

5
REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE; JJ.S.C
ODOKI; TSEKOOKO; OKELLO; KITUMBA; AG. JJ.S.C.)

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CONSTITUTIONAL APPEAL NO: 02 OF 2014

BETWEEN

15
MIFUMI (U) LTD & ORS :::::::::::::::::::::::::::::: APPELLANTS

AND

1. ATTORNEY GENERAL

2. KENNETH KAKURU ::::::::::::::::::::::::::::::RESPONDENTS

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[Appeal from the judgment of the Constitutional Court sitting at Kampala
delivered on 20th March 2010. (Mukasa- Kikonyogo, D.CJ, Mpagi-Bahigeine,
Twinomujuni, Byamugisha and Kavuma, JJA) in Constitutional Petition No. 12
of 2007]

25
JUDGMENT OF TUMWESIGYE, JSC

30 MIFUMI (U) Ltd and 12 others petitioned the Constitutional Court
asking the court to declare the marriage custom and practice of
demanding bride price, and its refund in case the marriage
breaks down, unconstitutional. By a majority of 4 to 1 the
Constitutional Court dismissed the petition, hence this appeal.

Background to the appeal

MIFUMI (U) Ltd, a Non-Governmental Organization and a women's rights agency operating in eastern Uganda, and 12 people petitioned the Constitutional Court under Articles 2(1) (2), 137(3) and 93(a) and (d) of the Constitution of Uganda and rule 3 of the Constitutional Court (Petitions and references) Rules (S.1. 91/2005) challenging the constitutionality of the custom of paying bride price as a precondition to contracting a valid customary marriage. They also challenged the constitutionality of demanding refund of bride price as an essential pre-requisite for the valid dissolution of a customary marriage.

It was the appellants' contention that the custom of bride price which is practiced by several ethnic groups in Uganda offends Article 31(3) of the Constitution. That Article provides that marriage shall be entered into with the free consent of a man and a woman intending to marry. The appellants' claim was that the demand of bride price by a third party interferes with the free consent guaranteed by the Constitution.

It was also their contention that the payment of bride price by men leads them to treat their wives as mere possessions. This, they claimed, perpetuates inequality between men and women which is prohibited by Article 21(1), and (2) of the Constitution.

5 The petitioners further contended that the demand for bride price by parents of a young woman to be married portrays her as an article in a market for sale, and amounts to degrading treatment which is prohibited by Article 24 of the Constitution. They thus prayed the Constitutional Court to declare the custom and
10 practice of demanding and paying, and also of demanding refund of bride price at the dissolution of customary marriage, unconstitutional.

The petition was supported by several affidavits including that of
15 Felicity Atuki Turner, the Director of MIFUMI (U) Ltd.

The Attorney General and Mr. Kenneth Kakuru, first and second respondents respectively, opposed the petition. They denied that the custom and practice of paying bride price and its refund for
20 the dissolution of the marriage was unconstitutional. The respondents argued that the custom is protected by Article 37 of the Constitution which accords all Ugandans the right to enjoy and practice their culture.

25 They further argued that the law in Uganda recognizes several other forms of marriage such as civil marriage under the Marriage Act and church marriage under the Marriage of Africans Act which are alternatives to customary marriage and if parties to the marriage decide to contract a customary marriage in lieu of other

5 alternatives, it is their choice to be bound by the requirements of the custom.

The Constitutional Court, with one member of the court, Justice Twinomujuni, JA, (RIP) dissenting, dismissed the petition, holding
10 that the marriage custom and practice of paying bride price, and demanding refund of the same, were not unconstitutional. Dissatisfied with the decision, the appellants lodged this appeal.

Grounds of Appeal

15 The appellants filed 12 grounds of appeal which their counsel combined into four broad groups in his written submissions. Ground 1, 2 and 3 were to the effect that the learned Justices of the Constitutional Court erred in law and fact when they declined to make a finding that custom of paying bride price and its refund
20 at its dissolution, is so notorious that the court should have taken judicial notice of it.

Grounds 4, 5, 6 and 7 were to the effect that the learned Justices of the Constitutional Court erred in law when they failed to make
25 a declaration that the demand for, and payment of, bride price fetters the free consent of persons intending to marry or leave a marriage in violation of Article 31(3) of the Constitution.

Grounds 8 and 9 were to the effect that the learned Justices of
30 the Constitutional Court erred in law when they declined to

5 declare the demand for a refund of bride price unconstitutional, despite their finding as a matter of fact and law, that the practice undermines the dignity of a woman contrary to Article 33(6) of the Constitution, and may lead to domestic violence.

10 The last ground which is ground 12 is that the learned Justices of the Constitutional Court erred in law when they declined to make declaratory orders under Article 137(3)(a) and (4) of the Constitution and decided that aggrieved parties may file a suit in the High Court under Article 50(1), despite their finding that a
15 demand for a refund of bride price was inconsistent with Article 31(1) and 33(6) of the Constitution.

The appellants prayed that the court finds that the custom of paying bride price is judicially noticed and is commonly practiced
20 in Uganda by all cultures. They also prayed for declarations that the custom and practice of demanding and paying bride price as a necessary condition for a valid customary marriage is unconstitutional, and equally that the custom of demanding for refund of bride price as a condition for the valid dissolution of
25 customary marriage is unconstitutional.

Mr. Ladislaus Rwakafuuzi and Mr. Emmanuel Ocheng represented the appellants while Ms. Patricia Muteesi, Principal State Attorney, and Ms. Sarah Naigaga represented the 1st and 2nd
30 respondents respectively. Counsel for the appellants and counsel

5 for the 1st respondent and the 2nd respondent himself filed written submissions.

The use of the term “Bride Price”.

10 Before going into the issues pertaining to this appeal, I consider it necessary to first comment on the common use of the term “bride price” to denote the property which is given by the groom’s parents to the bride’s parents in customary marriage. This is the term used throughout the appellants’ documents which they filed in the Constitutional Court and this court. The term is also
15 maintained in the appellants’ counsel’s submissions. The 1st respondent’s counsel also maintained the use of the same term in her court documents and written submissions.

The 2nd respondent, however, objected to the use of the term. He
20 argued that the term was not appropriate as there was no sale or purchase of a bride in customary marriages in Uganda. He stated that the term “*enjugano*” which is used in Runyankole to denote the property that a groom gives to the parents of the young woman in marriage has no English equivalent.

25 In their judgments both Justice Mpagi-Bahigeine (JA) (as she then was) and Justice Kavuma (JA) (as he then was) objected to the use of the term. They were of the view that the term “bride price” was coined by colonialists because of their failure to

5 appreciate the African customary marriage and the significance of its cultural rites.

I respectfully agree with those who object to the use of the term “bride price” to describe the property that is given by the groom’s
10 parents to the bride’s parents. The use of the word “pay” is equally wrong. There is no market in Uganda or Africa for that matter where brides are purchased. Property may be demanded by the bride’s kin and given by the groom’s parents in customary marriage, but it is wrong to call this a “price” for a bride.

15 During British colonial administration in Africa, customary marriage was not fully recognised as marriage. This was for two reasons: their objection to polygamy and “bride price”. Chief Justice Sir Robert Hamilton in **Rex v. Amkeyo**, 7 E.A.L.R. (1917)
20 stated: **“I know no word that correctly describes it [customary marriage]; ‘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 position was maintained for many years during colonial rule.

25 The idea that customary marriage is “wife purchase” is promoted by the continued inappropriate use of the term “bride price”. Dr. Yusufu Mpairwe is right in his affidavit in support of the 2nd respondent’s answer to the petition when he states in paragraph
30 4:

5 ***“(a) No bride is offered for sale and no bride is sold or bought***

(b) No one gives up one’s daughter. One’s daughter remains one’s daughter; she merely acquires a new status of a wife.”

10
Many writers on African customary marriage and some judgments have avoided using the term “bride price” because of its inappropriateness. For example, Justice Kavuma in his judgment preferred to call it “bride wealth.” Others have used terms such as
15 “dowry”, “marriage payment”, marriage consideration” and Uganda Law Reform Commission in its ***“Study Report on Marriage and Divorce in Uganda”***, Publication No. 2, 2000 used the term “Marriage gifts”.

20 This notwithstanding, I will use the term “bride price” in this judgment since court documents in the record of appeal and submissions of counsel used it. Introducing a new term at this stage, I believe, is bound to lead to difficulties and confusion
when referring to statements contained in the record. My use of
25 the term “bride price” should, however, not be interpreted to mean that I condone its continued use.

Consideration of the issues

30 **1. Grounds 1, 2 and 3: Whether the Constitutional Court erred by declining to take judicial notice of the custom**

5 **of bride price in customary marriage and its refund when**
the marriage breaks down.

10 Learned counsel for the appellants argued that the
Constitutional Court erred when it declined to take judicial
notice of the custom of bride price. He contended that the
court should have taken judicial notice of the custom of
15 bride price because firstly, various ordinances and
regulations have been passed by a number of districts in
Uganda concerning the custom of paying bride price. He
cited the Local Government (Tororo District) (Regulation of
the Exchange of Bridal Gifts) Ordinance 4 of 2009, The Teso
20 Birth, Marriages and Death Law, Legal Notice No. 252 of
1959, The Bugishu Bride Price Law, Legal Notice No. 176 of
1960 and the Sebei Bridal Law, Legal Notice No. 176 of
1960 as examples.

25 Secondly, he argued that the courts themselves have taken
judicial notice of the custom of paying bride price. He cited
cases such as **Aggrey Owori vs. Rosette Tagire** HCCS No.
178/2000, in which it was held that no customary marriage
is valid unless bride price is paid and **Nemezio Ayiiya Pet**
vs. Sabina Onzia Ayiiya HCCS No. 8/1973, where the court
took judicial notice of the Lugbara custom that instalments
of bride price were not fixed in terms of payment. He also
mentioned the case of **Wango vs. Dominiko Manano** (1958)

5 E.A. 124 in which the court took judicial notice of the custom of paying bride price in the West Nile District.

10 Counsel faulted the Constitutional Court for disregarding the affidavits on record which according to him clearly illustrated the existence of the custom and practice of demanding and paying bride price, and its refund where the marriage has broken down. The learned Justices of the Constitutional Court should not have disregarded the affidavits without stating valid reasons for not doing so, he
15 submitted.

Learned counsel for the 1st respondent, in her submissions, conceded that paying of bride price and its refund in case of its dissolution were a notorious custom in Uganda and that
20 courts have taken judicial notice of it without the requirement for its further proof.

In his written submissions, however, the 2nd respondent strongly disagreed and argued that the custom of paying bride price and its refund had to be proved by evidence
25 because the practice is different in different cultures of Uganda. He objected to the appellants' counsel's introduction of new evidence or information that was not presented at the hearing of the petition in the Constitutional
30 Court. He argued that the ordinances, subsidiary legislation

5 and cases cited by the appellants' counsel did not apply to all cultures in Uganda, and that customs and cultures were specific to a particular ethnic group and that they were not uniform to the whole country.

10 He agreed with what Justice Mpagi - Bahigeine, JA, stated in her judgment, that the custom of paying bride price has to be proved first since it keeps changing with time. He submitted that Section 15 of the Judicature Act permits the courts to apply, and any person to benefit from, a custom
15 unless the custom has been declared to be repugnant to natural justice, equity and good conscience, and not incompatible with any written law.

20 He contended further that although many affidavits were sworn alleging that women were suffering on account of payment of bride price by men, there was no single affidavit which was filed to prove the custom. Therefore, in his view, the custom was not proved in accordance with the law of evidence.

25 All Justices of the Constitutional Court wrote separate judgments though it was Deputy Chief Justice Mukasa-Kikonyogo (as she was then) who wrote the lead judgment. In her judgment, she stated that the practice of bride price
30 being customary was unwritten and diffuse and not easy to

5 ascertain. She did not agree that the custom was notorious
enough for the courts to take judicial notice of it.

Justice Mpagi –Bahigeine, JA (as she then was) stated in her
judgment that judges must reach a decision to accept a
10 custom on legal evidence and cannot import knowledge from
other sources, and that, therefore, the custom of paying
bride price has to be proved first since it keeps changing
with time. She stated further, that Uganda has diverse
ethnic groups and each group subscribes to its own culture
15 different from that of the others.

Justice Twinimujuni, JA (RIP), on the other hand, did not
expressly state in his judgment whether the custom of
paying bride price was judicially noticed or not. But by
20 implication, it is clear that he acknowledged that the custom
was common in Uganda and Africa as a whole. He described
bride price as property or money which a man has to pay in
order to get a bride. In most African customary marriages,
he stated, a man has to pay money or property (cows, pigs,
25 goats, e.t.c.) specified and demanded by the relatives of the
bride in order to marry.

Justice Byamugisha, JA, (RIP), did not either expressly or by
implication address the issue as to whether or not the
30 custom of paying bride price was judicially noticed. She

5 seems to have confined herself to the position that
customary marriage and the rites that go with it are
protected by the Constitution and should not be abolished
without the consent of the people it affects. The import of
her judgment, however, clearly shows that she acknowledges
10 the existence of the custom.

Justice Kavuma, JA, discussed the issue at great length in
his judgment. He stated that European judges who manned
the courts during the colonial administration required
15 African customs to be strictly proved in court because they
were strangers and ignorant of African culture and customs.
He stated that Kenya and Tanzania had passed legislation
which no longer requires strict proof of African customs in
court. He mentioned Tanganyika Local Courts Ordinance,
20 1961, and Section 60(a) of Kenya Evidence Act in this
regard.

That aside, Justice Kavuma, JA, was of the view that the
custom and practice of bride price in customary marriage
25 has been recognized in subsidiary legislations and
ordinances in several districts of Uganda, and in court
decisions. His conclusion was that the custom of bride price
in customary marriage in Uganda is so well known and
established that it requires no formal proof in court.

5 Having considered the different judgments of the learned
Justices of the Constitutional Court, it is not correct, in my
view, to state, as the appellants did in their grounds of
appeal, that the Constitutional Court declined to take
10 judicial notice of the custom and practice of bride price in
customary marriage. While it is true that Deputy Chief
Justice Mukasa - Kikonyogo and Justice Mpagi - Bahigeine
expressly stated in their respective judgments that the
custom of bride price was not notorious enough for the court
to take judicial notice of it, their opinion does not seem to
15 have been shared by other Justices of the Constitutional
Court. Three Justices out of five acknowledged, expressly or
by implication, the existence of the custom.

20 Interestingly, even the two Justices who clearly stated that
they declined to take judicial notice of the custom appear in
their judgments to have implicitly recognized the existence of
the custom. Deputy Chief Justice Mukasa- Kikonyogo held
thus in her judgment:

25 **“In my opinion, therefore, the 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
legal customary marriage, is not barred by the
30 Constitution. It is not *per se* unconstitutional. The**

5 **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 choose the
bride price option...”**

10 Justice Mpagi – Bahigeine also stated in her judgment as follows:

15 **“I agree ... that the term ‘bride price’ is a misnomer
coined by colonialists who did not appreciate the
meaning and significance of certain cultural rights
and ceremonies which include the exchange of
intrinsically unique gifts which are merely symbolic
as a sine qua non of a marriage. These are a form of
appreciation to the bride’s parents/guardians for
her nurturing and upbringing... this valued
20 customary practice should be clearly distinguished
from what is obtaining these days...”**

25 These statements, to me, clearly show that the two learned Justices acknowledged the existence of the custom of bride price in customary marriage. They knew what bride price consisted of, to whom it was paid and the reasons behind its payment. They did not dismiss the petition because the appellants failed to prove the custom. Instead they

5 dismissed it because, in their view, it did not violate any provisions of the Constitution.

10 Be that as it may, since the appellants made the issue of the Constitutional Court allegedly declining to take judicial notice of the custom and practice of bride price in customary marriage one of their grounds of appeal, I will proceed to consider it. I will start by considering the objection raised by the 2nd respondent in his written submissions that the subsidiary legislation and case law cited by the appellants' 15 counsel were new evidence and information that was not presented at the hearing of the petition, and should not be considered in the appeal. He cited **Tanganyika Farmers vs. Unyamwezi** (1960) EA 620 where the court held that an appeal court has discretion to allow a new point to be taken 20 on appeal, but it will permit such a course only when it is assured that full justice can be done to the parties.

25 He also cited the Privy Council decision in **United Marketing Co. Ltd Vs. Hasham Kara** (1963) EA 276 where Lord Hodson stated: "Their Lordships would not depart from their practice of refusing to allow a point not taken before to be argued unless satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new 30 plea."

The 2nd respondent is obviously not right in his argument against the presentation of subsidiary legislation, ordinance and case law cited by counsel for the appellants in his written submissions. It may be true that what counsel presented was new since they were not included in his arguments before the Constitutional Court. However, subsidiary legislation, ordinance and case law is not evidence but law. Law unlike new evidence, even if not presented at the trial court, can be presented at the appeal stage to help court come to a proper decision. For fair hearing, what an appellate court should be mindful of is that the opposing party should have had an opportunity to obtain the authorities presented to court in a reasonable time to enable him prepare his case. This is not a complaint that the 2nd respondent is raising, for he was given sufficient time to read the appellants' counsel's written submissions before preparing his own written submissions.

Secondly, the subsidiary legislation, ordinance and case law are all contained in Justice Kavuma's judgment. A judge will always consider legal authorities cited by counsel apart from authorities he or she may obtain through his or her own research to enable him or her come to a proper and just decision.

5 Thirdly, while this court will strive to be fair to both parties
by applying rules of evidence and procedure, it must always
be guided by Article 126(2)(e) of the Constitution which
enjoins the courts to administer substantive justice without
undue regard to technicalities. This is all the more important
10 in constitutional matters where the decision of a court is not
merely confined to the litigants' interests but has immediate
implications for the whole population.

The 2nd respondent also argued that the subsidiary
15 legislation, ordinance and case law cited, and even affidavits
sworn by the petitioners, mainly originate from the eastern
region of Uganda and do not apply to all cultures in Uganda.
It was also the 2nd respondent's argument that bride price
cannot be given a uniform interpretation because the
20 practice is different in different cultures in Uganda and
hence courts cannot take judicial notice of it.

It is true that there was a preponderance of subsidiary
legislation from the eastern part of the country which can be
25 explained by the fact that MIFUMI (U) Ltd, the 1st appellant,
operates mainly in Eastern Uganda. But decided cases
which were cited by the appellants' counsel and by Justice
Kavuma, JA, in his judgment, are not confined to the
eastern region. Some of them like Nemezio Ayiia Pet vs.
30 Sabina Onzia (supra) and Wango vs. Dominiko Manano

5 (supra), originated from north-west Uganda, while others
such as Peteconia Mpiriirwe vs. Oliver Ninsabimaana,
HCCS No. MKA 5 of 1990 and Florence Kantungo vs.
10 Yolamu Katuramu, Civil Suit No. MFP 6 of 1991, originated
from western Uganda. Therefore, the custom of bride price is
not confined to eastern Uganda alone but it is a Ugandan
custom, found and practiced in many communities.

Justice Twinomujuni, JA, stated in his judgment that the
courts composed of Ugandans who were educated, born,
15 live, worked and practiced law in this country for a long time
should be able to take judicial notice of a notorious fact.
Justice Kavuma also cited Halsbury's Laws of England, 3rd
Edition, Vol. 15, where it is stated:

20 **“Judicial notice is taken of facts which are familiar
to any judicial tribunal by virtue of their universal
notoriety or regular occurrence 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
25 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 to natural phenomenon”**

5

I entirely agree with both statements of the learned Justices of the Constitutional Court. In my view, the custom of bride price in Uganda is so notorious that judges by their regular interaction or even through their personal life experiences should take judicial notice of it. It is not necessary to require that the custom should be formally proved in court in order for the court to know it exists and therefore, with respect, the two learned Justices of the Constitutional Court erred to decline to take judicial notice of it.

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It is true that bride price is not uniform among all ethnic groups in Uganda. It takes different forms depending on the livelihood of the ethnic group concerned. In Uganda, for example, there are cattle keeping communities and, for want of a better term, agriculturalists. Cattle keepers will demand cattle as their form of bride price, whereas agriculturalist like the Baganda will emphasize other forms.

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The Uganda Law Reform Commission Report (earlier referred to) p. 72, states that bride price varies from tribe to tribe, clan to clan and family to family depending on one's economic status. That in Ankole, opinion leaders estimated it to consist, on average, of four heifers and some goats, and in Teso the number of cows used to range from 18-25 but after insurgency it stands at 2-7 heads of cattle and cash money. The report goes on to say that in Buganda, the

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5 mandatory items are kanzu (long white tunic for men) for the
father-in-law, gomesi (dress) for mother-in-law, mwenge
bigele (local brew), a cock which is given to the brother-in-
law and “mutwalo” (a specified sum of money). Other writers
such as Dr. Peter Atekyereza in his Article “**Bride Wealth in**
10 **Uganda: A Reality of Contradictions**” The Uganda Journal,
November 2001, include meat or a cow among items in the
bride price of the Baganda.

The point in this appeal and in the petition, however, is not
15 about the different forms or even rituals that bride price
takes. It is that bride price as practiced by different ethnic
groups in Uganda is unconstitutional because it denies
women their constitutional rights. To the appellants, the
form may differ but the essence of the custom remains the
20 same. Therefore, the issue of bride price has to be
considered in its generic form and not in its particularized
form.

25 **2. Grounds 4, 5, 6 and 7: (a) Whether bride price promotes
inequality in marriage.**

Learned counsel for the appellants submitted that the bride
price “agreement” violates Article 21(1) (2) and (3) of the
Constitution which provides for equality of persons. He
30 argued that in so far as bride price is paid only by the groom

5 and not the bride, inequality is thereby established in the marriage.

10 Before the Constitutional Court, counsel for the petitioners had argued that the payment of bride price by the groom introduces inequality in marriage and makes men treat their wives as mere possessions; and that that was why women's rights in marriage were constantly violated by men, including infliction of violence and abuse on women.

15 He, therefore, requested this court to declare that the custom and practice of demand for bride price as a condition precedent to a valid customary marriage promotes inequality in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution.

20 Counsel complained in his written submissions that although the issue of bride price violating women's constitutional right to equality under Article 21 was canvassed, the Constitutional Court did not make any finding on it in their lead judgment.

25 I agree that the Constitutional Court did not make any finding on it. It should have made a specific finding one way or the other on the issue of whether bride price results in violation of equality guaranteed by Article 21 of the

5 Constitution since it was included not only in the appellants' petition but also in the submissions of the appellants' counsel before the Constitutional Court.

10 Many affidavits were sworn in support of the petition to show how payment of bride price by men resulted in unequal relationship between men and their wives and the immense suffering the women have experienced at the hands of their husbands. Out of several affidavits that were sworn, I will only mention that of Fulimera Abbo, Abbo
15 Florence and Felicity Atuki Turner.

Fulimera Abbo was 15 years old when she got married. She started by cohabiting with her husband-to-be. Her brothers demanded bride price from her husband who grudgingly
20 gave them two cows. Then he started mistreating her, calling her stupid and telling her that she came from poor parents and how she was of no value to him.

Her husband never stopped mistreating her and beating her.
25 He refused to provide for the family claiming that he did not have money since her relatives made him poor. Her husband later married another wife. She believes she was mistreated because of bride price, and that if her brothers had not demanded bride price, she would have left the marriage and
30 led a better life.

Abbo Florence averred in her affidavit that she got married to Opudi Paul. Within the first week after giving birth to her first child, her husband wanted her to resume work in the garden. When she refused, her husband beat her. One day her child got sick when her husband was away. She sold cassava to get money to take the child to hospital. When her husband returned, he beat her because of selling cassava without his permission.

In 2004, her husband abused her and beat her so much that she tried to commit suicide by taking poison. She returned to her parents' home to recover but after her recovery her father forced her to go back to her marital home because he feared that her husband would ask him to refund the bride price.

Her husband never ceased to beat her. She left and went back to her parents' home and later decided to go to Busoga. Her husband followed her there and beat her badly. She sustained severe injuries on her head and became unconscious. Her husband left Busoga and went to her parents home where he took away all her clothes.

After her father's death, whenever she tried to go back to her parent's home, her uncles would tell her that she did not

5 have land there, and she should go back to her husband's
home and to her children. She reported this matter to
Mifumi Project and Mifumi, with the help of the Community
Liaison Officer of Tororo Police Station, took the matter to
10 clan leaders who allowed her to live at her father's home but
not to build on their land because a woman once married
cannot have a share of land at her parent's home. She
attributes her suffering to bride price.

The affidavit of Felicity Atuki Turner, founding Director of
15 the 1st appellant, states, among others, that Mifumi (U) Ltd
has been working to protect women from domestic violence
through three Advice Centres in Tororo District, offering
support and legal services to indigent women and through
collaboration with women's organizations in Tororo, Iganga,
20 Busoga, Mbale, Soroti, Karamoja, Lira and Gulu.

That in the course of her work, she has gained in-depth
knowledge and understanding on the subject of bride price
and she believes it has a negative impact on the status of
25 women. That Mifumi's work with women and research
revealed bride price as a major contributing factor to
violence and abuse of women. That she believes that
payment of bride price gives a man an idea that he has
purchased his wife's labour, reproductive capacity and

5 perpetual obedience which is a violation of the right to
equality and non-discrimination on the basis of sex.

To answer the affidavits in support of the petition on the
issue of bride price causing inequality and violence against
10 women, counsel for 1st respondent stated in her answer to
the petition that the payment of bride price does not
contravene Article 21 (1) and (2) of the Constitution and that
the custom does not lead men to treat their wives as mere
possessions. That the abuse of a custom by individual
15 persons does not prejudice its noble aim, and people who
appreciate its noble aim should not be denied their
constitutional right to practice customary marriage. That
bride price is intended to show appreciation to the parents of
the bride for taking good care of her.

20 Dr. Yusuf Mpairwe who deponed in support of the 2nd
respondent's answer to the petition stated that the
petitioners' claim that bride price contributes to violence and
abuse of women was unsubstantiated. He cited a paper
25 "*Domestic Violence in Developing countries. An
intergenerational Crisis*" by Robert Lalasc, published on the
internet in 2004, which shows that domestic violence is a
worldwide problem and it does not mention bride price as a
contributing factor. That the claim that bride price promotes

5 suicide among women is false as most recent figures published by WHO in 2003 on suicide did not show this.

There is no doubt that inequality and its attendant issues of violence and abuse of women is common in customary marriage as well as in other forms of marriage. As Professor Lilian Tibatemwa-Ekirikubinza (as she then was) in her book: "*Women's Violent Crime in Uganda*" 1999 Fountain Publishers, p. 51, observed:

15 **"It is now widely acknowledged, in almost all societies in the world, that domestic violence is widespread among spouses of all social and economic backgrounds and very often it takes the form of wife battery. Women, in almost all the world societies, are regularly beaten, tortured and, in some cases, even killed by their spouses or cohabitants. This then implies that wife battery is not reducible to the Uganda or, indeed, any single culture but is rather an issue of male-female domination."**

25 I may add that inequality and wife battery in Uganda is not peculiar to the custom of bride price either. On p. 205 of Uganda Law Reform Commission Report (earlier referred to) quoting the *Tribune*, 1991 and *Americas Watch*, 1991, it is written:

30

5 **“At the International level, the statistics on domestic violence from different countries continue to be alarming. For example, in South Africa, one out of every six women is assaulted by her mate. In Pakistan, 99% of housewives and 77%**
10 **of working women are beaten by their husbands. In Brazil, 70% of all reported incidents of violence against women take place in a home. In Tanzania, six out of 10 women in Dar es Salaam have experienced physical abuse from their partners. In**
15 **USA, a woman is beaten every 15 seconds. In Lusaka, Zambia, women aged between 20 and 40 years admitted being regularly beaten by their partners.”**

20 Inequality of men over women is not just about who possesses more physical strength. Male domination is rooted in the culture, tradition and custom of most societies the world over. To quote Professor Tibatemwa-Ekirikubinza again from the same publication, p.77:

25 **“In Uganda society, men have higher status than women by virtue of being male and consequently husbands are, to paraphrase Mushanga (1974:48), given absolute superiority over their wives in all family matters. As Gilles (1983:158) has pointed**
30 **out, a woman who questions her husband’s**

5 **authority takes a risk of being subject to physical
violence, since patriarchy does not only demand
that power be vested in men to dominate and
control others (women) but also allows men to use
whatever means (violence) necessary to maintain
10 their authority.”**

Uganda Law Reform Commission Report mentioned earlier,
p. 201 lists causes of domestic violence to include: mutual
misunderstandings, economic difficulties, jealousy,
15 disrespect, break down of communication between
partners, sex denial, unfaithfulness, lazy female partners,
lack of co-operation, claim of equal status, alcoholism, etc.

According to the affidavit sworn by the 2nd respondent there
20 was a referendum organized by Tororo District in 2001 and
attempts to abolish bride price were defeated and a majority
of women voted against it. In his paper entitled “*Bride
Wealth in Uganda: A reality of Contradictions*” referred to
earlier, Dr. Peter R. Atekyereza shows that in a survey
25 carried out on bride price in some districts in Uganda, bride
price was supported by 83% compared to 17% who opposed
it. Male support was 79% while female support was 88%.

Few will doubt that bride price is still popular in Uganda.
30 Nevertheless, justification for the maintenance of a custom

5 cannot be based on its popularity alone. It would still be
unacceptable if it were harmful. For example, an argument
that Female Genital Mutilation (FGM) should be maintained
because of its popularity in communities that practice
cannot justify it. I think, however, that the custom of bride
10 price has good reasons to justify it, though, as I will show
later, it can be abused.

The Constitutional Court considered bride price as a token
of gratitude to the bride's family for the girl's nurturing and
15 upbringing. The 2nd respondent views bride price as gifts
which are reciprocated by the girl's family. In fact in some
communities today, the family of the bride may give back a
lot more property in form of gifts than the bride price it
receives from the groom's side. Bride price, apart from being
20 gifts, has also been said to be good for the stability of the
marriage. Professor Arthur Phillips in "*Marriage Laws in
Africa*", p.7 writes:

**"Thus bride price is variously interpreted as being
primarily in the nature of compensation to the
25 woman's family... as part of a transaction in which
the dominant emphasis is on the formation of an
alliance between two kinship groups; as a species of
'marriage insurance', designed to stabilize the
marriage and/ or to give protection to the wife..."**

5 It is for these reasons that people still value the custom of
bride price.

10 However, it cannot be denied that there are men who view
bride price as consideration for their entitlement to the
woman's labour, obedience, her sexual availability and
15 fertility as Felicity Atuki Turner stated in her affidavit. I
agree that this attitude might contribute to domestic
violence if the man finds that his expectations in the woman
he has married have not been met. This in some cases might
also be promoted by some unsavory features that
15 accompany demand of bride price such as haggling over it. It
is conceivable that tempers which may be lost during the
haggling process can extend to the marriage itself when the
honeymoon is over. This attitude lends credence to the view
that bride price is nothing more than wife purchase.

20 Commercialization of bride price which is mentioned in some
of the affidavits in support of the petition, and decried by
Justice Mpagi-Bahigeine in her judgment, has also served to
undermine respect for the custom. In his book "*Obushwere*
25 *n'Amagara Gaabwo*" translated as "Marriage and Life in It"
in English, Fountain Publishers Ltd, 1996, authored by the
late Bishop Amos Betungura (written in
Runyankole/Rukiga), he writes (as translated in English) on
page 22 as follows:

5

“Our fore fathers started the custom of bride price because it gave honour to the girl. Bride price cows were named after her. It gave respect to the woman where she was married. These days, however, this good custom is being debased by some parents who make it appear like they are selling their daughters. They think bride price is intended to make them rich. Where bride price used to be one heifer and one bull, or two heifers, some parents start haggling from 12 cows and only stop at 10 or 8 cows!”

10

15

He goes on to show how some young men are failing to marry girls of their love because of the high bride price demanded by their parents.

20

I, however, agree with the 2nd respondent when he states in his affidavit that there are many more husbands who give bride price but who do not use it as a justification for inflicting violence and abuse on their wives. Therefore, while acknowledging that there may be some husbands who might use it as a justification to batter and abuse their wives, often used more as a pretext than the actual reason, this cannot constitute sufficient justification for denying the enjoyment and practice of the custom to people who cherish it as is provided for under Article 37 of the Constitution. In any case the burden was on the appellants to show that bride price

25

30

5 contributes to domestic violence against women in all ethnic groups that practice it, and they did not discharge this burden.

10 Nevertheless, it is important that in parts of the country where men are abusing this custom which the population as a whole seem to cherish, government, together with local governments, pass regulations which should be strictly enforced to stop this abuse.

15 To conclude on this issue, it is my view that payment of bride price in customary marriage is overrated by the appellants as a significant factor in the promotion of inequality and violence against women. I would therefore, decline to grant the declaration prayed for by the appellants,
20 that the custom and practice of demand of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution.

25 **(b) Whether bride price fetters the free consent of persons intending to marry.**

Counsel for the appellants argued that in the case of **Pamela Sabina Mbabazi vs. Henry Bazira** Civil Appeal No. 44 of 2004, the Court of Appeal had underscored the necessity of the couple's consent to marry and that if the Constitutional
30 Court had considered this authority which was cited during

5 the hearing of the petition, and correctly applied Articles 21 and 31(3) of the Constitution, the Court would have found that the bride price practices are unconstitutional because they fetter the parties' free consent to enter into marriage.

10 Counsel further argued that in spite of the fact that the learned Justices of the Constitutional Court had correctly interpreted Article 31(1) on the couple's constitutional right to enter into marriage not being contingent upon the demands of a third party for payment of bride price, and
15 hence fettering the couple's free consent to marry, the court had surprisingly declined to declare the custom unconstitutional in so far as it violated Article 31(3) of the Constitution.

20 Accordingly, counsel prayed court to declare that the custom and practice of demand for payment of bride price fetters free consent of persons intending to marry, thereby violating Article 31(3) of the Constitution.

25 In their reply, counsel for the 1st respondent supported the Constitutional Court, and submitted that Deputy Chief Justice Mukasa-Kikonyogo rightly held in her judgment that the Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the
30 bride price arrangement because a man and a woman have

5 the constitutional right to choose the bride price option as
the way they wish to get married. She further submitted that
the Deputy Chief Justice had also rightly held that where
persons intending to marry were given no alternative to
10 customary marriage or the bride price arrangement, this
would contravene their right to enter into a marriage under
Article 31 of the Constitution, as persons could not be
lawfully compelled to enter into bride price arrangement by
the demands of a third party. No evidence was adduced by
15 the appellants whereby a valid customary marriage was
entered into by payment of bride price, without the consent
of the prospective bride or groom, 1st respondent's counsel
argued.

20 Counsel further argued that Justice Kavuma, JA, in his
judgment, also correctly showed how in many cultures, not
only in Uganda but also in Africa, the bride has to give her
consent before the groom or his parents pay the bride price.
The appellants did not adduce evidence to show that anyone
was forced into customary marriage, counsel contended.

25 Counsel further argued that people freely choose the
customary marriage option from other types of marriage
which the law recognizes, and which unlike the customary
marriage, do not require the payment of bride price for their
30 validity. If they choose the customary marriage option, they

5 will be taken to have agreed to observe the customs and rites
that go with it, and this includes payment of bride price.
This will be in line with Article 37 of the Constitution which
guarantees all persons the right to enjoy, practice and
protect any culture in community with others.

10
The 2nd respondent agreed with the decision of the
Constitutional Court in finding that the custom of bride
price does not promote inequality in marriage, nor does it
fetter the free consent of persons intending to marry. There
15 are many types of marriage recognized by law as the learned
Justices of the Constitutional Court observed, and when
parties choose the type of marriage they want, they cannot
be said not to have freely consented to marry, 2nd
respondent submitted.

20
The 2nd respondent also agreed with the statement of Justice
Kavuma, JA, that bride price facilitates rather than hinders
the consent of parties to customary marriage. The intention
of the custom is to offer an opportunity to the groom and his
25 relatives to express gratitude and appreciation for the
upbringing of the bride in such a way as to be worthy of
becoming the wife of the groom. The custom is also
important for the stability of the customary marriage, 2nd
appellant contended.

30

5 In his rejoinder, counsel for the appellants argued that a
bride price “agreement” violates Article 31(3) of the
Constitution in so far as the couple’s right to marry is
contingent upon the demands of a third party for payment of
bride price. If marriage is a contract between two adults and
10 payment of bride price is a condition precedent to a valid
customary marriage, then the payment of bride price
undermines the free consent of the bride and groom because
the demand for bride price is made by third parties, counsel
argued.

15 Counsel further argued that it is not correct for anyone to
say that a party wishing to avoid payment of bride price may
contract a marriage under the Marriage of Africans Act or
the Marriage Act. According to counsel, marriage between
20 Africans under the Marriage Act requires that the marriage
be preceded by all formalities preliminary to marriage
established, usual or customary for Africans in religion
including culture. Therefore, in his view, bride price cannot
be avoided under the Marriage Act. He cited **Bruno Kiuwuwa**
25 **vs. Ivan Kiwanuka & Anor**, HCCS 52 of 2006 as a basis for
his argument.

It is true, as counsel for the appellants argued, that
Mukasa-Kikonyogo, DCJ, wrote in her judgment that, in her
30 words, **“in the narrow instance where one or both the**

5 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:
10 "Marriage shall be entered into with the free consent of
the man and woman intending to *marry*."

The narrow sense that the learned Deputy Chief Justice was
referring to, however, was purely hypothetical because there
15 are alternative forms of marriage to customary marriage
which people are free to use. The more important is what
she stated earlier when she said:

20 "....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
25 between a bride and a groom to enter into the bride
price arrangement. A man and a woman have the
constitutional right to choose the bride price
option as the way they wish to get married."

5 It was on that ground that she declined to grant the
petitioners' request for a declaration that bride price be
declared unconstitutional. I entirely agree with it.

10 Counsel for the 1st respondent argued in her submissions
that the appellants did not provide evidence to show that
there are customary marriages in Uganda whereby a valid
customary marriage may be undertaken by the payment of
bride price without the consent of the bride or groom, or that
persons are forced into customary marriage without their
15 consent.

I agree with learned counsel that the appellants did not do
so. They should have adduced evidence to show how the
demands of third parties deprive men or women of their
consent to marry. The appellants should have shown how,
20 for example, in customary marriage, it is common for X (a
man) to marry Y (a woman) or vice versa, without X's or Y's
consent because of bride price demanded by third parties
(relatives). Or how Y (a woman) was forced to marry X (a
25 man) by Y's parents because of the demands by Y's parents
for pride price. The appellants did not do so in any of the 29
affidavits they filed in support of the petition.

The issue of parents in some communities in Uganda
30 removing their under age daughters from school and forcing

5 them to marry in order for the parents to get bride price
(forced marriages) has been reported by Non Governmental
Organizations (NGOs) concerned with children's welfare, and
given wide coverage by the media. Clearly, this is an abuse
of the custom of bride price and a reflection on the poor
10 enforcement of the law by the law enforcement agencies. The
Constitution prohibits marriage (whether customary or not)
of persons below the age of 18 years, and section 129 of the
Penal Code punishes any person who performs a sexual act
with another person who is below the age of 18 years to a
15 maximum sentence of life imprisonment and even to death
where a person is below the age of 14 years.

In his judgment, Justice Kavuma JA, shows how in Kiganda
culture the bride's consent is obtained through an elaborate
20 procedure that culminates in "*okwanjula*" (introduction)
ceremony at which the bride introduces her prospective
husband to her parents, relatives and friends after which
bride price is paid.

25 According to Uganda Law Reform Commission, Report,
earlier referred to, p. 71, the courtship period in Ateso does
not involve much detail. When a boy and a girl decide to
marry, they inform their respective parents and on a pre-
arranged day, the boy's relatives visit the girl's relatives to
30 discuss bride price. On another pre-arranged day, the cattle

5 (bride price) are handed over to the girl's relatives before
witnesses. Other ethnic groups follow more or less the same
pattern as the two ethnic groups to formalize a valid
customary marriage. It is the consent of the boy and girl that
sets the ceremonies including payment of bride price in
10 motion and which culminates in the marriage.

In his affidavit in support of the petition, Fr. Deo Eriot stated
that he had observed many couples who cannot wed in
church because their parents demand that they first observe
15 the traditional practice of payment of bride price. He goes on
to state that he knows of couples who have had to save for
years to pay off the bride price before having a church
marriage, and he knows of priests who have been harassed
by parents to prevent them from performing the sacred
20 sacrament of marriage until the payment of bride price has
been effected. He further averred that he knows of a priest of
Tororo Arch Diocese who was detained in police custody for
performing a marriage function in the face of resistance from
the bride's parents who were demanding payment of bride
25 price, and that the Catholic Church Synod 2000 found that
the payment of bride price hinders church marriages.

I think the point Fr. Deo Eriot is making is that couples are
prevented from marrying in church, or marry with difficulty
30 in church, because of demands of bride price by the girl's

5 parents. This is different from saying, as the appellant's
counsel argued, that a man or a woman is forced to marry
because of bride price.

10 Under Article 31(1) a man and a woman where each is aged
18 years and above, are entitled to marry. Under Customary
Marriage (Registration) Act they follow the rites of the African
Community to which one of the parties belongs in order to
contract a valid customary marriage. This often includes
payment of bride price where it is demanded.

15 With respect to church marriage, Section 4 of the Marriage
of Africans Act provides that "**the formalities preliminary
to marriage established, usual or customary for the
Africans in the religion to which the parties belong** shall
20 apply to marriages under this Act".

The 2nd respondent correctly stated in his affidavit that there
is no Canon Law or Church regulations in any Christian
church that makes payment of bride price a pre-condition to
25 marriage because payment of bride price is not part of
preliminary formalities of any church. He also correctly
stated that the consent of parents for a man or woman aged
18 years or above to marry in church is a mere formality and
not a legal requirement because Article 31(1) entitles a
30 person aged 18 years and above to marry.

5 It is, therefore, unlawful for anybody to prevent a priest to wed a couple in a licensed place because a woman's relative demands bride price to be paid first, as Fr. Deo Eriot averred in his affidavit.

10 Counsel for the appellants argued that payment of bride price cannot be avoided because of the holding in **Bruno Kiwuwa Vs Ivan Serunkuuma and Juliet Namazzi** (supra) that preliminaries under the Marriage of Africans Act must include adherence to the couple's culture. With respect, this case was wrongly decided. Adherence to culture
15 belongs to the sphere of customary marriage and not to marriage under the Marriage of Africans Act or the Marriage Act. Each form of marriage under the law is self-sufficient and complete and one form of marriage does not extend into the other.

20 Section 29 of the Marriage Act which provides for conversion of customary marriage into marriage under the Marriage Act cannot be interpreted to be such an extension. Equally, it would not be correct, in my view, to interpret S.4 of the Marriage of Africans Act that provides: "**The formalities preliminary to marriage established, usual or customary for the Africans in the religion to which the parties belong shall apply to marriages under this Act...**" to mean
25 that marriages celebrated under the Act must adhere to African culture and its rituals. To me, this section recognizes

5 that there are different Christian denominations in Uganda,
but allows each denomination to apply its own formalities,
customs or rules in the celebration of marriage, provided the
provisions of the Act are complied with.

10 It may be true that many people who contract their
marriages in church under the Marriage of Africans Act
begin with traditional ceremonies which may involve
compliance with cultural rites and marriage prohibitions
within clans. Some churches also unwittingly promote this
15 by demanding, as a condition for solemnizing the marriage
in church, letters of consent from the parents of the bride
and the bride groom which consent is not provided for in the
law. This, however, does not mean that cultural rites are a
legal requirement for a marriage contracted under the
20 Marriage of Africans Act. Therefore, to import into the
Marriage of Africans Act a condition of compliance with
cultural matters such as bride price, prohibitions etc.. is, in
my view, wrong.

25 To conclude on this issue, I find that the Constitutional
Court did not err in holding that payment of pride price does
not fetter the parties' free consent to enter into marriage.

I would, accordingly, decline to grant a declaration that the
custom and practice of demand for payment of bride price

5 fettens free consent of persons intending to marry, thereby
violating Article 31(3) of the Constitution.

**Grounds 8 and 9: Whether the learned Justices of the
Constitutional Court erred in law when they held that it
10 was not essential to declare the practice of demand for
refund of bride price unconstitutional.**

Counsel for the appellants submitted that the learned
Justices of the Constitutional Court found that the demand
15 for refund of bride price undermines the dignity of a woman
and violates a woman's entitlement to equal rights with the
man in marriage, during marriage and at its dissolution.

According to counsel, the court also acknowledged as a fact
20 that bride price can lead to social ills such as domestic
abuse. That there was affidavit evidence like that of Achieng
Margaret and Florence Musubika which showed how women
suffer domestic abuse at the hands of their husbands.

25 Counsel argued that Uganda had obligations under (a)
Domestic Law (b) International Law and (c) Regional
Protocol, to protect the rights of women. Under domestic
law, Articles 20(2) and 33(3) of the Constitution oblige all
organs of government to uphold and protect women and
30 their rights. Therefore, the Constitutional Court had an

5 obligation to make a declaration on the constitutionality of
refund of bride price, given its findings on the manner in
which the refund violates Articles 31(1) and 33 of the
Constitution.

10 Counsel argued further that Uganda has an obligation under
International law to take appropriate measures to modify or
abolish existing regulations, customs and practices which
constitute discrimination against women under Article 2(f) of
15 the *Convention on the Elimination of All Forms of
Discrimination against Women* (CEDAW) which Uganda
ratified on 22nd July 1985.

On regional obligations, counsel cited the *Protocol to the
African Charter on Human and Peoples' Rights on the Rights
20 of Women in Africa* (2003) which obliges a state party to
outlaw cultural practices and traditions that affect the
dignity of women. Uganda signed this Protocol on 18th
December 2003.

25 Counsel prayed that this court makes a declaration that the
custom and practice of demand for refund of bride price as a
condition precedent to a valid dissolution of a customary
marriage lowers the dignity of women, thereby violating
Articles 31(1)(b), 32(2) and 33(1) of the Constitution.

30

5 Counsel for the 1st respondent did not make submissions on
this issue and left it to the court to decide.

10 The 2nd respondent submitted that the appellants failed to
prove that the custom of the refund of bride price lowers the
dignity of a woman. He argued that the Constitution was
written for all the people of Uganda and was meant to
accommodate different cultures; that because a custom is
being abused by a few individuals does not warrant its being
declared unconstitutional as in other cultures it may be
15 treasured.

He argued further that in Kinyankole culture, the refund of
bride price at the dissolution of marriage is an essential
element of customary marriage intended to avoid unjust
enrichment to the bride's family. That bride price is not
20 repayable in every case of divorce, and it is only repayable
when it is found that one of the parties has been guilty of
conduct causing the breakdown of the marriage.

25 The 2nd respondent argued further that there was no hard
and fast rule to guide in deciding the issue of refund of bride
price, and that it was the duty of the court to assist in the
growth of equitable customary rules. Courts, for example,
can intervene taking into account the length of marriage and

5 the number of offsprings to the marriage. Each case must be
judged on its own facts, he argued.

He contended that customary law is constantly changing
and it would be unjust to slap a constitutional declaration
10 banning the marriage and its practices across the board
without the communities themselves being afforded an
opportunity to be heard.

It is noteworthy that on the issue of refund of bride price,
15 the Constitutional Court agreeing with the petitioners found
that the demand for refund of bride price undermines the
dignity of a woman and violates a woman's entitlement to
equal rights with the man in violation of Articles 31(1) and
33 of the Constitution.

20 Mukasa- Kigonyogo, DCJ, stated in her lead judgment:

**"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
25 of the marriage demeans and undermines the
dignity of a woman.... 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.**

30

5 **Further, a refund demand fails to honour the wife's**
 unique and valuable contribution to a marriage. A
 woman's contribution in a marriage cannot be
 equated to any sum of money or property, and any
 refund violates a woman's constitutional right to be
10 **an equal co-partner to the man."**

I respectfully agree with this finding of the Constitutional
Court against which the 2nd respondent did not cross
appeal. The question then is, if the learned Deputy chief
15 Justice and the Constitutional Court as a whole found that
the custom and refund of bride price in the event of
dissolution of the marriage demeans the dignity of a woman
and violates a woman's constitutional rights, why then did
the court refrain from declaring the custom of refund of
20 bride price unconstitutional? Why did the court suggest that
women adversely affected by the custom should instead
institute criminal or civil proceedings against those who use
the custom to demand the bride price?

25 The court did not offer any explanation for this, and
therefore, I find that counsel for the appellants was justified
to complain about this omission. The Constitutional Court
having found that the custom and practice of refund of bride
price violates women's constitutional rights, should have

5 taken the next logical step to declare the custom unconstitutional.

10 Most ethnic groups in Uganda, apart from the Baganda ethnic group, practice the custom of refund of bride price at the dissolution of customary marriage. Refund of bride price has been covered in several books and journals written on marriage in Uganda. See, for example, "*Marriage and Divorce in Uganda*" by H.E Morris, the Uganda Journal, Sept. 1960, "*The Chiga of Western Uganda*" by May Mandelbaum (MA, 15 Ph.d (Columbia), 1957, and "*The Lango a Nilotic Tribe of Uganda*" by J.H. Driberg, 1954, among others. There is also case law which has taken cognizance of the custom. See, for example **Nemezio Aiiya vs Sabina Onziya Ayiia**, Divorce cause No. 8 of 1973 and **Muhinduka vs. Kabere**, Civil Suit 20 No. 1 of 1971.

25 There is affidavit evidence on record which was not contradicted to show that the custom of refund of bride price is oppressive to women. Okia Zadoki, an Atesot, deponed, for example, that his daughter, Amuge Ann Grace, was married customarily for 25 years. She produced 7 children with her husband. Misunderstandings developed between her and her husband and the husband started subjecting her to beatings and eventually chased her from her matrimonial 30 home. He then filed a suit in Pallisa Chief Magistrate's Court

5 for refund of bride price and the court ordered the deponent to refund the cows and the Kanzu (tunic) which the husband had paid as bride price. Since he did not have cows, a warrant of attachment was issued by the court to sell one of his pieces of land.

10 Fulimera Nyayuki from Tororo deponed that she was married to Okumu Rechi when she was aged 15 years. Her husband paid 1 cow and 2 goats as bride price. After two years she failed to conceive and her husband started beating
15 her. He even cut her with a panga and she still bears scars. When the beating became intolerable she left her husband and went back to her parent's home. After six years of staying with her parents she got married to another man.

20 When her first husband learnt that she was married to another man, he started demanding for refund of his bride price from her and her new husband since her parents had died. They were arrested and spent four days in police custody. MIFUMI Project intervened and they were released.
25 Her first husband is still demanding refund of his bride price and she fears she will be arrested again.

Nakiriya Stella, from Pallisa, deponed that her husband used to beat her and one day he cut her with a panga on the
30 face and disfigured it. He forcefully chased her from her

5 matrimonial home. He then sued her brother for refund of
bride price in Pallisa Chief Magistrates Court. The court
ordered her brother to refund the cows.

10 In my view, it is a contradiction to say that bride price is a
gift to the parents of the bride for nurturing her, and then
accept as proper demand for a refund of the gift at the
dissolution of the marriage. Dr. Mpairwe in his affidavit
states that bride price or "*enjugano*" in Kinyankole is offset
15 by the "*emihingiro*," that is gifts given by the relatives of the
bride. While this may be true, the "*emihingiro*" which are as
much of gifts as "*enjugano*," are not returned to the parents
of the woman at the dissolution of the marriage.

20 In my considered view, the custom of refund of bride price
devalues the worth, respect and dignity of a woman. I do not
see any redeeming feature in it. The 2nd respondent stated in
his submissions that it is intended to avoid unjust
enrichment. With respect, I do not accept this argument. If
the term "bride price" is rejected because it wrongly depicts
25 a woman as a chattel, how then can refund of bride price be
accepted? Bride price constitutes gifts to the parents of the
girl for nurturing and taking good care of her up to her
marriage, and being gifts, it should not be refunded.

5 Apart from this, the custom completely ignores the
contribution of the woman to the marriage up to the time of
its break down. Her domestic labour and the children, if
any, she has produced in the marriage are in many ethnic
groups all ignored. I respectfully do not agree with the
10 suggestion proposed by the 2nd respondent that when the
marriage breaks down, a woman's contribution should be
subjected to valuation, taking into account the length of the
marriage, the number of children the woman has produced
in the marriage, e.t.c., on the basis of which the refund
15 should be determined. If a man is not subjected to valuation
for the refund of bridal gifts ("emihingiro" in Runyankole)
when the marriage breaks down, it is not right or just that a
woman should be subjected to valuation. She is not property
that she should be valued. It is my view that refund of bride
20 price violates Article 31(1) 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 at its
dissolution**".

25 It is also my view that refund of bride price is unfair to the
parents and relatives of the woman when they are asked to
refund the bride price after years of marriage. It is not likely
that they will still be keeping the property ready for refund.

5 As Professor Tibatemwa Ekirikumbinza wrote in her
“*Women’s Violent Crime*” cited earlier, on p.82:

10 **In thosemarriages in which bride price has
exchanged hands, the practice is that on divorce
the husband is entitled to a refund of the bride
price. On many occasions the father or other
relatives of the wife will have spent the bride price
and may not be in position to refund it at the time
when the wife desires to leave her marriage.”**

15 The effect of the woman’s parents not having the property to
refund may be to keep the woman in an abusive marital
relationship for fear that her parents may be put into trouble
owing to their inability to refund bride price, or that her
parents may not welcome her back home as her coming
20 back may have deleterious economic implications for them.

Furthermore, if marriage is a union between a man and a
woman, it is not right that for customary marriage to be
legally recognized dissolution should depend on a third party
satisfying the condition of refunding bride price failure of
25 which the marriage remains undissolved.

It is my firm view that the custom of refund of bride price,
when the marriage between a man and a woman breaks

5 down, falls in the category that is provided under Article
32(2) of the Constitution which states:

10 **“Laws, cultures, customs and traditions which are
against the dignity, welfare or interest of women or
any marginalized group to which clause (1) relates
or which undermine their status, are prohibited by
this Constitution”.**

15 I would, therefore, declare that the custom and practice of
demand for refund of bride price after the breakdown of a
customary marriage is unconstitutional as it violates Articles
31(1)(b) and 31(1). It should accordingly be prohibited under
Article 32(2) of the Constitution.

The appellant’s grounds 8 and 9 accordingly succeed.

20 **Ground 12: Whether the learned Justices of the
Constitutional Court erred when they found that
the unfavourable aspects of the custom of bride
price may be remedied through redress under any
25 other law, and not through declarations.**

This complaint by the appellants is about what the
Constitutional Court held after declining to declare the
custom of refund of bride price which the court found to be
30 unconstitutional but at the same time went on to hold that

5 an aggrieved party's redress does not lie in constitutional
declarations but in pursuing criminal proceedings or civil
action. I fully discussed this issue under ground 8 and 9
and agreed that the Constitutional Court should have
10 granted the declaration sought by the appellant about
refund of bride price. It would, therefore, be superfluous for
me to say more on this.

To recapitulate, below are my findings:

15 1. On Grounds 1, 2 and 3 relating to the issue of whether
the Constitutional Court erred by declining to take
judicial notice of the custom of bride price, this question
is resolved in the affirmative. It is my finding that the
custom of bride price in customary marriage is so
notorious in its generic form that the courts should take
20 judicial notice of it.

25 2. On Grounds 4, 5, 6 and 7 relating to the issue of firstly
whether bride price promotes inequality in marriage, it is
my finding that it does not. I would, therefore, decline to
grant the declaration prayed for by the appellants that the
custom of bride price promotes inequality and violence in
marriage, thereby violating Article 21(1)(2) and (3) of the
Constitution. And secondly on the issue of whether bride
price fetters the free consent of persons intending to
30 marry, it is my finding that the Constitutional Court did

5 not err in holding that payment of bride price does not
fetter the parties' free consent into marriage. I would,
accordingly, decline to grant a declaration that the
custom of bride price fetters the free consent of persons
intending to marry, thereby violating Article 31(3) of the
10 Constitution.

3. On Grounds 8 and 9 relating to the issue of whether the
Constitutional Court erred in law when it held that it was
not essential to declare the custom of demand for refund
15 of bride price unconstitutional, it is my finding that the
custom of refunding bride price as a condition for the
dissolution of customary marriage is unconstitutional.
Accordingly, I would declare that the custom and practice
of demand for refund of bride price after the break down
20 of a customary marriage is unconstitutional as it violates
Articles 31(1)(b) of the Constitution, and it should be
prohibited. The appellants' grounds 8 and 9, therefore,
succeed.

25 4. On Ground 12, after my finding that the custom of refund
of bride price is unconstitutional and after granting the
declaration the appellants sought, I find that this ground
ceases to be an issue.

5

Accordingly, it is my view that this appeal partly succeeds and partly fails, as I indicated above.

10 Since this appeal concerns a matter of public interest, I would order that each party bear its own costs.

Dated at Kampala this.....th6.....day of.....AUG.....2015

15



Jotham Tumwesigye

20

JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

10 [Coram: Katureebe,JSC; Tumwesigye, Kisaakye,JJSC; Odoki, Tsekooko,
Okello & Kitumba,Ag.JJSC]

CONSTITUTIONAL APPEAL NO. 02 OF 2010

BETWEEN

- 1. MIFUMI (U) LTD
- 2. LUSWATA KAVUMA EVA
- 20 3. FR. DEO ERIOT
- 4. MUSIBIKA FLORENCE
- 5. OBOOTH SOLOMON
- 6. JAGWERI JAMES
- 7. NYAYUKI FULIMERA
- 25 8. OBONYO ANDREW
- 9. JAGWERI JAMES
- 10. ABBO FULIMERA
- 11. AWOR JANIPHER
- 12. ACHIENG MARGARET
- 30 13. AWOR DEBORAH

..... APPLICANTS.

AND

- 1. THE ATTORNEY – GENERAL
- 2. KENNETH KAKURU

..... RESPONDENTS

35 {*Appeal against the decision of the constitutional court at Kampala
(Mukasa Kikonyogo, DCJ, Mpaji- Bahigeine, Twinomujuni, Byamugisha &
Kavuma, JJA) dated 26th March, 2010 in Constitutional Petition No.12 of
2007*}

5 On the contrary, according to all the studies made, at such ceremonies there is usually feasting and dancing.

These customs seem to be so cherished that even persons intending to marry under the marriage Act, will still go through the customary rites of paying “bride price”.

10

The Uganda Law Reform Commission’s Study Report on Marriage and Divorce in Uganda States, at page 72, as follows:

“In all African Societies, bride price or, as it is commonly known as dowry, was and remains a common and highly respected custom.

15

As a pre-requisite in the process of marriage bride price is a primary requirement and is prima-facie evidence of a valid customary marriage thus distinguishing it from cohabitation.”

20

The important point to note here is that “bride price” is a highly respected custom. The question is then whether this court can simply declare it unconstitutional.

The petition as filed, and the appeal as argued by the appellants seems to suggest that the payment of “bride price” per se is not unconstitutional.

25

What they argue is unconstitutional, as far as I can discern, is that it is the payment of “bride price” as a sine qua non to a valid marriage that is unconstitutional. They seem to suggest that whether bride price is paid or not, it should not affect the validity of the marriage; meaning that one can still have a valid customary marriage even when no “bride price” has been paid.

30

To me, this calls for an understanding of what constitutes a customary marriage. The Customary Marriage (Registration) Act defines customary marriage as ***“a marriage celebrated according to the rites of an***

5 ***African community and one of the parties to which is a member of that community,”***

According to the Uganda Law Reform Report (Supra) ***“the preliminaries to a customary marriage involve courtship, the payment of bride price and performance of certain rituals.”*** (P.70). The same report observes, at
10 page 14, that ***“one of the essential requirements of a customary marriage is bride wealth , the absence of which renders a marriage invalid.”***
(Emphasis added).

It would appear to me that, unless a particular parent waives the
15 payment of the “bride price”, there cannot be a valid customary marriage where there has been no payment of “bride price”.

But it does happen with some parents that after the parties have agreed on the size or quantity of “bride price”, the father of the girl may waive it.
20 That is the very important prerequisite of the customary marriage. To argue that it should not be a sine qua non to a valid customary marriage is in effect to call for the abolition of customary marriage itself.

Most of the affidavits supporting the petition, and indeed the arguments of
25 counsel for the Appellants, point to the abuse of the custom of “bride price.” They identify the commercialization of the custom as the evil that has to be dealt with. The affidavit of ALICE AMASU dated 6th July 2007 in support of the petition states in paragraph 11 thereof as follows:

30 ***“THAT I verily believe that bride price is a commercialized practice that has lost its original value as a token and in its present form poses a financial hardship on poor people and increases the burden of poverty.”***

5 This in effect states that the original purpose of bride price was noble and acceptable, but it has been abused.

Then the affidavit of Roselyn Karugonjo Segawa dated 29th October 2007 also in support of the petition, states as follows in the following paragraphs:

10 **4 “ That the payment of “bride price” is a widely accepted custom meant to honour the woman and her family because it contributes to the stability of the marriage by bringing the two families together, compensates the bride’s family for time, money and other resources taken to raise her and is a sign of fulfillment of a customary marriage.”**

15 **5 “ That the payments of bride price has also now become commercialized especially in rural areas where poverty levels are high and parents have sold off their daughters below the age of 18 in marriage.”**

20 The affidavit goes on to highlight abuses of women by husbands ostensibly because they paid “bride price”. The deponent concludes her affidavit as follows in paragraph 11;

25 **“That in light of all the above, compulsory payment of pride price should be declared unconstitutional and a violation of human rights .**

Unsolicited gifts at marriage to the family of the prospective bride should not be outlawed but they should not be claimed back at dissolution of marriage” (Emphasis added).

