Mifumi (U) Ltd & 12 Others v Attorney General, Kenneth Kakuru

Court Division:
None
Case No:
Constitutional Petition No.12 Of 2007
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[2010] UGCC 2
Judgment Date:
26 March 2010

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA, AT KAMPALA

CORAM: HON. JUSTICE DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE C.K. BYAMUGISHA, JA

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

CONSTITUTIONAL PETITION NO. 12 OF 2007

BETWEEN

MIFUMI (U) LTD & 12 OTHERS…….PETITIONERS

AND

1. **THE ATTORNEY GENERAL)**
2. **KENNETH KAKURU) ……RESPONDENTS**

JUDGMENT OF HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO

This petition is brought under Article 2 (1) and (2), 137 (3), 93 (a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References Rules S. 1 91 of 2009. It is filed on behalf of the following thirteen petitioners:

1. ***Mifumi (U) Ltd.***
2. ***Luswata Kawuma Eva***
3. ***Fr. Deo Eriot***
4. ***Musibika Florence***
5. ***Oboth Solomon***
6. ***Jagweri James***
7. **Nyayuki Fulimera**
8. **Obonyo Andrew**
9. **Jagweri James**
10. **Abbo Fulimera**
11. **Awor Jenipher**
12. **Achieng Margaret**
13. **Awor Deborah**

The petitioners have an interest in the matters stated in the petition, which petitioners allege to be in violation of the Constitution of the Republic of Uganda. They also allege these matters to be in violation of the binding International Human Rights laws, conventions and treaties. For these violations, the petitioners seek the intervention of the Constitutional Court.

The first petitioner is a non-governmental Organization and women's rights agency. Its mission is to work with rural people to fight poverty, and to protect women and assist them to enforce their human rights. Other petitioners appear as individuals.

The petitioners challenge the constitutionality of the customary practice of demand for, and payment of bride price. They allege that bride price as a condition precedent to a marriage; and a demand for, and payment of, bride price as a condition precedent to dissolution of marriage should be declared unconstitutional. They are praying Court for the following declarations: -

> **"(a) That the custom and practice of demand and payment of bride price as a condition sine qua non of a valid customary marriage practiced by several tribes in Uganda, including but not limited to the Japadhola (found in Eastern Uganda) is unconstitutional, the Langi found in Northern Uganda, and Banyankole found in Western Uganda is unconstitutional.**

(b)That the custom and practice of refund of bride price as a condition sine qua non of a valid dissolution of a customary marriage practiced by several tribes in Uganda is unconstitutional, including but not limited to the Japadhola (found in Eastern Uganda), the Langi found in Northern Uganda, and Banyankole found in Western Uganda is unconstitutional.

> **(i)The demand for bride price by parents of the bride from prospective sons-in-law as a condition precedent to a valid customary marriage is contrary to Art 31 (3) of the Constitution that provides that marriage shall be entered into with the free consent of the man and a woman intending to marry, because the demand for bride price makes the consent of the persons who intend to marry contingent upon the demands of a third party;**
>
> **(ii) The payment of bride price by men for their wives as demanded by custom from several tribes in Uganda leads men to treat their women as mere possessions from whom maximum obedience is extracted, thus perpetuating conditions of inequality between men and women, prohibited by Art. 21(1), (2) Constitution of Uganda, which provides that all persons are equal before and under the law;**
>
> **(iii) (the demand for refund of bride price as a condition precedent to the dissolution of a customary marriage is contrary to the provisions of Art 31(1) of the Constitution of Uganda in as far as it interferes with the exercise of the free consent of the parties to a marriage.**
>
> **(iv) The demand for bride price by parents of the bride from prospective sons-in-law in as much as it portrays the woman as an article in a market for sale amounts to degrading treatment, prohibited by the Constitution of Uganda in Art 24, which guarantees that every person shall be treated with dignity.**

The petition is supported by many affidavits supplied by the petitioners, including one sworn by Felicity Atuki Turner, the Managing Director of the first Petitioner.

Answer by Respondents

In reply, both respondents opposed the petition. The Attorney General, who is the first respondent, with Mr. Kakuru as the 2nd respondent, denied that the custom and practice of payment of bride price or dowry as a requirement for the recognition of a customary marriage, or the refund thereof as a requirement for the dissolution of a customary marriage is unconstitutional. It was pointed out that the custom of payment of bride price is constitutionally protected by the provisions of Article 37 of the Constitution. The Court was prayed to dismiss the petition.

Issues

At the joint scheduling conferencing, the parties agreed to the following eight issues:

1. Whether the petition discloses issues for constitutional interpretation.

2. Whether payment of "bride price" before marriage and its refund during divorce are customs judicially noticed requiring no further proof.

3. Whether bride price means different things in the cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of the custom.

4. Whether 'okujuga' in Ankole does not mean refund of 'bride price'.

5. Whether 'bride price' is not commonly practiced by all tribes in Uganda.

6. Whether the custom of payment of 'bride price' by the groom's family to the bride's family promotes inequality in marriage contrary to Article 21(1), (2) and (3) of the Constitution.

7. Whether the demand for 'bride price' by parents of the bride as a condition precedent to a marriage fetters the free consent of the man and woman who intend to marry who are the only parties to a marriage contrary to the provisions of Article 31(3) of the Constitution which demands that men and women shall be accorded equal rights in marriage and its dissolution.

8. Whether the demand and payment of 'bride price' as a condition precedent to a customary marriage and the demand of the refund of 'bride price' as a condition to the dissolution of a customary marriage are customs that are practiced in pursuit of a person's culture which rights are guaranteed in Article 37 of the Constitution.

The first petitioner is represented by Mr. Rwakafuzi assisted by Ms. Atuki the Attorney General, the 1st Respondent is represented by Ms. Mutesi. Mr. Kakuru, the 2nd Respondent, appears in person.

The meaning of the terms "bride price" and "dowry"

Before I proceed with the legal arguments advanced by both counsel in their submissions, I consider it necessary to determine the meaning of the terms 'bride price' and 'dowry' if you are to avoid confusion. This is because the two terms are sometimes used interchangeably, which is not correct. The two terms are different. The research carried out from the dictionaries, text books in those countries where the practices exist, the terms bride price and dowry, were described as stated bellow:

Firstly, the terms 'bride price' and 'dowry' refer to payments made at the time of marriage in many cultures, in Asia and Africa. Bride price is typically paid by the groom or the groom's family to the bride's family. Dowry is typically paid by the bride's family to the bride or to the wedded couple. Thus bride price and dowry are not necessarily the converse of each other. However, in the twentieth century, dowry payments in South Asia have increasingly been demanded by and paid to the groom's family (and not just to the bride or the wedded couple). This suggests a usage of the term dowry to mean a groom price, the reverse of a bride price.

Bride price and dowry need not be mutually exclusive. Marriage transfers in both directions can occur simultaneously. A complex set of norms may then govern the nature and the magnitude of payments in either direction.

Secondly, in Wikipedia, the term bride price sometimes known as bride wealth is described as -

"an amount of money or property or wealth paid by the groom or his family to the parents of a woman upon the marriage of their daughter to the groom.

On the other hand, dowry **is paid to the groom, or used by the bride to help establish the new household, and dower, which is property settled on the bride herself by the groom at the time of marriage.) In the anthropological literature, bride price has often been explained in market terms; as payment made in exchange for loss to the family of the bride of the bride's labor and fertility within her kin group. The agreed bride price is generally intended to reflect the perceived value of the girl or young woman.**

The same culture may simultaneously practice both dowry and bride price. Most traditional marriage ceremonies, to be valid, depend on the payment of the bride price.

Issues:

Submissions by counsel for the parties

The petitioners first argue that the demand for a bride price by parents of the bride from prospective sons-in-law as a condition precedent to a valid customary marriage perpetuates conditions of inequality between the husband and wife. Article 31 of the Constitution mandates that **"women shall have the right to equal treatment with men..."** As equals, the petitioners

contend that a bride price, thus contravenes Article 21, which provides for equality and freedom from discrimination **("All persons are equal before and under the law in all spheres of…economic, social and cultural life and in every other respect shall enjoy the equal protection of the law.")**

Petitioners, further, argue that the practice of "bride rice" **"leads men to treat their women as mere possessions from whom maximum obedience is extracted…"** Under such a custom, the wife is not an equal in the realm of marriage vis-à-vis the husband, but rather she is simply a piece of his property.

1. Bride Price thwarts one's Constitutionalright to freely consent to enter into marriage

Petitioners argue that the demand for and payment of bride price and dowry as a condition precedent to a customary marriage violates Article 31(3) of the Constitution, which states that: **"marriage shall be entered into with the free consent of the man and woman intending to marry."** Affidavits supplied by the petitioners illustrate the frequency with which the bride price is used either to force a woman to enter into a marriage against her consent, or to bar a man from entering into a marriage relationship. Additionally, a bride price or dowry may force a couple to cohabit due to not being able to raise funds sufficient to meet the obligation.

2. The cultural practice of bride price offends the Constitutional right to one's human dignity

The Constitution provides that **"laws, cultures, customs or traditions which are against the dignity, welfare, or interest of women or which undermine their status, are prohibited by this Constitution."** Art. 33(6). Additionally, Article 24 provides for **"respect for human dignity and protection from inhuman treatment."**

Accordingly, no person shall be subjected to **"cruel, inhuman or degrading treatment or punishment."** Art. 24. Petitioners state that, both the demand for a bride price and the demand for a refund of the bride price, amount to the buying and selling of a bride as an item for sale in a market. Such **"haggling and pricing of young girls and women like commodities"** is argued to be an affront to human dignity. (See **Affidavit of Fr. Lawrence Ssendegeya, 3.)**

Furthermore, according to the petitioners' affidavits, the use of bride price leads to social ills such as fathers forcing daughters to get married simply to collect a bride price and young women being removed from schools and forced into early marriages. Uneducated women may even fetch a higher bride price, or dowry, due to the assumption that women in a school setting are less likely to be undefiled.

Moreover, petitioners note that bride price can even lead to inhuman and degrading treatment of corpses. In her affidavit, Felicity Atuki Turner notes that she has come across several cases where a wife's corpse has been denied burial pending the refund of the applicable bride price to the husband.

III. Submissions in reply by counsel for the Respondents

On the other hand, Respondents argue that the term **"Bride Price"** means different things in different cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of such a practice. A declaration of bride price as *per se* unconstitutional would neglect the numerous forms of bride price. For example, in Kinyankore customary marriages, frequently the bride price, or **"enjugano,"** takes the form of a gift from the groom to the bride. Moreover, such a gift is reciprocated from the bride to the groom (an **"emihingiro").** It was contended by Mr. Kakuru that since payment of bride price is a customary practice that the Constitutional Court cannot decide the constitutionality of the alleged customary law of **"bride price"** before it is found to be applicable to a specific community.

In the same vein, respondents contend that even where bride price is practiced, it manifests itself in different ways. Respondents do note that the practice of bride price, both the initial demand for a bride price and a demand for refund of bride price as a condition *sine qua non* of a valid dissolution of marriage, occurs among tribes such as the Japadhola, the Langi, and the Banyankole. However, to them **"there is no such thing as 'bride price' in Kinyankole culture or the culture of the Japadhola or the Langi..."** It was argued for 2nd respondent that **"there is no culture in Uganda where a bride is sold or bought or where a married woman is not free and does not enjoy equal rights and protection of the Constitution and the law."**

Additionally, Article 37 gives the right to **"enjoy, practice, maintain and promote any culture, cultural institution…[and] tradition...in community with others."** Respondents argue that the requirement to pay dowry or bride price does not contravene the Constitution because the practice of **"bride price or dowry"** is **"intended to show appreciation to a woman's parents for taking care of the woman."** Moreover, if such a practice does lead to isolated cases of men treating their wives as mere property, such a perversion of the purpose of bride price does not negate the noble aims of the practice, let alone render the custom unconstitutional. As contended by respondent, those men and women that appreciate the positive goals of a bride price agreement should not be denied their constitutional right to enter into such arrangements. Bride price being declared *per se* unconstitutional would thus deny a man and a woman one legitimate way to get married, which wood contravene Article 33(1), which is a violation of the constitutional right to marry and begin a family.

Furthermore, counsel submitted further that the requirement to pay bride price to the parents of the bride and the requirement for its refund at the dissolution of marriage does not contravene Article 31(1), (3). It was pointed out that the law permits and recognizes various types of marriages which are a reasonable alternative to customary marriage. In as far as parties intending to marry are adults who choose the option of undertaking a customary marriage fully knowing that it imposes these customary requirements, and do not undertake any other types of marriage which do not impose these customary requirements, they do in fact consent to the requirement for bride price and the refund thereof. As such, the said customs or practices do not interfere with the exercise of the free consent of the parties to the marriage as alleged.

Consideration of evidence by the Court

Eight issues were agreed upon by the parties at the scheduling conferencing period. However, I note that some of them overlap. I therefore, do not propose to strictly follow the order in which they are set out but to the convenience of the court.

On the first issue, whether the petition discloses an issue for constitutional interpretation, the answer is not hard to find. Article 137(3) is very clear on this issue.

Article 137(1) & (3) (a) & (b) of the Constitution provide:

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(2) …

(3) A person who alleges that –

> **(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **(b) Any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

It was argued for the respondents that the term ***'bride price'*** means different things in different cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of such a practice.

I concede that the practice of bride price being customary, unwritten, diffuse, and varied may be difficult to ascertain. However, that alone cannot stop this Court from interpreting it. So the answer to issue No. 1 is in the affirmative.

Regarding the second issue whether the payment of bride price before marriage and its refund during divorce are customs judicially noticed and hence requiring no further proof in the instant petition, it was vehemently argued for the respondents that the practice of paying bride price being customary had to be proved in relation to a particular community where known or practiced. Besides, to the respondents the custom of bride price means different things in Uganda. I agree that custom must be proved where it is not judicially noticed in accordance with Section 55 of the Evidence Act referred to by Mr. Rwakafuzi.

In the instant petition, it was incumbent upon the petitioners to establish the practice of bride price payment on marriage by, in the first instance, call witnesses or documentary evidence or any other satisfactory evidence to prove the practice. Although the court has got a wide discretion on this matter, the onus is on the party seeking to rely on the custom. Although many affidavits were filed alleging the suffering that might be caused or due to the practice of customary bride price, there was not a single affidavit to prove the custom. In the circumstances, I am unable to hold that the practice is so notorious that it should be judiciary noticed by the court.

For the remaining issues for convenience I intend to consider them together as there is a lot of overlapping.

As already noted, this matter is before this Court to determine the constitutionality of the custom and practice of demand and payment of bride price as requirement of customary marriage and or the refund of dowry as a requirement for its dissolution. As can be seen from the court record, many affidavits were filed in support of the arguments that the custom of bride price is unconstitutional. At the outset, it is important to note that the bride price encompasses two scenarios. First, the parents of a potential bride may require a bride price from their potential son-in-law as a condition precedent to their lawful customary marriage.

Secondly, in the event of a valid dissolution of marriage, the husband may demand refund of the bride price.

I wish to begin by acknowledging the significant rights and protections that the Constitution accords to women (See**Article 31(1), (3) (rights to freely enter into marriage); Article 33 (rights of women to equality with men).** Moreover, the Court is cognizant of the constitutional provisions intended to correct historical imbalances and an unequal playing field as between men and women **(**See**Art. 33(6)).** The Court, further, acknowledges the sentiment expressed by the petitioners that anytime a woman is equated with a sum of money or property, as occurs in any bride price agreement, such an agreement does, on its face, seem to undermine the status of the woman vis-à-vis the man. A potential bride price being discussed in terms of any quantity of money does, at first glance, seem to violate the constitutional prohibition against customs that undermine the status of a woman (See **Art. 33(6)).**

However, I accept the respondent's contention that in many situations, a bride price agreement is intended to show appreciation to the parents of a bride. In numerous instances, a bride price agreement may be entered into with joy by two parties seeking the felicities of a marriage relationship. Moreover, while Petitioners have produced affidavits suggesting that bride price can lead to social ills such as domestic abuse, the Court cannot state that such instances occur as a matter of course, or are definitively linked to a bride price arrangement. In any case, there are varied and numerous causes of spousal abuse, and the Court cannot say with certainty that bride price to be *per se* unconstitutional on such a ground. It is true bride price in some cases plays a factor in domestic abuse and women being treated as inferiors but that is no justification for the court to make a blanket prohibition of the practice of bride price.

In my opinion, therefore, the cultural practice of bride price, the payment of a sum of money or property by the prospective son-in-law to the parents of the prospective bride as a condition precedent to a lawful customary marriage, is not barred by the Constitution. It is not *per se* unconstitutional. The Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to so choose the bride price option as the way they wish to get married. In the premises, I would be declined to grant the petitioners' request for a declaration that bride price be declared *per se* unconstitutional.

The aforesaid notwithstanding, in the narrow instance where one or both of the man and woman wishing to get married is given no other alternative to customary marriage and a bride price agreement, such an arrangement contravenes one's constitutional right to freely and voluntarily enter into a marriage relationship **(Articles 20, 31(3)).** To be clear: **"Marriage shall be entered into with the *free consent* of the man and woman intending to marry." Art. 31(3)** (emphasis added). A man shall not be prevented from marrying the woman of his choice due to not being able to meet a bride price demand, nor shall a man or a woman be compelled to enter into a bride price marriage. A man and a woman's constitutional right to enter into a marriage relationship **(Art. 31(1))** shall not be made contingent upon the demands of a third party, the parents of the bride, for the payment of a bride price or dowry. Any payment of a bride price or dowry must be conditioned upon voluntary consent of the two parties to the marriage.

Additionally, I am in agreement with the view that the customary practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman and is in violation of **Article 33(6)** of the Constitution. Moreover, the demand of a refund violates a woman's entitlement to equal rights with the man in marriage, during marriage, and at its dissolution **(See Art. 31(1)).**

Further, a refund demand fails to honor the wife's unique and valuable contributions to a marriage. A woman's contributions in a marriage cannot be equated to any sum of money or property, and any refund violates a woman's constitutional right to be an equal co-partner to the man. The aforesaid notwithstanding, in my view, the declaration sought; that is, to declare the practice unconstitutional is not essential. The Constitution itself, under Article 50 and others can adequately take care of her grievances. The aggrieved party would be at liberty to institute criminal proceedings or a civil action in a court of competent jurisdiction under the relevant law.

In the result, this petition must fail and it is accordingly dismissed.

Before I take leave of this judgment, I wish to comment further on the difference between 'bride price' and 'dowry'. In certain African societies, the custom of presenting a gift to the bride's family is practiced as a token of gratitude. This gratitude is for the part the bride's family has played in taking care of the potential bride. Under this view, the gift or gifts are, under no circumstances, to be considered payment. The groom's family is not the only one giving gifts; the bride's family may give gifts as well. This practice arises out of the value society attaches to virginity as the fountain of life that is valued as the proper form for any marriageable woman to be in. A woman is endowed with the spring of life, and the gifts in dowry sometimes express gratitude for preservation of this spring of life without using the spring wastefully.

Dated at Kampala this …**26th** …day of …**March**…., 2010.

L.E.M. Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE

DECISION OF THE COURT:

By a majority decision of four to one of the Court, this petition is dismissed with no orders to costs.

Dated at Kampala this…**26th**...day of …**March**……, 2010.

L.E.M. Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE,

President Of Court Of Appeal And Constitutional Court.

JUDGMENT OF A. E.N. MPAGI-BAHIGEINE, J.A.

This petition is brought under Article 2 (1) & (2), 137 (3), 93 (a) & (d) of the Constitution of the Republic of Uganda (1995) and rule 3 of the Constitutional Court (Petitions and References) Rules S.1 91 of 2005.
It is brought by MIFUMI (U) Ltd, a non governmental organization and women's rights agency and other 17 petitioners from various parts of Uganda.

The petitioners allege and seek declarations that the demand for bride price or dowry by the parents of a bride and the payment thereof by the bridegroom or his parents or guardians as a condition precedent for most of the marriages in Uganda and the refund of the said bride-price as a condition precedent for divorce in most communities in Uganda are unconstitutional.
The petition is supported by a number of affidavits deponed by Felicity Atuki Turner, Fr. Deo Eriot, Alice Emasu, Achieng Margaret, Solomon Oboth, Obonyo Andrew, Jagweri James, Awori Jenipher, Fulimera Abbo, Awor Deborah, Florence Musibika, Fulimera Nyayuki, Roselyn Karugonjo-Segawa, Perepetua Nyamwenge, Ms Ngwicarach Erussi, Abbo Florence,

Ms Atimango Jeress, Mr. Sabiti Bernard, Ms Amaniyo Paula, Ms Agnes Joy Auro, Amuge Ann Grace, Nakirya Stella, Fr. Lawrence Ssendegeya, Okuni Joseph, and Achilu Daniel. The petitioners claim to be aggrieved by the aforesaid practices and seek the following declarations and redress:-

(a) **THAT, the custom and practices of demand of and payment of bride-price as *conditio sine qua non* of a valid customary marriage practiced by several tribes in Uganda, including but not limited to the Japadhola (found in Eastern Uganda), the Langi (found in Northern Uganda), and the Banyankole (found in Western Uganda) is unconstitutional**.

(b) **THAT, the custom and practices of refund of the bride-price as conditio *sine qua non* of a valid dissolution for customary marriage practiced by several tribes in Uganda, including but not limited to the Japadhola (found in Eastern Uganda), the Langi (found in Northern Uganda), and the Banyankole (found in Western Uganda) is unconstitutional because:-**

(i) **The demand for bride price by parents of the bride from prospective sons-in-law as a condition precedent to a valid customary marriage is contrary to Article 31 (3) of the Constitution that provides that marriage shall be entered into with the consent of the man and woman intending to marry, because the demand for bride price makes the consent of the persons who intend to marry contingent upon the demand by a third party.**

(ii) **The payment of bride price by men for their wives as demanded by custom from several tribes in Uganda leads men to treat their women as mere possessions from whom maximum obedience is extracted, thus, perpetuating conditions of inequality between men and women, prohibited by Article 21 (1), (2) of the Constitution of Uganda, which provides that all persons are equal before and under the law.**

(iii) **The demand for refund of bride price as a condition precedent to the dissolution of a customary marriage is contrary to the provisions of Article 31 (1) of Constitution of Uganda in as far as it interferes with the exercise of the free consent of the parties to a marriage.**

(iv) **The demand for bride price by the parents of the bride from the prospective son-in-law is as much as it portrays the woman as an article in a market for sale amounts to degrading treatment, prohibited by the Constitution of Uganda in Article 24, which guarantees that every person shall be treated with dignity.**

The petitioners are, hence, praying to this Court to:-

(a) Grant the declarations prayed for in paragraphs (a), (b) above; and

(b) Any other or further declaration that this Honorable Court may grant;

(c) No order is made as to costs.

The petitioners were represented by Mr. Stanislas Rwakafuzi assisted by Ms Jane Akuo.

Ms Patricia Mutesi Principal State Attorney represented the Attorney General while Mr. Kenneth Kakuru, the 2nd respondent appeared in person.

The Attorney General (hereinafter referred to as the first Respondent) in their answer to the petition denied all the allegations in the petition contending that all those customs were

protected by article 37 of the Constitution. That the payment of the bride-price or refund thereof does not interfere with the free consent of the parties to the marriage and thus does not contravene article 31 (1) or (3) of the Constitution.

For the 1st respondent it was further pointed out that there are various types of marriages recognized by the law, without customary requirements from which parties can choose.

Bride-price does not mean that a bride is for sale. It is merely symbolic of the parties appreciation for the upbringing of the girl. The girl is thus not degraded nor is she rendered as a chattel. Articles 24 and 21 (1) or (2) are thus not contravened.

Mr. Kenneth Kakuru, the second respondent similarly denied all the allegations in the petition contending that the petition was premature and alternatively that the petitioners are not entitled to any of the prayers sought in paragraphs (b) (c) and (d) of the petition. The respondents prayed for dismissal of the petition with costs.

The answers to the petition are supported by the affidavits of Margret Nabakooza, Kenneth Kakuru and Dr. Yusuf Mpairwe.
At the scheduling conference the agreed issues were:-

(a) **Whether the petition discloses issues for constitutional interpretation**

(b) **Whether the payment of bride price before marriage and its refund during divorce are customs judicially noticed requiring no further proof.**

(c) **Whether bride price means different things in the different cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of the custom.**

(d) **Whether "*Okujuga*" in Ankole does not mean payment of the bride price and whether "*Okuzimura*" in Ankole does not mean refund of the bride price.**

(e) **Whether bride price is commonly practiced by all tribes in Uganda.**

(f) **Whether the custom of payment of bride price by groom's family to the bride\s family promotes inequality in marriage, contrary to Article 21 (1), (2) & (3) Constitution of Uganda which guarantees equality of person in all spheres including marriage.**

(g) **Whether the demand for bride price by parents of the bride as a condition precedent to a marriage fetters the free consent of the man and woman who are the only parties to marriage contrary to the provisions of Article 32 (3) of the Constitution which provides that marriage shall be entered into with the free consent of the and woman intending to marry.**

(h) **Whether the payment of bride price by a man intending to marry a woman is a condition of inequality in marriages contrary to the provisions of Article 31 (3) of the Constitution which demands that men and women shall be accorded equal rights in marriage and in dissolution.**

(i) **Whether the demand and payment of bride price as a condition precedent to a customary marriage and demand of the refund of bride price as condition to the dissolution of a customary marriage are customs that are practiced in pursuit of a person's culture which right is guaranteed in Article 37 of the Constitution.**

(j) **Whether the demand and payment of bride price as a condition precedent to a**

customary marriage and demand of the refund thereof as condition precedent to a dissolution of a marriage, makes the woman commodity which lowers her dignity contrary to the demands of Article 33 (1) of the Constitution.

(k) **Whether the demand for refund of "bride price" does not take into account the Constitution of the woman in the home contrary to Article (4) of the Constitution which demands that woman shall have equal opportunity with men.**

(l) **Whether the custom of "bride price" causes domestic violence so that the woman is subject to cruel and degrading treatment by the man who treats her as a commodity that must give total submission, contrary to Article 33 (1) of the Constitution.**

(m) **Whether the demand for "bride price" as a condition precedent to the burial of a bride dying before her husband has paid bride price is a custom repugnant to good conscience; or whether a person cannot be a husband when he has not paid bride price.**

(n) **Whether the custom of the demand for the refund of the bride price stifles the consent of the parties to the marriage to dissolve the same contrary to Article 33 (3) of the Constitution which demands that a marriage between a man and woman must be by their consent.**

Regarding issue (a) whether the petition disclosed issues for constitutional interpretation, it was pointed out for the respondents that it did not. It was contended that if the petitioners were aggrieved as they claimed they ought to have proceeded under article 50 for enforcement of their claims under the Constitution.

For the petitioners it was argued that the petition revealed crucially important matters that bride-price as a cultural practice breached articles 2 (2), 21 (1), (2) & (3); 33 (1) and (3). This was in public interest.

It is well settled that in order to invoke the powers of this Court under Article 137, as the petitioners have done **"….. the petition must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough merely to allege that a constitutional provision has been violated"** per Wambuzi C J.**in Constitutional Appeal No. 2 of 1998, Ismael Serugo Vs Kampala City Council & Attorney General.**
The petition alleges that the act of payment of bride-price for prospective brides by their prospective grooms or their parents/guardians infringes Articles 2 (2), 21 (1), (2) & (3), 33 (1) & (3) of the Constitution for the various reasons therein stated.

On the face of it, these allegations warrant constitutional interpretation, for whatever their worth. There is thus, prima-facie, a cause of action disclosed.

I would allow issue (a).
Turning to Issues (b) and (c) namely;

(b) Whether the payment of bride-price before marriage and its refund during divorce are customs judicially noticed requiring no further proof, and

Whether bride-price means different things in different cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of the custom.

(c) Mr. Rwakafuzi contended that bride-price as a custom applies to all Uganda and has been judicially recognized. He cited S. 55 of the Evidence Act to the effect that a matter which is judicially noticed need not be proved. He maintained that it is practiced by all cultures in Uganda and that it has been judicially noticed in various parts of Uganda and therefore it is not necessary to prove it.

The respondents, however, argued that bride price has not attained judicial recognition because judicial notice is a process which requires evidence of matters being so notorious that it is judicially recognized. A custom has to be proved as being so notorious that it has to be judicially recognized but it is not for counsel so to state. Mr. Kakuru submitted that customary law has to be proved and must first pass the repugnant test under 15 of the Judicature Act. The petitioners should have gone to the High Court to challenge the custom in a civil suit, first. It is trite that a party who alleges a custom has to prove it. The rule is to be strictly adhered to even in cases where the custom as alleged is neither unique nor unknown especially when he alleges that it is at variance with the superior law of the land.

I would therefore disagree with Mr. Rwakafuzi that the custom of bride-price needs no proof. Customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs become so notorious that the courts take judicial notice of them, without the necessity of proof in each individual case. It becomes, in the end, as Mr. Kakuru very aptly put it, truly a matter of process and pleading. – See the Evidence Act (Cap 6) Section 46.

Judges must reach the decision to accept a custom on legal evidence. They cannot import knowledge from other sources like was trying to persuade the court to do. – Also see **Sarkar on Evidence. 12th Edition, page 577**.

It is only by recognition of the custom by way of court decisions that entitles it to judicial notice and not otherwise. I would thus agree with the respondents that the custom of paying / giving bride-price has to be proved first since they keep on changing with the times.
As to whether there can be uniformity of the custom of bride-price, it is a fact that Uganda's diverse tribal make up has each tribe subscribing to its own culture that has been passed on from generation to another. This means therefore that there are quite a number of cultural practices concerning marriage in Uganda. While a given practice might mean so much to a certain society it may be a violation of human rights to another. Thus, while it would be considered a denigration, an insult to the dignity and worth of a Muganda bride to leave her parents' home for marriage without 'a mutwalo' (bride-price) having been paid / given to her parents, a bride from another region might **herald** it as the epitome of civilization and liberation, an achievement for her in that she has not been haggled over and sold into marriage like any chattel in a market place. It is vital to note that 'mutwalo' 'price' is merely symbolic. It could be in the form of rare and intrinsically valuable items like 'a nsaamu', which is an engraved wooden hammer for making 'back-cloth', a very old hoe 'a kasimo' or

even a very old coin or such other symbolic items. Furthermore, there is no such concept as refund of 'mutwalo' "bride-price" in Buganda as it is in the Eastern region.

I think it should further be born in mind that cultural rights or customs being directly related to an individual's identity are very crucial to the enjoyment of all other rights. Their promotion and protection is a vital prerequisite for the completeness and fulfillment of a human being. The National Objectives and Directive Principles of State Policy XXIV positively protect these cultural practices. Article 37 encapsulates it: **"37…. Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, tradition, ….in community with others".**

The respondents denied the existence of such a thing as price contending that no bride is offered for sale and no purchaser buys any bride – See paragraph 4 (a) of Dr. Mpayirwe's affidavit. I agree with him that the term "bride-price" is a misnomer coined by colonialists who did not appreciate the meaning and significance of certain cultural rites and ceremonies which include the exchange of intrinsically unique gifts which are merely symbolic as a sine quo non of a marriage. These are a form of appreciation to the bride's parents / guardians for her nurturing and upbringing.

This valued customary practice should be clearly distinguished from what is obtaining these days when prospective grooms out of sheer egotism are obliged to take lorryfuls of goods to their future in-laws. This is an adulteration of the time-honoured 'kwanjula' – payment of the bride-price which is intended to be a very private ceremony at least in Buganda. Some also tend to confuse this with the Kinyankore custom of 'okuhingira' where a bride is sent off properly facilitated to start a home as stated by Mr. Kakuru.

Ms Mutesi summed it all up by pointing out that there are various forms of marriage in Uganda legally recognized which do not involve customary rites / practices, from which the petitioners could choose, before seeking to abolish other people's cultures.

I observe that all the deponents of the affidavits in support of the petition concentrated on incidences of domestic violence allegedly consequent upon failure to effect refunds of bride-price. I found this evidence lacking in data. Domestic violence is a worldwide plight to women/men which has received United Nations' attention - The Declaration on the Elimination of Violence Against Women – (General Assembly Resolution 48/104 of 1993) specifically enjoins member states to pursue policies to eliminate violence against women. The Domestic Violence Bill is still in the offing, hopefully the Act will soon emerge to take care of the situation. Curiously, violence is more prevalent in countries where the term 'bride-price' is unheard of, with the exception of India, but even in the case of India it is the payment of insufficient dowry by the bride which is the cause of domestic violence and suicide. It is not due to "bride-price".

I thus conclude by saying that in face of the divergent cultural beliefs and practices with different people valuing their own, courts should not be quick to extract them by slapping a blanket declaration banning them on ground of unsoundness. This would rob the various

ethnic groups of the cherished feeling of their identity, dignity and self-worth. These customs are value systems which only a particular tribe best knows. I think, therefore, that they ought to be allowed to keep what they treasure.

This is not to say, however, that courts should not eliminate those customs that are **proved** to be obnoxious, offensive and unconstitutional.

The petitioners could in the mean time avail themselves of redress under the Penal Code Act or any other relevant law.
I must say not the slightest attempt was made to prove any of the allegations made.
I think this sufficiently takes care of what I have to say about this petition which I dismiss forthwith.

Orders as to costs were not sought and I would make none.

Hon. Justice A. E. N. Mpagi-Bahigeine

JUSTICE OF COURT OF APPEAL

JUDGMENT OF BYAMUGISHA, JA.

The petitioners filed the instant petition challenging the constitutionality of the practice and custom of demanding and payment of bride price as a condition sine qua non of a valid customary marriage. They are also challenging the constitutionality of the practice and custom of the refund of bride price as a condition for the dissolution of a customary marriage. They allege that the said acts contravene Article 31(3) of the Constitution which provides that marriage shall be entered into with the free consent of the man and woman intending to marry and the demand of bride price makes the consent of the persons who intend to marry contingent upon the demands of a third party.

The petitioners further claimed that the payment of bride price by men for their wives as demanded by custom of several tribes in Uganda leads men to treat their wives as mere possessions or chattels from whom maximum obedience is extracted and this creates conditions of inequality in the home between men and women which is prohibited by Article 21(1) (2) of the Constitution.

The petitioners further averred that the demand for refund of bride price as a condition precedent for the dissolution of a customary marriage contravenes article 31 of the Constitution which provides for free consent of the parties to a marriage.

It was further averred that the demand for bride price by parents of the prospective bride from prospective sons –in-law in as much as it portrays the woman as an article in a market for sale amounts to degrading treatment contravenes article 24 of the Constitution which guarantees that every person shall be treated with dignity.

The petitioners sought the following declarations:

1. That the custom and practice of demand and payment of bride price as a condition sine qua non of a valid customary marriage as practiced by several tribes in Uganda is unconstitutional.
2. The custom and practice for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is unconstitutional
3. Any other or further declaration that the court may grant.
4. No order as to costs.

The petition was supported by several affidavits deponed by Roselyn Karugonjo Segawa, Pereptua Nyamwenge Ngwicarach Erusi, Abbo Florence, Atimango Jeress, Sabiti Bernard, Grace Aware, Fr Lawrence Sendegeya, Achieng Margaret and Felicity Atuki Turner among others.

The respondents filed separate answers opposing to the petition. The first respondent averred that the custom and practice of payment of bride price as a requirement for the recognition of a customary marriage or the refund of the same at the dissolution of a customary marriage is constitutional and does not contravene Article 32(1) (3) of the Constitution. He further averred that the custom of payment and refund of bride price are constitutionally protected by the provisions of Article 37 of the Constitution. He contended that the law permits and recognizes various types of marriage which are a reasonable alternative to customary marriage and in as far as parties intending to marry are adults who choose the option of a customary marriage fully knowing that it imposes these customary requirements. Such parties are taken to have consented to the requirements of payment of bride price.

This answer was supported by an affidavit of Margaret Nabakooza, a Senior State Attorney in the Attorney General's Chambers.

The second respondent in his answer stated that he is a Munyankore by tribe and has an interest in the subject matter of the petition in as far it relates to the traditions, customs and cultural norms of the Banyankole. He averred that there is no customary law that is generally applicable in Uganda as a whole. He further averred that bride price is a very broad term that covers different traditions and cultures and as such cannot be described or regulated or understood to cover every person, community or ethnic groups in Uganda in the same way. He asserted that the word bride price is derogatory and racist, having been coined by white slave traders, adventurers and missionaries who had no knowledge of African culture, norms and traditions.

He denied that customary marriage is concluded by the sell of the bride and as such customary marriage does not contravene Article 21(1) (2) of the Constitution. He further asserted that customary marriage among the Langi, Japadhola and the Banyankore is entered into freely and with the full consent of the parties and as such it does not contravene Article 31(1) of the Constitution.

The answer of the second respondent was supported by two affidavits deponed by himself and Dr Mpairwe.

The following issues were framed for our determination:

1. Whether the petition discloses issues for constitutional interpretation.
2. Whether payment of "bride price" before marriage and its refund during divorce are customs judicially noticed requiring no further proof.
3. Whether bride price means different things in the cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of the custom.
4. Whether 'okujuga' in Ankole does not mean payment of 'bride price' and whether 'okuzimura' in Ankole does not mean refund of 'bride price'.
5. Whether 'bride price' is not commonly practiced by all tribes in Uganda.
6. Whether the custom of payment of 'bride price' by the groom's family to the bride's family promotes inequality in marriage contrary to Article 21(1), (2) and (3) of the Constitution.
7. Whether the demand for 'bride price' by parents of the bride as a condition precedent to a marriage fetters the free consent of the man and woman who intend to marry who are the only parties to a marriage contrary to the provisions of Article 31(3) of the Constitution which demands that men and women shall be accorded equal rights in marriage and its dissolution.
8. Whether the demand and payment of 'bride price' as a condition precedent to a customary marriage and the demand of the refund of 'bride price' as a condition to the dissolution of a customary marriage are customs that are practiced in pursuit of a person's culture which rights are guaranteed in Article 37 of the Constitution.

Mr Rwakafuzi and Ms Atuki-Tana represented the petitioners while Ms Patricia Muteesi represented the first respondent. The second respondent, Mr Kenneth Kakuru represented himself.

In his submissions Mr Rwakafuzi stated that it is not necessary to have a common definition of 'bride price' for the whole country but what is important is to have a common understanding. He stated that 'bride price' applies to the whole Country and the results of the petition will affect the whole country. He cited section 55 of the Evidence Act which provides that a matter which has been judicially noticed need not be proved.

Learned counsel went on to state article 21(1) (2) (3) guarantee equality of persons in all spheres including marriage. He claimed that the culture of 'bride price' breaches this concept because the bride is supposed to be paid for by the groom. He further claimed that customary marriage begins with superiority of man over a woman. He went on to state that payment of 'bride price'

fetters equality in marriage and it affects the free consent of man and woman who are supposed to be together.

He submitted that although Article 37 allows a person to enjoy his culture, the enjoyment should not breach the law or the Constitution. He invited court to declare the practice unconstitutional.

On her part Ms Atuki submitted that the practice contributes to violence against women and it has far reaching social, economic consequences for women. She referred to the affidavit of Awor Debra and her experience with her husband to buttress her argument. As for the refund of bride price on the dissolution of customary marriage, she submitted that the refund acts as a threat against women. She further submitted that the custom is repugnant and incompatible with the Constitution and the United Nations Convention of violence against women which Uganda is a signatory to.

In reply, Ms Muteesi submitted that the Constitution is written for all the people of Uganda and was meant to accommodate different cultures, beliefs and aspirations. She pointed out that the petition is seeking to remove a constitutional right which is protected by Article 37 of the Constitution. She further pointed out that the petition is not seeking to declare a certain law or act to be infringing a right but that a certain right is infringing on other rights. She claimed that the custom of payment of 'bride price' and the refund are constitutionally protected by Article 37. She went on to submit that the Uganda laws permit and recognize various types of marriages which are a reasonable alternative to customary marriages. It was her contention that in as far as the parties intending to marry choose the option of a customary marriage knowing very well that it imposes certain requirements; they consent to abide by those requirements. It was her submissions that there is nobody in Uganda who is bound to marry under any system or one who is forced to do so. Furthermore learned Senior State Attorney submitted, all marriages have legal requirements and they all cost money. She claimed that Government has put in place laws to cover aspirations of all the people of Uganda.

She prayed for the dismissal of the petition.

The second respondent in his submissions stated that the petition does not disclose any matter for interpretation. He stated that if the petitioners are aggrieved, they should have gone to the High Court under Article 50 of the Constitution. He stated that customary law is not written and its existence, its scope and all the ingredients of a particular custom has to be proved and before it can be proved, it must pass the repugnant test under section 15 of the Judicature Act. He argued that evidence is required to show that the matter is so notorious to get judicial notice.

He further submitted that there is no such thing as 'bride price' and there is purchase or sale. He further stated that a daughter being given in marriage is not a sale. Among Banyankore counsel stated, there is no such thing as 'bride price'. It is called 'okujuga' which has no English equivalent. He referred to the affidavit of Dr Mpairwe in which the deponent stated that bride price is a very small percentage of marriage expenses.

On the refund of bride price at the dissolution of customary marriage, the second respondent submitted that it is an essential element of customary marriage to avoid unjust enrichment to the bride's family.

On the claim by the petitioners that payment of bride price leads to violence against women, he stated that there is no correlation between violence and bride price.

He, too prayed for the dismissal of the petition.

The mandate of the Constitutional Court as set out under Article 137 of the Constitution and decided cases is to interpret the Constitution make a declaration to that effect and to grant redress where appropriate. In order for the petitioners to succeed they have to prove that the payment and refund of bride price as practiced by different tribes in Uganda is an act or omission which is inconsistent with the articles of the Constitution which they cited. The test to be applied is an objective one. The following were the articles which they allege are violated:

Article 21 protects equality and freedom from discrimination. It reads:

"(1) All persons are equal before and under the law in all spheres of political, economical, social and cultural life and in every other aspect 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 ground of sex, race, colour ethnic origin, tribe, birth, creed or religion or 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 or social or economic standing, political opinion or disability.

(4)……..

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

Article 31(3) reads:

"Marriage shall be entered into with the free consent of the man and woman intending to marry"

Article 33 reads:

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

(2)……

(3)……..

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

(5)……..

(6) Laws, cultures, customs and traditions which are against the dignity, welfare, or interest of women or which undermine their status, are prohibited by this Constitution."

Chapter 4 of the Constitution deals with protection and promotion of fundamental rights and freedoms. One of the rights and freedoms which are protected under this chapter in Article 37 is a right to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language creed or religion in community with others. This means as I understand it that the enjoyment and promotion of culture is done in community with others. The enjoyment is community based. The rules and regulations governing cultural practices are unwritten. Each community uses its own rules. The rules in question have intrinsic value and significance for the community concerned. That being the case it is quite difficult to determine the extent that these cultural rules regarding the practice of paying 'bride price' violate the rights under the articles cited by the petitioners. Article 33(6) which prohibited laws, cultures or traditions which are against the dignity, welfare or interest of women did not spell out which laws and cultural practices are. The Constitution did not mandate Parliament to make a law to operationalise the provisions of the article. The affidavits which were deponed on behalf of the petitioners were largely from one area of Tororo where the first petitioner has been carrying on some work for women as Non Government Organization. Some stated the communities they belong to and some did not. They also did not state that men and women who intend to marry are forced to contract customary marriage. Customary marriage is one of the types of marriages recognized in this Country.

The complaint raised by the petititioners that cultural practice of the bride's parents demanding payment of bride price from prospective son in-law interferes with the right to free consent of the parties who intend to marry. I do not agree. When parties choose the type of marriage they want to contract they cannot be said not to have freely consented to marry. Every type of marriage in Uganda has its legal or cultural requirements. If a person chooses to contract a customary marriage is bound to observe the customs and rites of the given community into which he or she intends to marry.

There were other allegations that parents have been getting their daughters out of School to marry them off and correct bride price. A case in point is the affidavit of Awor Deborah. In her affidavit she stated that her daughter who was about to sit her Primary Leaving Examination disappeared from home without her knowledge. Later her husband told her that he searched for her and found her in a certain place where they gave him Ug Shs 95,000/= with three cows and three goats. The husband later told her that the girl was married. The matter was reported to the authorities and efforts to prosecute him were futile. I consider this case to one of those in which parents neglect their parental duties and machinery to enforce the law is weak. Article 34 of the Constitution spells out the right of children and the responsibility of parents especially in the provision of education. The state machinery should have swung in action to have the culprit

brought to book. But I do not think that such acts are caused by the customary practice of paying 'bride price'. They are caused by greed.

The petitioners made allegations that the payment of bride price is the cause of domestic violence against women. Acts of violence are criminal in nature and there are penalties under the Penal Code Act for the perpetrators. However, there is no scientific or empirical evidence that was adduced by the petitioners to prove the connection between payment of 'bride price' and domestic violence against women. Moreover violence against women and men who are in relationships is a worldwide phenomena and the movement to fight domestic violence started in countries where the word 'bride price' is not in their vocabulary.

Any attempt to abolish a cultural practice in a given community must take into account the role which is played by women themselves in the formation of the cultural practice in question. In the case of payment of 'bride price' I have doubts whether the majority of women dislike the practice as the petitioners tried to portray. Customary marriage and the practices which go with it are protected by the Constitution and it would be unjust to slap a constitutional declaration banning the marriage and its practices across the board without the communities concerned being afforded an opportunity of being heard. The contents of the affidavits of Mr. Kakuru and Dr. Mpairwe which were deponed in defence of the Banyankore culture were not rebutted.

I would accordingly dismiss the petition with no order as to costs.

Dated at Kampala this…**26th** ….day of…**March**….2010

C.K.Byamugisha

Justice of the Constitutional Court

JUDGMENT OF S.B.K.KAVUMA, JA

Introduction.

I have had the advantage of reading, in draft, the judgments prepared by my Lords, L.E.M.Mukasa Kikonyogo DCJ, A.E.N. Mpagi-Bahigeine, A. Twinomujuni and C.K.Byamugisha JJA.

The background to this petition together with the contents of the same and the supporting affidavits, the reply to it by the respondents and their respective affidavits in reply, the submissions of counsel for the 1st respondent and those of the second respondent who appeared personally, are very well and ably set out in those judgments. I need not fully repeat them here and where I partially do, it is for purposes of emphasis and ease of reference.

Declarations sought.

