... Different treatment is permitted where the laws are necessary for (a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or (d) providing for any matter acceptable and demonstrably justified in a free and democratic society."

The interpretation of the Section by the Constitutional Court is to the effect that man who resigns on account of marriage would receive no pension, gratuity or allowance. Furthermore, an unmarried woman who resigns for reasons other than marriage would not be favoured by the section. Would it matter that the woman’s resignation is so that she can take care of her children or indeed engage in any other maternal function?

It is a general rule of constitutional interpretation that when considering the constitutionality of any

legislation, its purpose and effect must be taken into account. If the purpose of the enactment was, as stated by the court, to protect women's rights within the context of their unique natural maternal functions in society, then the entitlement would not be based on marital status but rather on women's motherhood.

The Constitutional Court also justified the discrimination in the section on the need to "*protect the family which is* noted in the National objectives of State policy 19 to be the natural and basic unit of society

If we are to consider marriage as a corner stone for the unit of the family, we must support both wives (women) and husbands (men) to make choices which would strengthen the institution of marriage. The Pensions Act was enacted in 1946 when it was perhaps expected that wives and never husbands would have to make changes in their lives on account of marriage. Society has since then evolved. For example recent developments in statutory law have seen male employees being granted paternity leave to take care of their families. **(Section 57 of the Employment Act, 2006).** This I believe is in recognition of men's parental roles in a changed society.

I would therefore declare that in its present form and if strictly interpreted as it was by the Constitutional Court, the impugned part of Section 10 of the Pensions Act would not comply with the State's constitutional obligation to support women in their natural maternal functions. The section would also go against the duty of the State and of Society to protect the family which is imbued in the Constitution's National Objectives of State Policy (19).

Nevertheless, I must point out that in the matter before us, the appellant did not allege that his resignation was on account of marriage but rather that he had got a better paying job. Consequently, even if this Court were to declare the relevant part of Section 10 unconstitutional, it would not entitle the appellant to the remedies sought for.

However, as I have earlier pointed out in this judgment, the discrimination on the basis of age in the impugned section is justifiable.

Arising from the analysis above, I would dismiss the appeal.

Costs

Since the present matter raises issues of public importance, I would order each party to bear its own costs.

Dated at Kampala this 14th day of February 2019

PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT