

**Law Advocacy for Women in Uganda v Attorney General - Constitutional
Petitions Nos. 13 /05 /& 05 /06 [2007] UGCC 1 (5 April 2007)**

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

5 CORAM: HON. MR. JUSTICE S. G. ENGWAU, JA

HON. MR. JUSTICE A. TWINOMUJUNI, JA

HON. LADY JUSTICE C.N.B. KITUMBA, JA

HON. LADY JUSTICE C. K. BYAMUGISHA, JA

HON. MR. JUSTICE S. B. K. KAVUMA, JA

10 CONSTITUTIONAL PETITITONS NOS. 13 /05 /& 05 /06

BETWEEN

15 LAW & ADVOCACY FOR WOMEN IN UGANDA ::::::::::: PETITIONER

AND

ATTORNEY GENERAL OF UGANDA ::::::::::: RESPONDENT

JUDGEMENT OF THE COURT

The petitioner, an association that advocates for women rights in Uganda, filed two separate petitions that were later consolidated.

The petitions were brought under *Article 137 (3)* of the Constitution and *The Constitutional Court (Petitions and References) Rules, 2005 (S.I. No. 91 / 05)* challenging the Constitutionality of some sections of the Penal Code Act and *2n (i)* and *(ii), 14, 15, 23, 26, 29, 43, 44*, of the Succession Act. The petitioner

alleged that the above impugned provisions are contrary to *Articles 20, 21, 24, 26, 31, 33,* and *44* of the Constitution.

The petitions were supported by the affidavits of Sylvia Tamale, the Dean of the Faculty of Law and an Associate Professor Makerere University.

The petitions sought the following declarations and orders namely:

- 1. The section 154 of the Penal Code Act and the relevant provisions of the succession Act enumerated above violate Articles 20, 21,(1), 21 (2), 21 (3), 24, 31 (1), 33(6) and 44(a) of the Constitution of Uganda, 1995 and infringe fundamental human rights enshrined in International Conventions that Uganda is signatory to.**

2. **That the relevant provisions of Succession Act and Penal Code Act that violate the Article of the Constitution be declared null and void.**
3. **No order as to costs in any event.**
4. **Any other or further declaration that this court may deem fit to**

grant.

The respondent filed answers opposing the petitions. In Constitution petition No. 13 /05, the respondent contended that section 154 of the Penal Code Act is not unconstitutional and does not discriminate against anyone on the grounds of

sex or marriage within the context of the Constitution. He averred that the impugned section is acceptable and demonstrably justifiable in a free and democratic society and fosters the sanctity of marriage which is within the public interest limitation as prescribed by *Article 43* of the Constitution.

He further averred that the section does not go against the principles enshrined in the Constitution and striking it out would encourage immorality and promiscuity which are contrary to the public policy and the letter and spirit

of the Constitution, particularly *Article 126(1)* of the Constitution.

In the alternative but without prejudice to the above averments, the respondent contended that if this Court finds that any part of section 154 of the Penal Code

Act is unconstitutional, the Court should recommend amendment of the offending part to bring provisions in line with the Constitution. The answer was supported by the affidavit of Margaret Nabakooza, a Senior State Attorney, in the Directorate of Civil Litigation, Attorney General's Chambers.

In petition No.05 / 06, the respondent denied that the provisions of the Succession Act being challenged by the petitioner are inconsistent with the articles of the Constitution and that they discriminate against anyone on ground of sex or otherwise. It was further averred that the provisions do not subject women to degrading treatment as alleged by the petitioner and they are

acceptable and demonstrably justifiable in a free and democratic society.

He prayed for the dismissal of the petition. The averment was by the affidavit of Benjamin Wamambe, a Senior State Attorney, in the Directorate of Civil Litigation, Attorney General's Chambers.

When the parties appeared before the Registrar of this Court for a scheduling conference under *rule 8 (2)* of *S.I No.91 /05*, they agreed on the following issues:-

1. *Whether section 154 of the Penal Code Act is inconsistent with Articles 20, 21, 24, 31, 33(1) and 44 of the Constitution.*

2. *Whether sections 2(n) (I) (ii), 23, 26, 27, 29, 43, 44 of the Succession Act are inconsistent with Articles 20, 21, 24, 26, 31, 33, and 44 of the Constitution.*

3. *Remedies.*

When the petition came before us for disposal, Ms. Patricia Muteesi, Senior State Attorney, in the Attorney General's Chambers informed us from the bar that although in both petitions they had denied the allegations, after due considerations, the respondent was conceding that the provisions of the law being challenged by and large violate the provisions of the Articles of the

Constitution. She however, wanted to address us on whether the impugned sections should be struck out.

In reply, Mr. Rwakafuzi, learned counsel for the petitioner pointed out that under *article 137* of the Constitution, this Court has powers to pronounce that a given piece of legislation is null and void or to construe it so as to bring it in conformity with the

Constitution. He further stated that the petitioner is asking the Court to make declarations on the issues as framed.

Ms. Muteesi then submitted on the provisions of section 154 (supra). This section states as follows:

"(1) Any man who has sexual intercourse with any woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or a fine not exceeding two hundred thousand shillings; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation of six hundred shillings and on subsequent conviction not exceeding twelve hundred thousand shillings as may be so ordered.

(2) Any married woman who has sexual intercourse with any man not being her husband commits adultery and is liable on first conviction to a caution by the court and on subsequent conviction to imprisonment for a term not exceeding six months."

The learned Senior State Attorney cited to us the decision of this court in the case of

*Uganda Association of Women Lawyers & 5 other V Attorney General -
Constitutional Petition No.2 / 03.*

What learned counsel was asking us to do was not to strike out the offence of adultery from the Penal Code since it was not being challenged.

Mr. Rwakafuzi did not agree. He submitted that the basis of the petition is discrimination.

He cited *article 21* that protects equality and freedom from discrimination. The article provides as follows:

"(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and 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 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.

Learned counsel also cited *article 24* which provides for respect for human dignity and protection from inhuman treatment. The article provides as follows:

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

The other articles are 31(1) that deals with the rights of the family. The article is couched in the following words:

" (1) A man and a woman are entitled to marry only if they are each of age of eighteen years and above and are entitled at that age to
â€“(a) to find a family; and
(b) to equal rights at and in marriage, during marriage and at its dissolution."

The last article that learned counsel cited is *article 33(1)* that protects the rights of women. It states as follows:

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

Mr. Rwakafuzi further submitted that *section 154* of the Penal Code Act treats a married man differently from a married woman in that a married man commits no adultery with an unmarried woman. He pointed out that is an offence for a married woman to have sex with any man whether married or not but the same

law exonerates a married man's conduct who has sex with an unmarried woman. He stated that this set of law treats women derogatorily and with less respect contrary to *article 24*. He claimed that the law perpetuates the inferior status of women.

he invited us to follow the reasoning in the case of *Uganda Women Lawyers*

Association & 5 others v Attorney General - Constitution Petition No. 2 /03.

He also cited to us the case of *Unity Dow v Attorney General of Botswana [1999] 1 L . L . R*

(Constitutional) 623 & [1992] Appeal 574 which judicially discussed the provisions of section 3 of the Constitution of Botswana that afforded equal protection to all persons irrespective of sex.

Ms. Muteesi, in reply stated that *section 154* of the Penal Code Act is discriminatory against women on grounds of sex and it is inconsistent with articles 21(1) and 31(1)(b) of the Constitution. She further stated that the respondent was in agreement with the petitioner that the Court in making the declarations should modify the impugned provisions by providing the same punishment for married men and married women instead of striking it out.

Articles 2 of the Constitution governs the supremacy of the Constitution. It

provides as follows:

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

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

The provisions of this article are clear. Any law or custom that is inconsistent with any of the provisions of the Constitution is void to the extent of the inconsistency.

In the matter now before us, it is the petitioner's contention that the impugned section of the Penal Code Act is inconsistent with the stated articles of the

Constitution because it discriminates between a married man and a married woman on the grounds of sex .

The state has, rightly in our view, conceded that the section is inconsistent with *articles 21* which provides for equality before the law and prohibits discrimination on grounds of sex and *31 (1) (b) which gives equal rights between* married couples at and in marriage and at its dissolution.

The respondent prayed that the law on adultery should not be struck out but instead, it should be modified under *article 274* of the Constitution in order to bring it in line with the provisions of the Constitution.

We accept the submissions of the respondent that under the stated article a court is joined to construe any existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provision of the Constitution.

However, under *article 137 (3)* this court is only required to declare whether or not an Act of Parliament or any other law or anything done under authority of any law or any act or omission by any person or authority is inconsistent with or is in contravention of the provisions of the Constitution. The Court is also enjoined to grant redress where

appropriate. The provisions of the article do not seem to give this Court mandate to modify a law which it has found to be inconsistent or in contravention with the provisions of the Constitution.

Both counsel cited to us the decision of this Court in the case of *Uganda Women Lawyers & 5 others v Attorney General* (supra) as authority for modification.

With respect, this court did not modify the impugned provisions of the Divorce Act. Two issues were framed for court's determination. They were:

1. Whether the impugned provisions of the Divorce Act are in contravention of the Constitution as alleged.
2. Whether the petitioners are entitled to the relief prayed for .

Both issues were answered in the affirmative by all the five justices on the panel. The justices also rejected the only defence that was raised by the respondent. The defence was that a law that had been saved by the then *article 273* of the Constitution cannot be nullified as being in contravention or inconsistent with the Constitution. The respondent had cited the case of *Pyarali Esmail v Adrian Sibbo Constitution Petition No. 9 /97* which was a reference

from the High Court on the provisions of the Expropriated Properties Act (Act 87)

The unanimous decision of the Court was that since the expropriated properties Act was an existing law within the meaning of Article 273 of the 1995 Constitution, the provisions of the impugned sections would be construed,

qualified and adapted to conform ***Article 26 (2) (b) (1) of the 1995 Constitution.***

The Court found that the impugned provisions of the Act were null and void.

In dealing with the provisions of the impugned sections of the Divorce Act

Twinomujuni JA who wrote the lead judgement at page 24 said:-

"It is, in my view, glaring impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are derogation to articles 21, 31, and 33 of the Constitution."

Okello JA on his part at page 17 said:-

"In the instant case, the evidence available reveals that sections 4(1) and (2), 5, 21, 23, 24, and 26 of the Divorce Act discriminate on the basis of sex. This brings them into contact with articles 21 91) (2), 31 (1) and 33 (1) & (6) all of which provide against

discrimination on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sexes, contrary to the articles 21 (1) & (2),

31 (1) & 33 (1)& (6) of the Constitution, they are all null and void."

Mpagi - Bahigeine JA at page 8 said that:-

"In sum, agree that the impugned sections of the Divorce Act clearly violate and are inconsistent with the stated provisions of the 1995 Constitution and are thus null and void".

Engwau JA on his part at page 5 said:-

"After considering the submissions of counsel for both parties, it is my considered view that the impugned sections of the Divorce Act are inconsistent with and contravene Articles 21, 31 and 33 of the Constitution".

Kitumba JA at page 2 said:-

"Regarding the impugned provisions of the Divorce Act, I entirely agree that they are inconsistent with the provisions of the Constitution as alleged in the Petition".

It is clear from the above extracts of the judgements delivered by their Lordships that they declared the provisions of the Divorce Act that the petitioners were challenging *Articles 2 (2)* of the Constitution. This means that the said provisions are of no legal consequence and are no longer valid.

Admittedly, Twinomujuni JA and Okello JA in their respective judgements stated that all the grounds of divorce mentioned in section 4 (1) and (2) are available to both parties to the marriage and the provisions of the Act relating to the naming of a co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage, this was a minority position.