The petitioners seek the following declarations:-

> **(a) That custom and practice of demand and payment of bride price as a condition *sine qua non* of a valid customary marriage as practiced by several tribes in Uganda is unconstitutional;**
>
> **(b) The custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is unconstitutional;**
>
> **(c) Any other or further declaration that this Honorable Court may grant.**
>
> **(d) No order is made to costs.**

The respondents contend that the respondents are not entitled to those declarations.

The issues.

In their joint Conferencing Notes filed into court on 20th July 2009, the petitioners and the 1st respondent set out the following agreed issues:-

> **(a) Whether the petition discloses issues for constitutional interpretation;**
>
> **(b) Whether payment of "bride price" before marriage and its refund during divorce are customs judicially noticed requiring no further proof;**
>
> **(c) Whether "bride price" means different things in the different cultures of Uganda such that the Constitutional Court cannot make a uniform interpretation of the custom;**
>
> **(d) Whether "okujuga" in Ankole does not mean payment of "bride price" and whether "okuzimura" in Ankole does not mean refund of "bride price";**
>
> **(e) Whether "bride price" is not commonly practiced by all tribes in Uganda;**
>
> **(f) Whether the custom of payment of "bride price" by the groom's family to the bride's family promotes inequality in marriage, contrary to Art 21(1), (2) & (3) Constitution of Uganda which guarantees equality of person in all spheres including marriage;**
>
> **(g) Whether the demand for "bride price" by parents of the bride as a condition precedent to a marriage fetters the free consent of the man and woman**

who are the only parties to a marriage contrary to the provisions of Art 31(3) of the Constitution which provides that marriage shall be entered into with the free consent of the man and woman intending to marry;

(h) Whether the payment of "bride price" by a man intending to marry a woman is a condition of inequality in marriage contrary to the provision of Art 31(3) of the Constitution which demands that men and women shall be accorded equal rights in marriage and its dissolution;

(i) Whether the demand and payment of "bride price" as a condition precedent to a customary marriage and the demand of the refund of "bride price" as a condition to the dissolution of a customary marriage are customs that are practiced in pursuit of a person's culture which right is guaranteed in Art 37 of the Constitution;

(j) Whether the demand for "bride price" as a condition precedent to a customary marriage and the refund thereof as a condition precedent to a dissolution of a marriage, makes the woman a commodity which lowers her dignity contrary to the demands of Art 33(1) of the Constitution;

(k) Whether the demand for refund of "bride price" does not take into account the contribution of the woman in the home contrary to Art 33(4) of the Constitution which demands that women shall have equal opportunities with men;

(l) Whether the custom of "bride price" causes domestic violence so that the woman is subjected to cruel and degrading treatment by the man who treats her as a commodity that must give total submission, contrary to Art 33(1) of the Constitution;

(m) Whether the demand for "bride price" as a condition precedent to the burial of a bride dying before her husband has paid bride price is a custom repugnant to good conscience; or whether a person cannot be a husband when he has not paid 'bride price';

(n) Whether the custom of the demand for the refund of the "bride price" stifles the consent of the parties to the marriage to dissolve the same contrary to Art 33(3) of the Constitution which demands that a marriage between a man and woman must be by their consent.

Principles of constitutional interpretation.

Before I consider the issues above, I will here below state the principles of constitutional interpretation that will guide me in doing so.

The majority of these principles were ably summarized in the judgment of Manyindo DCJ, (as he then was),in**Major General David Tinyefuza Vs Attorney General, Constitutional Petition No.1 of 1996** as follows;

> "……I think it is now well established that the principles which govern the construction of statutes also apply to the construction of constitutional provisions. And so the widest construction possible in its contexts should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancilliary and subsidiary matters. See Republic - vs – El- Menu [1969] EA 357 and Uganda – vs Kabaka's Government [1965] EA 393. As was rightly pointed out by Mwenda, CJ. (as he then was) in El-Manu (Supra), in certain contexts a liberal interpretation of Constitutional provisions may be called for. Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the court should be dynamic progressive and liberal or flexible, keeping in view ideals of the people, social-economic and political-cultural values so as to extend the benefit of the same to the maximum possible.
>
> In other words, the role of the court should be to expand the scope of such a provision and not to extenuate it. Therefore the fundamental human rights ought to be construed broadly and liberally in favuor of those on whom the rights have been confirmed by the Constitution. "Emphasis mine)"

In the case of Attorney Vs Momodou Jube (1984) AC 689 which was an appeal to the Privy council from the court of Appeal of Gambia Lord Diplock said at page 700:-

" A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given generous and purposeful construction."

"The interpretation should be generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for the individuals the full benefit of the charters protection"see R – Vs – Big M Drug Mart Ltd. [1985 DLR 4^{th} 321, 395 – 6^{th}(Supreme Court of Canada per Dickson, J.

In Unity Dow – vs – Attorney General of Botswana (1992) LRAC 623 it was stated that a generous construction means :-

> "…….that you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous provisions such interpretation is compelling."

In interpreting our Constitution this court must not lose sight of our chequered history on human rights. The framers of the Constitution had this in mind when they stated in the preamble:-

> "Recalling our history which has been characterized by political and constitutional instability;
>
> Recognizing our struggle against the forces of tyranny, oppression and exploitation;
>
> Do hereby, in and through this constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda……."

In De Clerk & Snot – vs – Du Plassis & Another [1990] 6 BLR 124 at p.128 the Supreme Court of South Africa no doubt bearing in mind their own past chequered history of human rights abuses stated:-

> "When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in human rights field. The state by legislative and administrative means curtailed…….the human rights of most of its citizens in many fields while the courts looked powerless. Parliament and Executive reigned Supreme. It is this malpractice which the bill of rights seeks to combat. It does so by laying down ground rules for state action which may interfere with the lives of its citizens. There is now a threshold which the state may not cross. The Courts guard the door." [emphasis mine]

This case was cited with approval in Major General Tinyefuza – Vs Attorney General Constitutional Appeal No. 1 of 1997 (Supreme Court) per order, JSC.

…… the powers of this court in statutory interpretation are not limitless or absolute. The limits were expounded by Wallen, CJ. in the Supreme Court of the United States in Troop – Vs Dulles 35 6 US 86 2L Ed. 785 at 590 (1956):-

> "In concluding as we do that the eighth Amendment forbids congress to punish by taking away citizenship. We are mindful of the gravity of the issue inevitably raised whenever the Constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of Constitutionality. The issue confronts us, and the task of resolving it is inescapably ours. The task requires the exercise of judgment, not the reliance on personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the constitution forbids.
>
> We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The

> Judiciary has the duty of implementing the Constitutional safeguards that protect individual rights. When the government acts to take away the fundamental rights of citizenship, the safeguards of the Constitution should be examined with special diligence.
>
> The provisions of the constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorize and limit government powers in our nation. They are rules of government. When the constitutionality of an Act of congress is challenged in this court, we must apply these rules. If we do not the words of the constitution become little more than good advice.
>
> When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate the challenged legislation. We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of Constitutional Adjudication."

These remarks were cited with approval by this court in Major General David Tinyefuza (Supra) and this court concluded thus:-

> "we would respectfully agree that it is the duty of this court to enforce the paramount demands of the Constitution. The current thrust of highly persuasive opinions from courts in the Commonwealth is to apply a generous and purposive construction of the constitution that gives effect to and recognition of fundamental human rights and freedoms. We believe that this is in harmony with the threefold injunctions contained in **Article 20(2)** commanding the respect of; upholding and promoting human rights and freedoms of the individual and groups enshrined in chapter 4 by all organs and agencies of government and by all persons. To hold otherwise, may be to suggest that Articles 20(2) is idle and vain." (Sic)

The Constitutional interpretation principle of harmonization adopted by this court in **Tinyefunza's case (supra**) is a well known Constitutional construction principle. It is also very relevant to this petition. Manyindo, D.C.J (as he then was), observed of that principle as follows:-

> "…….the entire Constitution has to be read as an integrated whole and no one 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 paramouncey of the Constitution."

On appeal **(Attorney General Vs Tinyefunza supra)** oder J.S.C. expressed the same view in this way: in other words

"Another important principle governing interpretation of the Constitution is that all provisions of the Constitution concerning an issue should be considered all together. The Constitution must be looked at as a whole." (Sic)

Article 126 of the Constitution provides –

"126. Exercise of judicial power.

(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles –

(a) …….

(b) …….

(c) ……

(d) ……

(e) substantive justice shall be administered without undue regard to technicalities."

The National Objective and Directive Principles of State Policy No.1 (i) provides –

"The following objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."

Issue (a).

The gist of **issue (a)** is whether the petition raises any matter for constitutional interpretation. This issue arevolves around the jurisdiction of this Court in matters of constitutional interpretation. The relevant Article of the Constitution is **Article 137** which provides:-

"137 Questions as to the interpretation of the Constitution.

(1) Any question as to the interpretation of this constitution shall be determined by the Court of Appeal sitting as the constitutional court.

2)……

(3) A person who alleges that-

(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may-

(a) grant an order of redress; or

(b) refer the matter to the High Court to investigate and determine the appropriate redress.

(5) ……..

(a) ……..

(b) ……..

(6) ……

(7) ……..

Under this Article, once a party alleges that an Act of Parliament or any law or any act done or omission by any person or authority under any law is inconsistent with or in contravention of any provision of the Constitution and seeks declarations and redress, then this court is duty bound to exercise its jurisdiction to interpret the Constitution.

In the instant petition, the petitioners have alleged:

First that that part of the customary law governing customary marriages under which bride price is demanded as a condition *sine qua non* for validating a customary marriage and where, on dissolution of such a customary marriage, the dissolution is to be validated by a refund of the

bride price, again as a condition *sine qua non*, is inconsistent with and in contravention **Articles 21(1), (2), (3), 31(1), 24, 33(1) & (3)** of the Constitution..

Secondly, the petitioners, as I understand them, have also alleged that some specific acts and omissions done or omitted to be done during the observance of the custom of giving and demanding a refund of bride price as a condition precedent to the validation of customary marriages and their dissolution are inconsistent with and in contravention of **Articles 21(1), (2), (3), 31(1), 24, 33(1) & (3)** of the Constitution.

The petitioners also seek this court's declarations and redress as indicated above. The petition, therefore, in my view, satisfies the criteria set out by the Supreme Court of Uganda in **Ismail Serugo Vs Kampala City Council and another, Constitutional Petition No.2 of 1998.** See also**Attorney General Vs Major General David Tinyefuza, Constitutional Appeal No.1 of 1997,** and **R/O 133 Major General James Kazini Vs The Attorney General, Constitutional Petition No.8 of 2009.**

I therefore, find in the affirmative on **issue (a)**.

Issue (b).

The gist in **issue (b)** is whether the payment of "bride price" before validation of a customary marriage and the demand for a refund of the same to validate a dissolution of the marriage is a custom that can be taken judicial notice of without the requirement of further proof.

The Parties' submissions on issue (b).

In their evidence and the submissions of their counsel, the petitioners contend that the demand, payment and refund of bride price in the circumstances described in the petition are matters of customary law that should be taken judicial notice of without requiring any further proof.

The respondents do not agree. They contend that bride price as custom in the contraction and dissolution of customary marriages as practiced in Uganda must be strictly proved in accordance with the rules of proof of customary law. They also argue that no all encompassing definition of bride price exists throughout the whole of Uganda. In the second respondent's view, some local words and terms relating to bride price payment and refund as a feature of customary marriages have no English equivalents. He singles out the word '***Okujuga'***, in Kinyankole culture. He contends that the words 'bride price' were coined by Europeans who were not knowledgeable in matters of African customary law and practice.

Observations and background to the resolution of the remaining issues.

Before I go into the actual resolution of the remaining issues, I consider it appropriate to make some observations and give a general background to my resolution of those issues.

The Observations.

I accept the concern expressed by the second respondent that the words ***'bride price'*** were coined by Europeans with a deficiency of knowledge and appreciation of African culture and Customary Law. To such people the exchange of bride wealth from the side of the bridegroom to that of the bride in a customary marriage arrangement was nothing but a payment of a ***'price'*** by the bridegroom to the parents of the bride in a ***'transaction'*** in which the bride is ***commoditified*** or portrayed as an ***'article'*** for sale to the bridegroom in payment of the ***"purchase price"***, they termed ***'bride price'.*** This, as I will show later in this judgment was an error. It resulted from a serious misconception of African Customary Law and practices in the area of customary marriages. Suffice it to say for now that I prefer the use of the words ***'bride wealth'*** to ***'bride price'*** and I will use bride wealth whenever I find it appropriate to do so.

I also prefer to refer to the act of exchanging bride wealth between the side of the bridegroom and that of the bride as ***"giving"*** rather than ***'paying'***. This is the essence of the use of ***'bride wealth'*** in customary marriages and the definitions of the words used in relation thereto. The concerned words will be given and defined later in this judgment.

The background.

Over the years, courts in Africa generally and in Uganda in particular have had two different attitudes towards the question of proof of African customs. One attitude has been one of extreme caution by requiring strict proof of a custom, many times, before it is accepted as one which can be taken judicial notice of. I, for purposes of convenience, refer to this attitude as the traditional approach. The other attitude has been marked by some degree of flexibility whereby African Customary Law can be more or less treated as any other law and can be taken judicial notice of, without the requirement for further proof or at least, by accepting as sufficient, the knowledge of those who are involved in the administration of justice like African assessors and judicial officers conversant with the law in this area. I call this the liberal approach.

During the days of colonialism in Africa, superior courts of law, were manned by judicial officers of European origin. They had little or no knowledge or appreciation of local African customs and how they operated among the indigenous people. The challenge to such judicial officers was how to administer customary law in those circumstances.

The Traditional approach articulated.

To the majority of colonial judicial officers, the answer was in adopting the traditional approach. This approach is well articulated in the following statements and judicial pronouncements.

> **"Although customary law is undoubtedly part of the law of the various East African Countries, it has not, certainly in the past, been accepted that the courts can take judicial notice of such law in the same way as they can of the statute, and received English law, the general attitude of the courts has been to regard such law in much the**

> **same way as foreign law and to require proof of its contents particular exception being taken by High court judges, particularly in Tanganyika during the late nineteen twenties and early nineteen thirties to magistrates who were also administrative officers making use of their knowledge of customary law without calling evidence to prove it"** see**Evidence in East Africa by H.F.Morris No.24 at pages 112 to 113."**

The Privy Council in **Angu Vs Attah (1916) P.C 74 – 28, 43**, in an appeal from the then Gold Coast clearly stated the attitude thus:-

> **"As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native custom until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them"**

The traditionalists would not even be willing to rely on guidance by African assessors even when one of the functions of such assessors was to advise the judge on matters of customary law. African judges as has been stated by H.F. Morris above, were not allowed to resort to their knowledge of their own Customary Law.

In **Ndenbera S/O Mwandawale 1947 14 EACA 85** the East African Court of appeal held:-

> **"the existence of native custom must be proved in evidence and must not be assumed from statements of the assessors or from the experience of the judge."**

In R.V **Gansambizi Wegonga [1948] 15 EACA 50,** the East African Court of Appeal rejected a position that had been taken by a trial judge that since he had the assistance of assessors, it was not necessary to call a witness to give evidence in proof of a custom. The court stated-

> **"The legislatures of all the East African territories have been vague, perhaps intentionally so in defining or setting out [assessors] functions and until they are so defined it would be unsafe and impossible for the court to set them out in comprehensive certainty. All that can be said is that in the examination of the actual exercise by assessors of any functions, this court will always apply the test of what is fair to the accused person and will keep in mind the example of natural justice."**

The levels of the caution exercised by those who believe in the traditional approach is clearly exercised by the court in **Guzambizi Wesonga (Supra**). In that case, a reference had been made to the Indian Evidence Act s.48 which provided:-

> **"When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right of persons who should be likely to know of its**

> **existence if it existed, are relevant. The expression general custom or right includes customs or rights common to any considerable class of persons"**

Inspite of the very clear accommodation by the section of opinions of assessors or the knowledge of indigenous judges in the administration of Customary Law by courts, and indeed the possibility of relying on such knowledge in taking judicial notice of the same as part of the law of the land, their lordships were reluctant to accept such.

Those clear intentions of the S.48 of the Indian Evidence Act were unfortunately, to be thrown into serious doubt by Cole and Denison in their ***Tanganyika: The development of its laws and Constitution P. 137.n.66***where they categorically stated-

> **"reference in this connection [in Kiswaga s/o Lugama] to S.48 of the Indian Evidence Act is, it is submitted, misconceived for the reason that that section does not contemplate customary law"**

The Traditional approach was sealed in London at the London Conference on the future of Law in Africa in 1960 where it was recorded that:-

> **"the general sense of the conference was that assessors were not a suitable way of finding out the customary law"**(See record of the Proceedings p.14)

In the superior courts, the resistance to flexibility in proof of customary law and treating it as any other law in taking judicial notice of it, persisted even after independence.

In **Ernest Kinyanjui Kimani V Muiru Gikango and Another 1965 E.A 735,** the court had this to say per Duffus JA-

> **"Customary law is a part of the law of Kenya….The parties in this case are Africans and therefore the court will take judicial notice of such customary laws as may be applicable…..The difficulty remains how are these customary laws to be established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference……..but usually in the High Court or in a magistrate's court the relevant customary law will, as a matter of practice and of convenience, have to be proved by witnesses called by the party relying on that particular customary law in support of his case……It would, in my view, be wrong to rely only on the opinion of assessors at the conclusion of the trial."**
>
> Newbold V.-P.was even more emphatic on this point. He stated:-

> **"when it is alleged that by any particular African customary law a result follows different from that which would follow under the ordinary law of Kenya, then the existence of the African customary law has, unless it has become of such general notoriety that judicial notice may be taken of it under section 60 of the Evidence Act, 1963, to be proved by the person invoking it in precisely the same way that a person invoking customary rights has to prove the custom."**

The above judicial pronouncements were made after Kenya had passed an amendment to its Evidence Act in 1963 to accommodate African Customary Law as law that can be taken judicial notice of in Kenya courts.

The Liberal Approach.

I now turn to the liberal approach to the proof of African Customary Law.

In Pande s/o Nawuku Vs R [1951] 18 EACA 263, the Court of Appeal left the question of the function of the assessors to give an opinion on Customary Law open. It, noted that the Privy Council had:-

> **"contemplated without dismay the possibility of a court being guided by the opinion of native assessors in matters of native custom."**

In some parts of Africa, for instance in Buganda, then a province of the Uganda Protectorate, the colonial state allowed some flexibility in this area to the native courts. There are judicial pronouncements to show that even some European judges showed some respect to the fact that some native judicial officers possessed sufficient and useful knowledge which they could positively use in adjudicating matters involving fellow Africans under Customary Law administered by native courts and could take judicial notice of such law.

In Kigozi Vs Njuki 1943 6 ULR 113 Whitley C.J stated thus:-

> **"in British courts questions of custom rarely arise and when they do arise the courts probably have no definite knowledge as to what the custom is and unless the custom has become notorious it must be formally proved by evidence. In the native courts of Buganda the position is quite different. They have few written laws and no case law and consequently they are for the most part administering customary law. Justice is administered by the high Officials and Chiefs who are themselves familiar with the customs of their people and generally speaking require no evidence to inform them what those customs are. In the great majority of cases in their courts turning upon customs, it would be unreasonable to expect evidence as to custom. In a few cases where there might be a doubt as to what the custom actually is, it might be desirable or even necessary, that**

> **evidence be adduced on thepoint. It would, I think, be dangerous to lay down any hard and first rule."**

In **Kajimu Vs The Lukiiko 1949 (Notes on selected decisions of Her Magesty's court of Uganda cases originating from the Buganda Courts [1940 – 1958] Nairobi at Page 25** Peerson J. stated:-

> **" the members of the [Superior Native] courts being the superior elders in each Principality or Province, native custom is, I presume, in the breasts of the courts"**

In **Wongo V Dominiko Manano [1958] E.A** pg Sir Audley Mc Kisack C.J. took judicial notice of a local custom of the people of West Nile District when he held:-

> **"The court is not obliged to look only to registration to ascertain whether the respondent is married: the bride price paid although less than that demanded by the bride's father was greater than that permitted by the District Council's by-law and according to native custom, of which the court takes notice, that is sufficient evidence of the woman's marriage to the respondent."**

Some more definite and positive steps have been taken towards moving away from the very strict traditional to the liberal approach in the East African region.

In 1961, an amendment to the **Tanganyika Local Courts Ordinance** provided that the High Court in exercising its appellate jurisdiction under that Ordinance:

> **"Shall not refuse to recognize any native law or custom on the grounds that it has not been established by evidence, but may accept any statement thereof which appears to it to be worthy of belief which is contained in the record of the proceedings in or before any lower court or authority which has exercised jurisdiction in the case or from the assessors or any other source which appears to be credible or may take judicial notice thereof."**

The section was reproduced in the **Tanganyika Magistrates Court Act 1963.** Further, the **Tanganyika Primary Courts (Evidence) Regulations 1964, r.3(3)** thereof provides that the rules of the customary law which apply in a district need not be proved unless a party wishes to prove them, or unless the primary court, in any particular case, requires a party to prove a rule on which that party bases his case.

In Kenya, **S. 60 (a)** of its **Evidence Act** is now wide enough in scope to include customary law as law that can be taken judicial notice of. The section provides among matters that can be taken judicial notice of as:-

> **"all written laws, and all laws, rules and principles written or unwritten having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this ordinance, in any part of Kenya."**

Inspite of the resistance to the liberal approach mentioned earlier above, a contrary and more progressive view was, expressed by Crabbe J.A. in his judgment in the case of **Earnest Kinyanjui Vs Muiru (supra).** His Lordship through a lonely voice had this to say:-

> **"The customary law is part of the laws of Kenya and under section 59 of the Evidence Act, 1963 the court is bound to take judicial notice of it, and therefore the person relying on it need not prove it, except, I think, when the custom relied upon is a peculiar one……**
>
> **Before concluding this judgment, I should like to express my own views on the general observations made by my brother Duffus that in civil claims native law and custom must be proved in a magistrate's court or in the High Court. The rule that the customary law must be proved was stated by the Privy Council in the Ghana case of *Angu V. Attah*…….But this rule which was applied only in the 'British courts' originated from the fact that most of the early judges in the British colonial territories in West Africa were Europeans, who were un acquainted with the various rules of the customary law. The courts therefore insisted on the proof of rules of customary law. The rule was not however always followed, for in deciding questions of native law and custom, the existence or content of any rule of customary law was in some cases determined by reference to any book or manuscript recognized as a legal authority, and the court could also call to its assistance chiefs or other persons whom the court considered to have special knowledge of native law and custom. The rule in itself is fast becoming out of date, and I think it is too late to extend its application to East Africa. It may be a convenient rule in the present circumstances in Kenya, but I do not think that sections 59 and 60 (1) (a) and (2) justify a rigid adherence to the rule in *Angu V. Attah*……I am satisfied that if it was the intention of the Kenya Parliament that the customary law should be proved several times before the courts could take judicial notice of it, it would have said so in plain language. In my view the fact that Parliament has made provisions, such as the summoning of assessors and resorting to appropriate books or documents of reference for the purpose of ascertaining the customary law militates against the inference that the customary law must necessarily be proved."**

It is clear, therefore, that the position with regard to taking judicial notice of customary law in Tanzania and Kenya received direct legislative intervention in line the liberal approach.

What then is the position in Uganda about taking judicial notice of Africa customary law?

The Evidence Act.

The question of judicial notice being taken by courts in Uganda appears at first sight, to be solely governed by the **Uganda Evidence Act** Cap 6 of the Laws of Uganda and the case law on the subject. S.55 of the Evidence Act provides:-

"55 **Facts judicially noticeable need not be proved.**

No fact of which the court will take judicial notice need be proved."

"S.56 gives a long list of matters that may be taken judicial notice of. The section provides:-.

"56 Facts of which court must take judicial notice

(1) The court shall take judicial notice of the following facts –

(a) All acts and Ordinances enacted or hereafter to be enacted, and all Acts of Parliament of the United Kingdom now or heretofore in force in Uganda;

(b) All Orders in Council, laws, statutory instruments or subsidiary legislation now or heretofore in force, or hereafter to be in force, in any part of Uganda;

(c) The course of proceeding of Parliament, and of the councils or other authorities for the purpose of making laws and regulations established under any law for the time being relating thereto;

(d) The accession and the sign manual of the Head of the Commonwealth;

(e) The seals of all the courts of Uganda duly established; all seals of courts of admiralty and maritime jurisdiction and of notaries public, and all seals which any person is authorized to use by any Act of Parliament or other written law;

(f) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Uganda, if the fact of their appointment to that office in

any part of Uganda, if the fact of their appointment to that office is notified in the Gazette;

(g) The existence, title and national flag of every State or Sovereign recognized by the Government;

(h) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Gazette;

(i) The territories of the Commonwealth;

(j) The commencement, continuance and termination of hostilities between the Government and any other State or body of persons;

(k) The names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorized by law to appear or act before it; the rule of the road on land or at sea.

(l) The rule of the road on land or at sea.

This list is, however, not comprehensive.

The Uganda Evidence Act does not have the equivalent of the clear and specific provisions quoted above in respect of Tanzania and Kenya with regard to the courts taking judicial notice of customary law in those countries. The Act, however, in S.56 (b) (Supra) covers **"……laws, ……or subsidiary legislation now or heretofore in force or hereafter to be in force in any part of Uganda."**

The custom and practice of giving of bride wealth has, at various times and in various parts of Uganda been the subject of subsidiary legislation. In the former Bukedi District (Present day Tororo, Pallisa, Busia, Butatejja and Budaka District), the **Bukedi Bride Price law Legal Notice No. 259 of 1950** used to apply. There were also the **Teso Birth Marriages and Death law, Legal Notice No. 252 of 1959**, the **Bugishu bride price law – legal Notice No. 1766 of 1960, Sebei Bride Price Law, Legal Notice No. 176 of 1960**, and **the West Nile District Council by-law on bride price** see **Wongo Vs Dominiko (supra):**

Tororo District has recently passed the **Tororo Bye-law on Bride Price**. To that extent, therefore, as for, Tororo District, bride price is currently legislatively recognized and can, in my view, be taken judicial notice of.

As for the former Bride Price by laws given above, this is evidence that at some point in time, bride price was legislatively recognized in those areas.

For other areas where the giving or the refund of bride wealth is practiced, it is my view, that all other requirements being satisfied, that customary law aspect can also be taken judicial notice of under s.56 (b) of the Evidence Act which talks of, inter alia,…….. "**laws".** The insertion of the word "**laws"** in that subsection was not in vain. It intended to cover other law which was not covered by s.56 (a).

Therefore, while s.56(a) deals solely with the written law of this country, s.56 (b) deals with both the unwritten, e.g. the common law and Customary Law and to some extent with that part of the written law relating to Orders In Council, Statutory Instruments or Subsidiary Legislation now or heretofore in force or hereafter to be in force. A positive interpretation and understanding of this section by courts in Uganda is called for so as to embrace African Customary Law in it.

Further, bride wealth has been the subject of numerous judicial decisions in all regions of Uganda as exemplified by the following cases;

Nemezio Ayiiya Pet Vs Sabina Onzia Ayiiya Divorce Petition No. 8 of 1973on marriage under Lugbara Customary Law where the courts' holding was to the effect that before all dowry is paid, a man and a woman cohabiting can be regarded as husband and wife but marriage is not valid until the all dowry is paid.

See also**Wongo Vs Dominiko Manano (supra), Florence Kentungo VS Yolamu Katuramu Civil Suit No. MFP 6 of 1991** where A Mukanza J.held:-

> **"There was credible evidence that dowry was paid. The plaintiff was therefore the widow of the deceased, their marriage was found to be valid because of bride wealth having been given."**

In**Peteconia Mpirirwe Vs Oliver Ninsabimaana Hccs No. Mka 5 of 1990 (arising from Administration Cause No. MKA/4/8/89** at Kabale. Tsekoko J. (as he then was) had this to say:

> **"After considering all the evidence adduced by both parties on issue 1 and 2 and having considered the submissions of both defence and plaintiff's counsel and the three cases I have cited above, I find as a fact that even if it is accepted that the deceased had paid Shs. 100,000/= as fine to the parents of the defendant, there was no valid marriage between the defendant and the deceased as recognized by Bakiga customs."**

In Aggrey Owori Vs Rosette Tagire HCCS 178/2000the court held that the view of courts of Uganda is that no customary marriage is valid unless dowry, if demanded, is paid.

On the strength of what I have shown so far under the Evidence Act, Subsidiary Legislation and judicial decisions, I am of the view that bride wealth as practiced by different nationalities in

Uganda is a custom of sufficient notoriety that has been taken judicial notice of by courts in Uganda without the requirement of further proof. In holding this view, I adopt the liberal approach. I further adopt the definition of the word *'notorious'* as given by Black's law Dictionary in preference to that prescribed by the rule in **Angu Vs Attah (supra).** Black's law Dictionary defines notorious as :-

> **"Generally known and talked of, well or widely known, forming a part of common knowledge, universally recognized".**

The Constitution.

Having held that in my view, the custom of bride wealth as practiced in Uganda has been judicially noticed under the Evidence Act, I now turn to the Constitution in further fortification of that view.

At the promulgation of the 1995 Constitution of the Republic of Uganda, a new and revolutionary approach to the exercise of judicial power by the courts of this country was adopted as provided for in **Article 126** of the Constitution already quoted above.

Article 2of the Constitution provides:-

> "**2 Supremacy of the Constitution.**
>
> **(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> **(2) ……..**

Clearly, by this Article, the Constitution is the supreme law of the land. The same Constitution under **Article 126 (2) (e)** enjoins the courts of this country to administer substantive justice without undue regard to technicalities.

The province of the Evidence Act is, in my view, to lay down evidential and procedural rules as to what matter is or is not admissible for purposes of establishing facts in dispute and as to the manner in which such matter may be placed before court. That Act is not concerned with direct establishment of relevant principles of substantive law. It is mainly concerned with facts in their wide sense. What the Act provides for, therefore, in my view, are matters of technicalities rather than substantive law. See **An Introduction of the India Evidence Act, 2nd Edition 1904 by Sir James Stephen**. See also **Stephen Uglow** in his **Trial Materials 2nd Edition (Sweat and Maxiwell) pg 2** where he observes:-

> **"evidence and procedure are among the most technical and abstruse areas of law."**

The rules of how courts take judicial notice of any fact as laid out in the Evidence Act and the court decisions pronounced thereunder, should be techinicalities taken as technicalities other than as matters of substantive law. They should not, therefore, in appropriate cases, defeat the courts' pursuit of substantive justice in strict obeyence of the commands of **Article 126 (2) (e)** of the Constitution.

It is the duty of courts in this country to accept and recognize the view that under **Article 126, (1)** and**2 (b)** of the Constitution, customary law was constitutionally elevated from the inferior position the colonial judiciary had apparently relegated it to in comparison with the other laws, including common law as was known in the United Kingdom and as was applied to Uganda by the 1902 Uganda Order In Council.