Even if this was a minority position, the respondent did not point out to us areas that his Court can or should modify and adapt to bring them in conformity with the provisions of the Constitution. The section is a penal one and this Court in our considered opinion cannot create a sentence that the courts can impose on adulterous spouses.

Consequently it is our finding that the provision of section 154 of the Penal Code Act is inconsistent with the stated provisions of the Constitution and it is void. We answer the first issue in the affirmative.

On the second issue, Mr. Rwakafuzi submitted that *sections 2 (n) (i) (ii)* of the Succession Act where the words 'legal heir' are defined, a male heir is preferred to a female one. He contended that preference on the basis of sex is discriminatory.

On *section 27* which governs the distribution of property of intestate deceased persons, counsel submitted that where a man dies intestate his property is distributed according to the percentage provided. The provision, counsel submitted, has no provision for female intestate. He contended that the section should apply to properties of both female and male. He also pointed out that the percentage is oblivious to the contribution of the wife to the wealth in the home.

On *section 43* which provides for the appointment of the testamentary guardian, it is only a father who by will can appoint a guardian or guardians for his child during minority. Learned counsel pointed out that there is no provision for a mother to appoint a guardian for her child who is still a minor.

Section 44 that governs the hierarchy of people who can be appointed statutory guardians, counsel pointed out, leaves out female relatives.

Sections 15 and *16* that govern the domicile of a wife during marriage, counsel submitted, are discriminatory in that a husband may not take the domicile of his wife. He contended that there should be domicile of choice.

The last provisions of the Succession Act that Mr. Rwakafuzi submitted on were

sections 26 and *29* and *rules 1, 7, 8, and 9* of schedule 2 to the Act. He pointed occupancy of the matrimonial home and the man is not burdened at all if he choose to re-marry.

Ms. Muteesi made a brief reply. She submitted that the provision of *section 2 (n) (i) (ii)* are inconsistent with *Articles 21 (1), 31 (1) (b)* and she associated herself with the submissions of Mr. Rawkafuzi that should apply equally without any preference.

On *section 27* she stated that it is discriminatory in as far as it does not provide for equal treatment in the division of property of intestate of male and female. She stated that it should apply to both.

On *sections 44* and *43*, she submitted that they are inconsistent with articles *21 (1)* and *31 (1) (b)* of the Constitution.

On *section 14* and *15*, the learned Senior State Attorney submitted that the provisions are contrary to *articles 21 (1)* and *31 (1) (b)* of the Constitution and the provisions should apply to both men and women.

As *section 27* and the rules made there - under, she conceded that in as far as the rules provide different covenants for widows and not widowers, they are inconsistent with *articles 21 (1)* of the Constitution.

She invited us to declare the provisions as applicable equally to widows and widowers and to find them void to the extent of inconsistency.

The concession by the respondent in respect of the impugned provisions of the Succession Act lead to the inevitable finding that the said provisions are inconsistent with the stated provisions of the Constitution and are therefore void. Consequently, we answer the second issue in affirmative.

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The petitioner is entitled to the following declarations:-

1. Section 154 of the Penal Code Act is inconsistent with article 20 (1) (2) (3) 24, 31 (1), 33 (6) of the Constitution and it is null and void.

2. Section 2 (n) (i) and (ii), 14,15, 26, 27, 29, 43, 44 of the Succession Act

and Rules 1, 7, 8, and 9 of the Second Schedule of the same Act are

inconsistent with and contravene Articles 21 (1) (2) (3) 31, 33(6)of the

Constitution and they are null and void.

3. Each party will bare its own costs.

Dated at Kampala this 5th Day of April 2007

S. G. Engwau

Justice of appeal

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1. **Twinomujuni**

Justice of appeal

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C. N. B. Kitumba

Justice of appeal

C. B. Byamugisha

Justice of appeal

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S. B. K. Kavuma

Justice of appeal