African Customary Law, under the traditional approach, was regarded as foreign law and apparently inferior to the other law of the land, hence the requirement of strict proof of the same under very strict rules. That positioning was most unfortunate. There was, in my opinion, no other law more legitimately applicable in Uganda than the various indigenous Customary Laws that were in place in the country before the advent of colonialism. Yet African Customary Law was not to be taken judicial notice of with the same laxity as was with the other law. The test was stricter for Customary Law than with any other law including English Common Law as applied to Uganda. That liberal test for other law other than Customary Law is stated in Halsbury's laws of England 3rd Edition Vol 15 thus:-

> **"Judicial notice is taken of facts which are familiar to any judicial tribunal by virtue of their universal notoriety or regular recurrence in the ordinary course of nature or business. As judges must bring to the consideration of the questions they have to decide their knowledge of the common affairs of life, it is not necessary on the trial of any action to give formal evidence of matters with which men of ordinary intelligence are acquainted whether in general or in relation to natural phenomenon."**

In**R.V. Field JJ, Experte while [1895] 64 LTJ M.C.158.** the court PerWILLS J.observed:-

> **"In the nature of things, no one in determining a case of this kind can discard his own particular knowledge of a subject of this kind. I might as well be asked to decide a question as to the sufficiency of an alpine rope without bringing my personal knowledge into play."**

This, I believe, is what is referred to by my brother A. Twinomujuni JA in his judgment in this petition when he says:-

> ***"However this court composed of Ugandans who were born, lived, worked and practiced law in this country during a period of over half a century should be able to take judicial notice of a notorious fact that the practice of bride price has caused untold suffering to thousands of women throughout Uganda……some of us have witnessed even worse experiences than the witnesses from Tororo." (Sic)***

Article 126 (1) of the Constitution**,** in my view, liberates African Customary Law from that degrading position explained above and commands in very clear terms that all law, including Customary Law, has to be administered in conformity with the norms, values and aspirations of the people. Such approach should be within the context of the thinking of progressive people and societies. See the Court of Appeal for Uganda in **Attorney General Vs Osotraco Ltd, Civil Appeal No. 32 of 2002** where the court stated:-

> **"The law has to be construed in line with the thinking or norms of progressive societies"**

I am of the strong view that the thinking, the norms, values and aspirations of the progressive people and societies in Uganda dictate that the liberal approach to taking judicial notice of African Customary Law in general and the custom of giving and refunding bride wealth in particular in Uganda be fully embraced. This, as I have shown above in this judgment, is what has happened in Tanzania and Kenya by legislation. This is what is called for both in the letter and the spirit of **Article 126(1)** and **2(e)** of the Constitution.

Given that over the nearly half a century of independence this country's courts of judicature have almost wholly transformed from being predominantly manned by European judges to being manned by Uganda judicial officers knowledgeable in African Customary Law, there is no reason why the test stated above is not applied by the courts in taking judicial notice of any aspect of that law in appropriate cases, just as they do in respect of other laws including common law both local and received or applied.

In conclusion on this **issue (b),** I, therefore, find that the giving of bride wealth as a requirement of a valid customary marriage and the refund of bride wealth as a requirement of a valid dissolution of such marriage as known and practiced in various parts of Uganda is so notoriously known and appreciated that it can and has actually been in the past in numerous cases taken judicial notice of without the requirement of any further proof. It should be so taken without any hesitation.

Issue (c).

The gist of **issue (c)** is whether bride price means different things in different cultures of Uganda such that there can be no uniform interpretation of the custom.

From the affidavit evidence on record and from my own knowledge of the custom of payment and demand of a refund of bride price as practiced in Uganda the true position is that the custom and practice may be referred to or called by different names in different nationalities in the country. What is clear however is that there are well universally known and accepted attributes of the custom and practice. These are:-

(a) it is either a sum of money or an amount of property,

(b) it is demanded by the parents/relatives of the bride as a pre-condition to marrying the bride under customary law.

(c) it is given to the parents/relatives of the bride as a pre-condition to the validity of such marriage

(d) it may be demanded and refunded as a pre-condition to the validation of a dissolution of a customary marriage.

It was vehemently argued by the second respondent that in the Kinyankole culture there is no English word equivalent to what could be termed bride price. He particularly pointed out the word ***"Okujuga'*** as an example. My own knowledge backed by research and books of high repute in the Kinyankole language, notably the "Kashobolozi" y'O runyankole-Rukiga" the (Runyankole Rukiga dictionary) show that bride price is accurately defined by the word **"Enjugano"** which, according to that dictionary at page 17 is defined as ***"Ebyobutungi ebi omwojo arikutwara owa ishe omwishiki ahabwokushwera omuhara."*** **Loosely Translated in English this means *"the wealth/things of value which a boy takes to the father of a girl for purposes of marrying that girl"***

'Okujuga'the word referred to by the 2nd respondent in his submission is defined by the same dictionary at page 348 as:-

"Okuha ebintu nkente nari embuzi murikwebaza abeka y'omwishiki ou murikuza kushwera"translated in English as:-

"Giving things like cows or goats to appreciate the family of a girl you intend to marry."

I accept the above dictionary definitions of the two words ***'enjugano'*** and ***'okujuga'*** and the meanings assigned to them. I, therefore, find that in the Kinyankole culture *'**enjugano'*** is equivalent to the English words bride wealth, erroneously termed bride price and ***'okujuga'*** defines the act of giving the bride wealth to the parents/relatives of the bride.

I must add here however that in many African cultures the word bride wealth is often interchangeably used with the word *'dowry'* to mean the same thing. See **Wongo Vs Dominiko (supra), Aggrey Aworia Vs Rosette Tagire (supra)** and **Namezio Ayiiya Pet Vs Sabina Onzia Ayiiya (Supra)**. See also the Runyankole Rukiga English Dictionary by C. Taylor as revised by Y.Mpairwe, page 66 where it defines **'enjugano'** as *'dowry'*.

I agree with the second respondent that the words bride price were coined by Europeans who were ignorant of African cultures and customs. This fact is evidently brought out by the attitude expressed by Hamiliton C.J. in **R Vs Amkeyo EAPLR [1917-1918]4** when he stated in apparent reference to bride wealth thus:-

> **"In my opinion the use of the word "Marriage" to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas. I know of no one word that correctly describes it; "wife-purchase" is not altogether satisfactory,**

but it comes much nearer to the idea than that of "marriage" as generally understood among civilized people."

This was a complete misconception of bride price and its role in African culture and Customary Law in the area of customary marriages.

In Kiganda culture the word ***"omutwalo"*** when used in relation to marriage means bride wealth. The Luganda Dictionary ***"Enkuluze y'Oluganda eye'Makerere*** at page 811 defines the word ***"Omutwalo"*** thus:-

> ***"ebintu ebisalirwa omusajja byateekwa okuwaayo eli abazadde b'omuwala nga tannaba kumuwebwa mubutongole"***translated to mean *the things demanded from a man which he has to give to the parents of a girl before he is allowed to officially given the girl's hand in marriage.*

In Ateso bride wealth is referred to as ***"akituk nu emanyit***" meaning *"cows for purposes of the marriage ceremony"*. The expression derives from the individual words ***"akituk****" "meaning cattle or cows,"* "nu" meaning *"for purposes of,"* and ***"emanyit"*** meaning *"the marriage ceremony"*, See the Ateso-English English for International learners by Apuda Ignatius Loyola at pages 192, 415, and 344.

In Lugbara bride wealth is called ***"Aje."***

I have not talked of ***'emihingiro'*** which, as my brother A. Twinomujuni JA has ably and clearly shown in his judgment means dowry' and not '**bride price'** in the Kinyankole culture which appears to distinguish between bride wealth and dowry.

All that said however, once the attributes I mentioned above are present in a customary marriage arrangement, that marriage, in my opinion, is based on the custom of giving bride wealth. I have shown that it is notoriously known that the practice of giving bride wealth is universally practiced in Uganda. I accordingly find that this court can safely make a uniform interpretation of the custom to apply throughout Uganda. I therefore find in the affirmative on this issue.

Issue (d).

The gist of this issue is the meaning of the words ***'Okujuga'*** and ***'Okuzimura'*** and whether they mean giving and refund of bride wealth respectively in Ankole.

I take the use of the word Ankole here to refer to Kinyankole culture.

"***Okuzimura"*** in the *"Kashoboolozi"* y'Orunyankole-Rukiga" the (Runyankole Rukiga Dictionary) is defined as ***"Okugarurira omukwe enjugano, omukazi yaaba amushenzire"*** loosely translated, *to return to one's son-in-law the bride wealth given for his wife, when he (son-in-law) divorces their daughter.*

I have already given the meaning of the word ***'okujuga'*** above.

From the above, I find that the words ***'Okujuga'*** and '***Okuzimura'*** in Kinyankole culture mean the giving and the refunding of bride wealth respectively. I therefore find in the affirmative on this issue.

Issue (e).

The question in this issue is whether bride price is not commonly practiced by all tribes in Uganda.

Longman's Dictionary of contemporary English defines commonly as ***"usually; generally; ordinarily."***

Black's Law Dictionary 6th Edition defines

Common when used as an adjective as:– ***belonging or pertaining to many or to the majority. Generally or prevalent, of frequent or ordinary occurrence or appearance, familiar by reason of frequency……"***

I find the above dictionary definitions of ***'common'*** clear enough to support the view, which view I hold, that bride price is commonly practiced by all nationalities in Uganda. The affidavit evidence on record together with the numerous judicial decisions, many of which are cited in this judgment on the subject, support the same view. My own knowledge of the matter is no different. The common attributes of bride wealth stated above generally cut across all Ugandan nationalities. I therefore, find in the negative on this issue.

Issue (f).

The gist in this issue is whether the giving of bride wealth by the groom's family to the bride's family promotes inequality in marriage contrary to **Articles 21 (1), (2), and (3)** of the Constitution.

I wish to state, right at the outset that for this issue and for issues**(g) (h), (j), (k), (l) and (n**), the principle of constitutional interpretation of harmony outlined above is, among others, most relevant. The court therefore has a duty to harmonize the various constitutional provisions concerned without destroying any of them.

Article 21of the Constitution provides:-

"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.

(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.

(4) ……

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

Article 37of the Constitution provides:-

37 Right to culture and similar rights.

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

By putting this provision in the Constitution under chapter 4 which deals with Fundamental Human Rights, the frames of the Constitution pronounced themselves on the importance they and the people of Ugandan attach to culture. By the same Constitution, in its **Article 20 (1)**, Fundamental rights and freedom of the individual are inherent and not state granted. By **Article 20 (2)** all organs and agencies of Government and all persons are commanded to respect, uphold and promote the rights and freedoms of the individual or groups enshrined in chapter 4 of the Constitution.

I have held elsewhere in this judgment that the custom and practice of giving of bride wealth is commonly recognized, observed and practiced by all nationalities throughout Uganda. That custom is therefore, allowed and protected by the Constitution under **Article 37** (supra). **Article 21 (5)** above specifically prohibits taking such a custom as being inconsistent with **Article 21.** I find no justifiable or even logical and convincing reason for court to impose a ban on such a constitutionally guaranteed custom evidently enjoyed and practiced by the people of this country. I find National objectives and Directives of state policy **No.s 1(1) supra and 24** very relevant here.

To many nationalities in this country payment of bride price enhances equality in the marriage in that it promotes mutual respect among the parties to the marriage and is a symbol of the value of the bride she walks into such marriage with.

As a logical conclusion of my pronouncements so far on this issue, I have no hesitation in finding, as I hereby do, that the custom of giving bride wealth by the groom's family to the bride's family does not promote inequality in marriage and does not contravene nor is it inconsistent with **Article 21 (1), (2) and (3**) of the Constitution. I so find.

Issue (g).

The gist in **issue (g)** is whether the demand of bride price by parents of the bride as a condition precedent of marriage fetters the free consent of the man and woman the parties to a customary marriage who are the only parties to the marriage contrary to **Article 31 (3)** of the Constitution. That Article provides;

> **"31 (3) Marriage shall be entered into with the free consent of the man and woman intending to marry."**

Basically and in short, the petitioners say the payment of bride price militates against the consent of the man and woman since the proceeds of the arrangement go to the parents of the bride and yet the marriage is between the bride and the bride groom. The respondents, on the other hand, base their case on what they see as the positive purpose and value of bride price in the institution of marriage. I agree with the concept of bride wealth as factor in facilitating, rather than hindering or fettering the consent of the parties to a customary marriage.

The custom is intended to, inter-alia offer an opportunity to the bride groom and his relatives to express gratitude and appreciation to the parents of the bride for the caring for and upbringing of the bride in such a way that she can be appreciated by the bridegroom as one who can become a wife of his choice. The custom also strengthens the bonds that bind the two families of the bride and that of the bridegroom in the interest of the stability in the marriage.

In a way, it gives a sense of fulfillment to the parties to the marriage by enhancing self esteem and self confidence in each of the parties in that the bride groom realizes he has a valuable partner in the marriage who can also rely on his assured determination and ability to ensure her wellbeing in their home.

As for the bride, it is important to realize that the giving of bride wealth is only one component or aspect in a process that eventually matures into the actual marriage.

In many nationalities, by the time the bride wealth is given, the bride's consent to marry the bridegroom has already been secured and assured either expressly or by conduct through the interaction between the two families, and always with close consultations of the bride as to whether she consents to marrying the bridegroom. Intermediaries between the side of the bride and that of the bridegroom, like the ***Katerarume*** (go between) in the Kinyankole culture or the ***'Ssenga'*** official aunt of the bride and the ***'Muko'*** (the official brother in law to the bridegroom), in the Kiganda cultures are examples of significant intermediaries between the two sides.

In many cultures, in addition to the above steps being carefully taken to ensure the bride is not forced into a marriage with a partner she does not love, the question is clearly put to either the

bride herself or her official agent for instance in Kiganda culture to the official aunt **(*Ssenga),*** who is freely chosen by the bride herself from among her aunts or her very close relatives from her paternal side whether she consents to the marriage. The bride or her aunt's answer is the conclusive evidence of such consent or lack of it. That act is greatly respected at the introduction ceremony ***(Okwanjura)*** in Kiganda culture. Okwanjula is defined in the 'Enkuluze y'Oluganda eye'Makerere' (The Luganda Dictionary) as ***"Omuwala okulaga bazadde be omulenzi gwaba asiimye okufumbirwa"*** translated as *the function at which a girl introduces or shows to her parents the boy she has chosen to marry*. Further still, in the very rare cases where the girl may feel she is being forced into a marriage with someone not of her choice, either shortly before or at the night preceding the wedding day the girl will just vanish ***(okubula)*** from her parents' home in most cases with the active assistance of the official aunt who is usually fully in the know of the reason for the girl's attitude and protest. But this is very rare indeed. The meaning of ***'Okwanjula'*** as sown above necessarily embodies consent.

The culture of the Kikuyu, one of the nationalities in Kenya, is another example of an elaborate process of ascertaining whether or not the bride consents to the marriage.

In **Mwangiru Vs Mumbi 1967 E.A 639** the customary marriage between a man and woman was found invalid for lack of the woman's consent because on one of the two occasions where such consent was to be given by the bride and ascertained, the bride chose to hide away from the second occasion and her absence was held to be her expression of lack of consent.

I accept the contention of the respondents that since in Uganda there is a variety of marriage options from which those who intend to get married can choose, when two adults choose to get married in a customary marriage where bride wealth is recognized as a pre-condition to such marriage, then they do accept to observe all the features that go with it. None of them should, therefore, be heard or complain that her or his consent is fettered unless there is satisfactory evidence to support the contrary view.

I therefore, find in the negative to this issue.

Issue (h).

The complaint in this issue is whether the payment of bride price by the bride groom renders the wife an unequal partner in marriage contrary to **Article 31 (3)** of the Constitution.

Article 31 (3)of the constitution quoted in and relied on by the parties to the petition as their framed and agreed **issue (h)** does not address the issue of equal rights of the parties to the marriage. It is concerned with entrance into marriage by the parties thereto with their free consent. It provides:-

> **"31 (3) marriage shall be entered into with the free consent of the man and woman intending to marry.**

I have addressed the aspect of consent in my resolution of **issue (g)** supra. I also addressed the concept of equality in marriage during my resolution of **issue (f)** supra. In the circumstances, I say nothing more in respect of **issue (h).** It has already been adequately addressed.

Issue (i).

The gist in this issue is whether the payment of bride price as a condition precedent to the validity of a customary marriage and a refund of the bride price as a condition precedent to the validity of a dissolution of such marriage are customs that are guaranteed by **Art. 37** of the Constitution.

I have already reproduced **Article 37** of the Constitution elsewhere in this judgment. The Article does not attempt to specify or list what customs or cultural practices it guarantees. It is a general provision for the protection and guarantee of all lawful customs /cultures that are recognized and accepted as such by the people of Uganda who cherish them. It follows therefore, in my view, that if a custom is known to exist and it does not offend against any provision of the Constitution or other laws of the land, then such a custom qualifies for the constitutional guarantee and protection under **Article 37** of the Constitution. I have already in this judgment considered and accepted the justification and role of the custom of giving of bride wealth and I will not repeat it here. Suffice it to say that what I have already stated in that regard applies to this issue with equal force.

Conclusions.

As for the practice of demanding of a refund of the bride wealth, it is contended by the respondent that it is for, among other things, avoiding unjust enrichment on the side of the bride by keeping the bride wealth after the wife has been released from the marriage.

On the side of the bridegroom, according to the respondents, the giving of bride wealth keeps him committed to the marriage and the scare of giving bride wealth each time a man marries a wife deters him from contracting numerous customary marriages.

The petitioners' main complaints are in essence the unfairness that may go with such refund such as failure to take into account the wife's contribution to the development of the home during the marriage, or the inability of the wife to leave the marriages due to the lack of capacity by the wife's side to mobilize the bride wealth to effect the refund. This, keeps the wife in a relationship she no longer desires to stay in. Of great concern also is the commercialization of bride wealth to worrying levels with its adverse consequences.

These and other difficulties of failed marriages are, however, not the preserve of customary marriages alone. All other forms of marriage, once they break up pose problems. What is important is that there are laws that can be invoked to redress the grievances of an aggrieved party. The Constitution itself commands in **Article 31 (1) (b)** the enjoyment of equal rights by parties to a marriage at, during and at the dissolution of marriage. There are also other provisions of the law including **Articles 43** and**50** of the Constitution and Penal laws that can be called to the aid of an aggrieved party in the event of the collapse of such a marriage. Legislative

measures can also be taken by the appropriate legislatures to curb excesses like commercialization of the bride wealth. Such parties should be encouraged to resort to those laws and the remedies they offer. The hardships and difficulties experienced by individuals at the hands of their partners in marriage notwithstanding, the custom which has operated among the people of Uganda from time immemorial with full acceptance of its nature as one having the force of law, cannot be denied of its constitutional guarantee and protection by **Article 37** of the Constitution. I therefore find in the affirmative on this issue.

Issue (j).

The gist in this issue is the complaint that payment of bride price as a condition precedent to the validity of a customary marriage and a demand for its refund as a condition precedent to a valid dissolution of the same comoditifies a wife thus injuring her dignity contrary to **Article 31(1)** of the Constitution. Article 33 (1) provides:-

> **"33(1) Women shall be accorded full and equal dignity of the person with men."**

Again, the attitude that bride wealth as practiced by various nationalities of Uganda comoditifies a wife married under customary law is basically the result of the misconception of the custom as erroneously decreed by court in **R V Amkeyo (Supra)** which I have dealt with at length during my resolution of **issues (g)** and **(h)** above.

I will not therefore repeat it here. It applies with equal force to this issue. I accept the submission of the second respondent that during the process of contracting a customary marriage, there is no girl on offer for sale. The bride remains the daughter of her parents in the Kinyankole culture and indeed in other cultures. Custom and tradition also have it that one of the purposes of giving cows to the parents of the bride as bride wealth, at least in the Kinyankole culture, is to ensure that whenever their daughter comes visiting home there would be a ready source of milk for the daughter and her friends to enjoy. That is far from eroding away the dignity of the bride. I therefore find that there is no commoditification of the bride in such a marriage. **Article 31 (1)** of the Constitution is not contravened by the giving of bride wealth by the bride groom to the parents of the bride.

Looked at it this way, bride wealth ceases to present the greatly misconceived picture painted by the decision of Hamilton CJ in **R Vs Amukeyo (supra**). To adopt that attitude would be a resurrection of the ghost of **Amkeyo (supra)** from a 93 year slumber in the limbo of dead attitudes to African customary law on bride wealth where it should be left and allowed to lay and rest in eternal peace, as it has been, since it was dispatched there 43 years ago by Sir Udo Udoma CJ (as he then was), in **Alai Vs Uganda 1967 EA 596** at the advance age of fifity years during which period it appears to have reigned supreme in that area. The learned Chief Justice held;

> **"(1)…….any married woman in s.150 A Penal Code means any woman who is married to any man irrespective of the form of such marriage; provided that such marriage has been conducted in one of**

the forms recognized by the people of Uganda, including marriages according to the custom of the people.

It would be a judicial retrogression if court was to resurrect **Amkeyo (supra)** as a binding legal authority in our law or to allow it ghost to rule over the people from the eternal resting place of the dead. I find in the negative to this issue.

Issue (k).

The complaint in **issue (k)** is whether the demand of a refund of bride wealth as a condition precedent to a valid dissolution of a customary marriage does not take into account the contribution of the woman in the home contrary to **Article 33 (4)** of the Constitution.

Article 33 (4)provides:-

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

In all the affidavit evidence on record, there is nowhere, where it is indicated that where a refund of the bride price is demanded, the dissolution of the marriage process takes into account the contribution of the woman in the home. Clearly that is an act or omission which infringes or threatens the wife's fundamental rights or freedom guaranteed under the Constitution. Competent courts should, therefore be moved for appropriate redress whenever the act or omission occurs. Additionally, the act or omission is also in my view, un acceptable as it clearly offends against **Article 31 (1)** which provides:-

"A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age –

(a) …….

(b) to equal rights at and in marriage, during marriage and at its dissolution."

See also this court's judgment in **Civil Appeal No. 30 of 2007 Julius Rwabinumi Vs Hope Bahimbisokwe Rwabinumi.**

While I condemn such acts and omissions referred to above, that does not render the custom per-se unconstitutional. The unconstitutional acts or omissions can be adequately contained under the Constitution without destroying a constitutionally guaranteed and protect custom.

This, in my view, is a good example of where the good in the custom should be retained while the offending acts and omissions are discarded. Condemning the entire custom would be equivalent to throwing the baby with the bath water.

I find in the negative to this issue.

Issue (l).

The gist in **issue (l)** is whether the custom of bride price causes domestic violence so that the woman is subjected to cruel and degrading treatment by the man who treats her as a commodity that must give total submission contrary to **Article 33 (1)** of the Constitution.

Article 33 (1) provides;

> **"33(1) Women shall be accorded full and equal dignity of the person with men."**

I have considered much of the matters raised in this issue during my resolution of issues **(g) (h) (I)** and **(j)** above particularly the action of comoditification of the wife. I will only add here that it is evident that some men misuse the enjoyment of the custom of bride price by committing crimes and grave violations of human rights of their partners in marriage. This, however, cannot be solely attributed to the nature of customary marriages where bride wealth is given. It is unbecoming behavior of the individuals concerned. It is common knowledge, and research has also proved it, that even in marriages where the custom of bride wealth is unknown and is never practiced, violence against women is rampant the world over. Whatever violence may arise in a customary marriage cannot, therefore, in my view, be justification to condemning as unconstitutional the custom. The abuse of the custom is an evil in society that must be fought through laws of the land and the enhancement of human values of morality in society. I find in the negative for this issue.

Issue (m).

The gist in **issue (m)** is whether the demand for bride price as a condition precedent to the burial of a bride dying before her husband has paid bride price is a custom repugnant to good conscience or whether a person cannot be a husband when he has not given bride wealth.

It is evident that some communities in Uganda demand giving of bride wealth as a condition precedent to the burial of a deceased's woman's body where such bride wealth was not given prior to the death of the woman. Denying a body burial in circumstances complained of in this petition is clearly an act or omission in violation of all known principles of discence and according respect and dignity to persons both during and after life. It is common knowledge that ancestors are highly regarded in African cultures. The Constitution must be obeyed both in the letter and the spirit and so must all the other laws of the land. I find the act or practice of denying a body of a deceased woman burial because of non giving of bride wealth repugnant to good conscious. It is also a threat to the rights of the concerned living and also a denial of dignity to the deceased. The departed should be respected by being accorded a timely and descent burial. S. 121 of the Penal Code Act on hindering burial of a dead body could also be invoked. I find in the affirmative for this part of this issue.

The other part of this issue questions whether a man is not a husband before giving of bride wealth.

I think this is a question which depends on each community which practices the custom of giving of bride wealth.

In Kiganda culture, the parents may decide to ask for no **"mutwalo**" (bride wealth) at all, but the son in law who marries the bride is a husband.

In some other cultures, before bride wealth is given a man is not a husband. See **Florence Kentungo Vs Yolamu Katutanu Civil Suit No. 6** of **1991 MFP.**

I take the view, however that the question in this part of the issue is being raised in the context of refusal of burial to a woman's body till payment of bride price is effected by the deceased's 'husband'. For reasons I have given in the first part of the issue I find the practice an infringent of and a threat to rights and freedoms of others. I, therefore, find in the affirmative on this issue.

Issue (n).

The gist in this issue is whether the custom of demand for the refund of bride wealth stifles the consent of the parties to the marriage to dissolve the same contrary to **Art. 33 (3)** of the Constitution.

The custom of giving and demanding a refund of bride wealth is one of customary laws governing customary marriages. Under it many acts or omissions may be done or omitted to be done. One of such acts could be the forcing of a party to remain in a customary marriage relationship that party no longer desires to be party to. Any act or omission which results into such a situation would be an infringent of the concerned party's right and freedom to enjoy a customary marriage through his or her free will and consent. The party then would be entitled to move a competent court to seek redress. This is because the custom of demanding a refund of bride wealth does, in many cases, have positive aims and results. Those should not be sacrificed at the altar of the negative acts or omissions. Society should have the liberty to enjoy the good of the custom while discarding the bad acts and omissions resulting from negative exercise of a constitutionally guaranteed custom. Again, the baby should never be thrown with the bath water. It is also worth noting that not all dissolutions of customary marriages call for mandatory refund of the bride wealth. The issue recognizes this from the way is framed. In the Kiganda culture, for instance, no such refund of bride price is demanded or even expected. Current developments also indicate that the concerned parties may decide not to press for a refund of the bride price even in cultures which are more strict than others on the matter of refund of bride wealth.

In **Emmy Ndyamureeba Vs Eva Namanya HCDEC No.001 of 2006**, the voluntary forfeiture of refund of bride price was recognized. I find this development commendable as one of the ways of minimizing the problems encountered by customary married couples at the dissolution of their marriages, I therefore find that the custom of demand of refund of bride wealth is not per-se, unconstitutional. I therefore, find in the negative to this issue.

Declarations.

In the result, I would dismiss the petition and make the following declarations:

> **1. That the custom of giving bride wealth as a requirement for the recognition as valid customary marriage and of demanding a refund of the bride wealth as a requirement for the recognition as valid dissolution of a customary marriage is not, per-se, unconstitutional in as much any acts or omissions that may be done in the purported exercise of the custom if found to be an infringement of or a threat to the enjoyment by an person of other constitutionally guaranteed rights and freedoms may be dealt with under Articles 43 and 50 of the Constitution and in as much as there are other laws of the land which can be resorted to contain any crimes that may be committed by any person in the purported exercise of the constitutionally protected custom of giving and demanding a refund of bride wealth and in as much as any excesses in the enjoyment of the custom can be legislatively contained.**
>
> **2. There will be no orders as to costs.**

Dated at Kampala this…**26th** …..day of …**March**….2010

……

S.B.K.KAVUMA

JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA: (Dissenting)

I have the honour of reading the judgment, in draft, of the Honourable Deputy Chief Justice. I wish to adopt her statement of the background to this petition, the statement of the facts, the issues and arguments of counsel on both sides of this legal contest. I shall therefore not repeat them in this judgment. I shall deal with the issues which were agreed upon at the scheduling conference and before us at the hearing of the petition. Those issues are:-

> (a) Whether the demand for payment of bride price fetters the free consent of persons intending to marry provided in article 31(3) of the Constitution.

(b) Whether bride price perpetuates conditions of inequality contrary to article 21(1) and (2) of the Constitution.

(c) Whether refund of bride price as a condition precedent to dissolution of a customary marriage fetters the free consent of persons in a marriage provided for in article 31(3) of the Constitution.

Before I embark on the exercise of consideration of the above issues, it is necessary to give my own understanding of some terms used in this judgment in order to minimize confusion.

Bride Price:

The common understanding of the word "bride" is a woman about to be married, just married or recently married.

The word price also means:-

"an amount of money for which a thing can be offered, sold or bought."

See Longmans Dictionary of Contemporary English and Oxford English Learners Dictionary.

Dowry:

The two dictionaries define this word to mean:-

"property or money brought by a BRIDE to her husband when they marry"

Or

"the property and money that a woman brings to her husband in marriage."

From these definitions, it can be concluded that bride price is the money or property that a man has to pay in order to get bride. In most African customary marriages, a man must pay money or animals (cows, pigs, goats etc) specified and demanded by the parents or relatives of the bride and are paid by the bridegroom or his parents or relatives. In many such marriages, bride price must be paid before a customary marriage can be recognised to have taken place. This must be distinguished from what the Banyankole of Western Uganda call "Emihingiro" which in English means marriage gifts. These are gifts given by the parents and relatives to the bride to assist her and her husband start life in their new enterprise. In this same language, bride price is called "Enjugano".

I have carefully perused all the affidavits in support of this petition and those in support of the opposition to the petition. I have also read a good amount of literature about marriage practices in most African countries. I do understand that this petition is about bride price as defined in this judgment or "Enjugano' as the Banyankole call it. Incidentally my own tribe, the Bakiga of Kigezi, who are very close neighbours and share a similar language with Banyankole, call bride

price “Enjugano.” Similarly, the word dowry means, in Runyankole-Rukiga, “Emihingiro” the property that the bride comes with when she joins her husband in marriage.

It is my considered view that this petition is challenging the constitutionality of our traditional marriage practice of paying bride price or “Enjugano” as the Banyankole-Bakiga call it. It is not about dowry or “Emihingiro”. The difference must be clearly borne in mind in order to deal with the issues at hand with a clear mind.

So, what type or marriages are we talking about? What type of practices are we dealing with? What are the elements of the traditional practices which are being challenged in this petition? I venture to say that they are those with the following three elements or characteristics:-

(a) The parents of a bride demand payment of bride price (as defined supra) before a legal marriage can take place.

(b) The payment of bride price is made by the bridegroom or his parents/relatives to the parents or relatives of the bride. The payment is never made to the bride herself and more often than not, she is not consulted as to how much her future husband should pay for her.

(c) Whenever the marriage breaks down which results into a divorce, the bride price which was paid must be refunded to the bride groom (more often, irrespective of which of the spouses was at fault or how long the marriage has subsisted).

Now, for learned counsel Kenneth Kakuru and his friends who claim that there is no payment of bride price among Banyankole, if their customary marriage practices do not have the above three characteristics named above, then they can rest assured that their customary marriage practices are not being challenged in this petition. I say this with tongue in cheek because I am very conversant with the tradition customary marriage practices of the Banyankole which are very similar to those of my own Bakiga traditionalists.

DETERMINATION OF ISSUES

I have, in the foregoing section of this judgment endeavoured to explain the difference between bride price [Enjugano] and dowry [Emihingiro]. The bride price in issue has three elements or characteristics, namely:-

(a) Parents or relatives of the bride demand and get paid money or property as a condition precedent before giving her to a bridegroom in marriage.

(b) The payments only move from the side of the groom to the parents of the bride and never the other way round. The bride has no share in it.

(c) When the marriage breaks down and is dissolved, bride price has to be refunded on demand.

On the other hand dowry [Emihingiro] is never demanded. I have learnt that in some cultures in India, dowry is demanded by the parents of the groom from the parents of the bride. This however, is not the practice in most African cultures. At any rate, it does not seem to exist in Uganda.

Secondly, dowry [Emihingiro] as practiced in Uganda is for the use and enjoyment of the bride and the bridegroom and not their parents or relatives.

Thirdly, when the marriage breaks down, dowry [Emihingiro] is never refunded. I wish to make it clear again that in this petition, the dowry [Emihingiro] aspect of a customary marriage are not being challenged at all and do not form part of any issue for determination. It is the bride price [Enjugano] aspect of the customary marriages that is being challenged as being unconstitutional.

Article 2 of the Constitution states:-

> **"2(1) This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> **(2) if any law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void." [Emphasis mine]**

In this petition, the main issue for determination is whether the traditional custom of demanding bride price, practiced in many tribes in Uganda, contravenes any provision of the Constitution of Uganda. The petitioners contend that to the extent that bride price involves involuntary payment of money and properties in exchange for the bride, and the properties must be refunded on the marriage being dissolved, the custom is unconstitutional.

The respondents contend that payment of bride price is a custom protected by article 37 of the Constitution which states:-

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

Three issues have been condensed from a host of several issues originally agreed at the scheduling conference to make it easy to deal with only one broad issue of bride price. I have already stated the issues earlier in this judgment and I now proceed with them individually:-

ISSUE NO.1

This is whether the payment of bride price fetters the free consent of the persons intending to marry contrary to article 31(3) of the Constitution. This article states:-

"Marriages shall be entered into with the free consent of the man and the woman intending to marry."

The petition is supported by affidavits of one Felicity Atuki Turner, a founding Director of MIFUMI (U) LTD and those of the other petitioners who give account of horrific experiences they have personally gone through because of the custom of payment of bride price. In order to capture the nature of their complaint, I reproduce in full the affidavit sworn by Felicity Atuki Turner on 5th July 2007 which states as follows:-

"AFFIDAVIT

I, FELICITY ATUKI TURNER of P O Box 274 Tororo make solemn oath and state as follows:-

1. THAT I am a founding Director of MIFUMI (U), a non-governmental organization and women's rights agency and the 1st petitioner herein and I swear this affidavit in that capacity.

2. THAT MIFUMI (U) was registered in 1997 as a non-governmental company under the Non-governmental Registration Statute 1989, with registration no 2032 and on 14th June 2006 it was incorporated as a company limited by guarantee without a share capital, registration No.80828.

3. THAT MIFUMI (U)'s overall mission is to work with rural people to fight the burden of poverty and in particular to protect women from violence and oppression and remove barriers towards their upward mobility, equality and equity.

4. THAT the 1st petitioner institutes this petition in public interest and to uphold and defend the constitution.

5. THAT I believe that all people are born equal and women should be accorded equal status with men both in law and in practice.

6. THAT MIFUMI (U) has been working to protect rural women from domestic violence since 1999 through free advice centers in Tororo District, offering support and legal services to indigent women and through collaboration with women's organizations in Tororo, Iganga, Busoga, Mbale, Soroti, Karamoja, Lira and Gulu amongst others.

7. THAT in the course of my work I have gained in-depth knowledge and understanding on the subject of bride price and verily believe that it has a negative impact on the status of women.

8. THAT MIFUMI's work with women and research revealed bride price as a major contributing factor to violence and abuse of women and that a common resort from men beating heir wives is "I am beating my cows, so it is none of your business."

9. THAT I verily believe that the payment of bride price renders the notion that a man has purchased his wife's labour, reproductive capacity and perpetual obedience which is a violation of the right to equality and non discrimination on the basis of sex.

10. That the Bukedi Bye-law on Bride Price (Laws of Uganda, 1964, revised) was enacted in an attempt to standardize the amounts of bride price demanded which had gone to high levels against increasing poverty in the then Bukedi district (Tororo, Pallisa, Busia, Butalega and Budaka), however this provision is till to high for most people therefore the State is helping in keeping alive laws that are to the detriment of women and poor people.

11. THAT I have come across several cases of women who are forced to remain in abusive relationships because they cannot afford to refund bride price which is required at the dissolution of marriage and have in some cases attempted to commit suicide rather than continue to endue the hardship, or been killed by their partners for failing to refund and that I verily believe this practice to be a violation of Art 24 of the constitution which prohibits cruel and degrading treatment.

12. THAT bride price has increasingly become a tool of oppression of women because it turns them into a possession equated to a price and in rural areas where the poverty levels are high the practice has increasing increasingly become commercialized in nature with the parents of girl or woman extracting as much as they can from the prospective groom.

13. THAT payment of bride price reduces women to the status of chattel or property and exposes them to all sorts of abuse, widow inheritance and the risk of HIV infection.

14. THAT in the course of my work I have come across several cases of corpses of women being denied burial unless the payment of bride price is complete which practice I verily believe to be a customary practice repugnant to natural justice equity and good conscience and incompatible with the Constitution and therefore not enforceable by the courts under S.15 of the Judicature Act (Cap 13) and that I verily believe this practice to be a violation of Art 24 of the Constitution which prohibits cruel and degrading treatment.

15. THAT in the course of my work I have come across several cases where young people cannot marry partners of their choice because they cannot afford

the bride price demanded and verily believe that this practice denies the right of marriage to one's choice and is therefore unconstitutional.

16. THAT I verily believe that due to the prospects of bride price, parents view their daughters as a source of income whereupon they are removed from school and forced into early marriages of serial marriages, that is if the first groom fails to pay the bride price, they are removed and married a second, third or even fourth time and that some are used as stakes to borrow money.

17. THAT the court process is abused through extortionist practice of bride price whereby parents accuse young boys of defilement when cannot afford to pay for bride price.

18. THAT in the course of my work I have come across cases where men have been jailed and their property confiscated, such as iron sheets, land or animals, when their daughters or sisters leave a marriage before refunding the bride price.

19. THAT I verily believe that bride price no longer resembles its original traditional form of being a token gift in marriage but has instead become a commercialized practice with a resulting negative impact on the status of women legally, socially, economically and as a human rights violation.[1]

20. THAT I verily believe that bride price in its present form objectifies and commodifies women and therefore has the effect of perpetuating inequality between the sexes as well as discrimination on the basis of sex and is a violation of the rights of women.

21. That payment of bride price places the women in a vulnerable inferior position and reduces her to a chattel and not equal to her husband which is a violation of Art. 31(1) of the Constitution which provides that "Men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and and at is dissolution."

22. THAT following research into the practice of bride price, MIFUMI held a referendum in Tororo district in December 2001 and won by a 60% YES vote to turn bride price into a non refundable gift.

23. THAT I verily believe that bride price is a custom that is repugnant to equity and good conscience and incompatible with the 1995 Constitution of Uganda that provides for equality under Article 21(1).

24. THAT I verily believe that bride price is incompatible with Art, 33(1) of the Constitution which provides that, "Women shall be accorded full and equal dignity of the person with men."

25. THAT I verily believe that bride price is incompatible with Art 33(6) of the Constitution which provides that "Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution.

26. THAT keeping bride price in its present form has the effect of perpetuating inequality between the sexes as well as discrimination on the basis of sex and is a violation of the rights of women.

27. THAT bride price in its present form does not accord women full and equal dignity with men as required by the Constitution.

28. THAT bride price is a customary practice which is against the dignity, welfare or interest of women and undermines their status in as far as it maintains and entrenches inequality between men and women and discrimination on the basis of sex contrary to the Constitution.

29. THAT I swear this affidavit in support of a Petition for a declaration that the practice of bride price is unconstitutional and a violation of International Human Rights Conventions to which Uganda is a signatory.

30. THAT what is stated herein is true to the best of my knowledge."

There are on record several other affidavits substantiating the complaints raised in Atuki Turner's affidavit. I will here summarise only a few examples:-

(a) Achieng Margaret got married to one Ocheri James. She failed to deliver for him a child. As a result she was constantly being assaulted as being useless because Ocheri had paid bride price of one cow and two goats for which she had given no value. She had to ran from the marriage when she perceived that the man was about to kill her.

(b) Fulimeri Nyayuki and Solomon Oboth. Fulimera got married to Okumu Rechi when she was only 15 years. He paid one cow and two goats as bride price. When she failed to conceive, he started torturing her and she still has scars of her mistreatment inflicted with knives and pangas. She left him and after some years she got married Solomon Oboth. Since her parents had died, Okumu Rechi started demanding a refund of bride price from Solomon Oboth. He caused the arrest of Fulimera and Solomon who stayed in prison for a very long time till relatives assisted him to refund the one cow and two goats to the former husband of his wife.

(c) Jagweri James. He got married to Akello Lillian in 1991 (cohabitation) and they got 3 children. She then died before he paid bride price. Her parents and relatives could not allow him to burry her for over one week till he agreed to pay three cows. He says that because of what happened, he was traumatised, stressed and dehumanized, he did not have the cows but he was forced to look for them even when his wife's body was lying still unburied.

(d) There are many other affidavits on record with stories of how they (women mostly) had been tortured as a result of a husband's belief that since he had paid bride price for his wife, he had the power to own everything in the home, to beat her at will and to sell their small daughters in marriage at will. If a wife resisted such behaviour, she risked being battered, maimed, tortured and killed. Indeed many women have been victims of this kind of treatment almost everywhere in Uganda.

The first petitioner MIFUMI (U) LTD is a Non-governmental organisation based in Tororo Eastern Uganda. Most of the people whose affidavits are on the court record are from Eastern and North Eastern Uganda. However, this court composed of Ugandan who were borne, have lived, worked and practised law in this country during a period of over half a century, should be able to take judicial notice of a notorious fact that the practice of bride price has caused untold suffering to thousands of women throughout Uganda just like their counterparts in Eastern and North Eastern Uganda. Some of us have witnessed even worse experiences than the witnesses from Tororo. The accumulated effect of all these affidavit evidence is to corroborate the affidavit sworn by Felicity Atuki Turner whose affidavit was reproduced in full above. The respondents have not rebutted or even attempted to rebut the account of these humiliating experiences that woman have to endure because their parents sold them for cows and are waiting to reclaim the same cows when their perceived usefulness comes to the end.

What remains now is to determine whether the effects of the practice of bride price collection violates the Constitution of Uganda. Article 33(1) provides that women should be accorded full and equal dignity of the person with men. Yet under the custom of bride price, women are not treated as human being but as chattels. They are priced so low that they are exchanged for a cow or a few cows, a pig or a few pigs or a goat or a few goats. Their price is fixed without reference to them. Many young men cannot marry because they have no property to pay for young women. A young woman is not at liberty to choose a man of her heart because if he has no property, she has no chance to marry him. Marriage is not an exercise of free consent as required by article 31(3) of the Constitution. Bride price helps to perpetuate a belief in society that a man is superior to a woman, that once he buys a woman, he can batter her, humiliate her and treat her as he likes.

In my humble judgment I would hold that the custom of paying bride price in a customary marriage is repugnant to good conscience and contravenes article 31(3) and 33(1) of the Constitution. It is high time that the custom is abolished and the woman should be set free.

ISSUES NO.2 & 3.

I will treat the remaining two issues together. They are whether bride price perpetuates conditions of inequality contrary to article 21(1) and (2).

The third issue is whether refund of bride price as a condition precedent to dissolution of marriage fetters free consent in marriage provided for in article 31(3) of the Constitution. While discussing issue No. One above I generally pointed out the effect of the custom of bride price on women. I pointed out that it perpetuates the perception that a woman is inferior to a man. So I would answer the second issue in the affirmative.

The requirement that bride price must be refunded is in my view the worst aspect of the bride price regime. Whenever bride price is paid in money or animals, it is not kept in banks or kraals to await the event that the marriage may fail so that a refund of the bride price can be made. In majority of cases the money is used by the parents of the bride to pay school fees, to pay bride price for the brothers of the bride, to improve their living standards and in some cases, the father of the bride might marry another wife and use the property as bride price.

So, the properties so paid never remain intact. This can produce the following consequences to the woman for whom the bride price was paid:-

(a) The woman will tend to stay in abusive marriage for fear that if she leaves, she will be condemned by her relatives as they have no money or cows to refund the bride price.

(b) Women stay in abusive marriages even when they are battered and tortured and some are killed by their husbands in the process.

(c) Women can be exploited for decades after which their husbands divorce them merely because they want to recover bride price and marry younger women. The woman is chased from her home and children when she can no longer get married and has no where to go. For the service she has rendered to her husband for so long, she leaves with nothing.

(d) In many cultures, the husband can still get back the bride price even when he was the one responsible for the breakdown of the marriages. This encourages some men to marry and divorce indiscriminately which leaves a lot of desperate and helpless women in society which provides a bleeding ground for prostitution.

In my judgment, the practice of bride price violates all the constitutional provisions which were enacted to give protection to women including articles 21, 24, 31, 32(2) and 33 of the Constitution. Yet the practice no longer serves any useful purpose in society. It has now become purely commercialised and highly exploitative and humiliating to women. I support the emerging practice where before, during or after the wedding of couples, the groom with the help of parents, relatives and friends gives to the parents of the bride whatever ex-gratia payment (Kasiimo) they may wish to give to thank them as appreciation for bring up his bride. It is voluntary, it is not demanded, there is no haggling, it does not humiliate the bride and it is never refunded when the marriage breaks down.

In the result, I would allow this petition and make the following declarations:-

(1) The practice of demanding and payment of bride price as a requirement for the recognition of a valid customary marriage is unconstitutional and violates articles 31(1)(b), 31(3), 32(2) and 33(1) of the Constitution.

(2) The demand for refund of bride price as a condition precedent to the dissolution of customary marriage contravenes articles 31(3)and 32(2) of the Constitution and is null and void.

(3) The demand and payment of bride price dehumanises the woman in a marriage as it portrays her as a chattel that can be sold in market and subjects her to potential humiliation, cruel, torture and degrading treatment in contravention of articles 24, 31(1)and 32(2) of the Constitution.

(4) The regime of bride price subjects a woman to slavery and servitude when it makes it impossible for her to move out of an abusive marriage long after it has irretrievably broken down. This is contravention of articles 25 and 44(b) of the Constitution.

(5) Each party to this petition will bear its own costs.

Dated at Kampala this……**26th** ……day of….**March**…….2010.

Hon. Justice A. Twinomujuni

JUSTICE OF APPEAL.

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[1]The Bukedi by-law states that; "The maximum bride price which may be paid or demanded shall be five head of cattle, five goats and twenty shillings." A person receiving or demanding bride price in excess of this commits an offence and is liable to a fine not exceeding one hundred and fifty shillings."