30 To my understanding the above affidavit is to the effect that what is good in the custom of bride price should be kept but what is bad and amounts to abuse should be discarded.

5 To me, this is the crux of the matter. Should we declare unconstitutional a cherished age old custom on the basis that some people in some communities have abused it?

10 This calls for examination of other provisions of the Constitution, bearing in mind the rule of constitutional interpretation laid down by this court in a number of decisions, namely that a provision of the constitution must not be looked at in isolation. All provisions relevant to the subject should be examined together so that they are construed in harmony with each other.

15

Under the Cultural Objectives, the Constitution states that

20 ***“Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.”***

“The State shall -

(a) Promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans.”

25

Article 37 states as follows:

“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.”

30

Article 126 of the constitution enjoins courts to exercise judicial power

“in the name of the people and in conformity with law and with the values, norms and aspirations of the people.”

5 In this appeal we are faced with the problem of a cherished custom which
has been practiced by our society from time immemorial. Admittedly,
according to the affidavit evidence, some people in some communities
have started abusing that custom.

10 I advisedly use the term “some people in some communities” because it is
not all the people in all the communities that are abusing the custom.

According to the affidavit evidence of Dr. Mpairwe in support of the answer
to the petition, he asserts that among the Banyankole, there is no
15 commercialization of bride price because whereas the groom pays the “bride
price” (Enjugano) the bride’s family provides the bride with presents
(Emihingiro) whose value may even exceed the “bride price.” According to
the Uganda Law Reform Commission Report (Supra), “bride price” among
the Baganda seems to be minimal and a token of appreciation which is not
20 returned.

Even in some communities where evidence exists of some individuals
abusing and commercializing the custom of bride price, there is no
evidence to suggest that the majority of the marriages are not happy and
25 stable despite their having been entered into as customary marriages where
“bride price” was given.

After analyzing the subject of commercialization of “bride price”, the Uganda
Law Reform Commission Report (supra) observes as follows;

30 ***“Despite the changes that have occurred, overwhelming
majorities of people still have a positive attitude to bride wealth
and would like it to continue in marriage.*”**

5 **However, there is a feeling that the amount of bride -wealth should be reduced.”**

From the foregoing, and having considered the relevant provisions of the Constitution, I am of the firm view that the payment of “bride price” in a customary marriage *per se* is not unconstitutional. However, the State in
10 carrying out its duty of promoting and preserving those cultural values and practices which enhance the dignity of Ugandans, should put in place appropriate legislation to regulate and enjoyment of these cultural practices so that they are not abused.

15 I note that in the past some Districts did pass by - laws to regulate the payment of “bride price.” Perhaps what needs to be done is to put in place one piece of legislation at National level, i.e. enacted by Parliament which regulates the practices. To declare unconstitutional a custom that is
20 cherished by the majority of Ugandans on the basis that some people have abused it is not tenable. Those who appreciate and value it as it was originally meant to be, should be allowed to continue to enjoy their culture. The State, however, should ensure that those cultural practices are not abused to the detriment of other citizens, particularly women.

25 Once the “bride price” has been paid, it should not be looked at (or regarded) as some form of deposit to be returned in the event the marriage fails. This is an aspect of the cultural practice which works against the rights and dignity of women. All must know and accept that despite the payment or exchange of marriage gifts or “bride price”, once the marriage
30 has taken place, the provisions of the Constitution must apply. Thus under Article 31(1)(b) which provides for a man and a women who have married to be entitled “**to equal rights at and in marriage, during marriage and at its dissolution**” must apply.

5

The return of "Bride price" connotes that the woman in the marriage was on some sort of loan. But even in a sale, the cliché is that goods once sold cannot be returned, or goods once used cannot be refunded for. If that cannot be done in respect of common goods, cattle, etc, why should it be applied to a woman in a marriage. This, to me, compromises the dignity of the woman contrary to Article 33(1) of the Constitution.

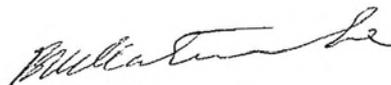
For the foregoing reasons, I agree with my brother that the cultural practice of refunding "bride price" is inconsistent with the Constitution and therefore should be abolished. I also agree with the orders he has proposed as to costs.

Order of the Court

By six to one majority decision the appeal partially succeeds. The custom of refund of "bride price" is declared unconstitutional. The parties shall bear their own costs.

Dated at Kampala this 6th day of August 2015.

25


Bart. M. Katureebe
CHIEF JUSTICE

30

5

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

10

(CORAM: KATUREEBE, TUMWESIGYE, KISAAKYE, JJ.SC; ODOKI, TSEKOOKO, OKELLO, AND KITUMBA AG. JJ.SC)

CONSTITUTIONAL APPEAL NO. 03 OF 2014

15

BETWEEN

MIFUMU (U) LTD & OTHERS APPELLEANTS

AND

20

1. ATTORNEY GENERAL } RESPONDENTS
2. KENNETH KAKURU }

25

[Appeal from the judgment of the Constitutional Court at Kampala (Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine, Twinomujuni, Byamugisha and Kavuma, JJ.A) dated 20th March 2007 in Constitutional Petition No. 12 of 2001]

30

JUDGMENT OF DR ODOKI, AG JSC

I have had the benefit of reading in draft the judgment of my learned brother, Tumwesigye JSC, and I agree with it. I concur in the orders he has proposed.

35

Dated at Kampala this ^{6th}.....day of ^{AUG}..... 2015.

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Dr B J Odoki
AG JUSTICE OF SUPREME COURT

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**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

[Coram: Katureebe, Tumwesigye, Kisaakye, JJSC; Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC]

Constitutional Appeal No. 02 of 2010.

1. MIFUMI (U) LTD.
2. LUSWATA KAWUMA EVA.
3. FR. DEO ERIOT.
4. MUSIBIKA FLORENCE.
5. OBOOTH 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.

Between

..... APPLICANTS.

And

1. THE ATTORNEY - GENERAL
2. KENNETH KAKURU.

..... RESPONDENTS.

{Appeal against the decision of the Constitutional Court at Kampala (Mukasa Kikonyogo, DCJ, Mpagi-Bahigeine, Twinomujuni, Byamugisha & Kavuma, JJA) dated 26th March, 2010 in Constitutional Petition No. 12 of 2007}

JUDGMENT OF J.W.N. TSEKOOKO, AG.JSC.

I have had the advantage of reading in draft the well reasoned judgment prepared by my learned brother, the Hon. Justice J. Tumwesigye, JSC.

I agree with his reasoning and his conclusions that the appeal partially succeeds as indicated in the draft judgment. This case concerns matters of general public interest and I, therefore, agree with the proposal by my learned brother that each party should bear their own costs both here and in the Constitutional Court.

Dated at Kampala this^{6th}..... day of^{Aug}..... 2015.


.....
J.W.N. Tsekooko,
Ag. Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**(CORAM:KATUREEBE CJ, TUMWESIGYE; KISAAKYE; JJSC ODOKI,
TSEKOOKO; OKELLO; KITUMBA; AG JJSC)**

CONSTITUTIONAL APPEAL NO. 03 OF 2014

BETWEEN

MIFUMI (U) LTD & 11 OTHERS.....APPELLANTS

AND

1. THE ATTORNEY GENERAL

2. KENNETH KAKURU

.....RESPONDENTS

Appeal from the judgment of the Constitutional Court at Kampala (Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine, Twinomujuni, Byamugisha & Kavuma, JJA dated 26th March, 2010 in Constitutional Petition No. 12 of 2007

JUDGMENT OF G.M. OKELLO, AG. JSC

I have had the benefit of reading in draft the judgment of my learned brother, Justice Jotham Tumwesigye, JSC. I agree with his reasoning, conclusion and the orders he has proposed.

Dated at Kampala this ^{6th} day of Aug.....2015.



G.M. OKELLO

AG. JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

**CORAM: KATUREEBE, TUMWESIGYE, KISAAYE JJ.S.C, ODOKI,
TSEKOOKO, OKELLO AND, KITUMBA,AG. JJ.S.C.**

CONSTITUTIONAL APPEAL NO.03 OF 2014

BETWEEN

MIFUMI (U) LTD & ORS.....APPELLANTS

AND

**1. ATTORNEY GENERAL }
2. KENETH KAKURU }RESPONDENTS**

[Appeal from the judgment of the Constitutional Court at Kampala (Mukasa-Kinyogo DCJ, Mpagi – Bahigeine, Twinomujuni, Byamugisha, and Kavuma JJ.A) dated 20th March 2007 in Constitutional Petition No. 12 of 2001]

JUDGMENT OF KITUMBA, AG JSC

I have had the benefit of reading in draft the judgment of my learned brother, Tumwesigye JSC. I concur with his reasoning, decision and the orders proposed therein.

Dated at Kampala, this ^{6th}..... day of ^{Aug}..... 2015.

C.N.B. Kitumba
C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE; CJ. TUMWESIGYE; KISAAYE; JJ.S.C;
ODOKI; TSEKOOKO; OKELLO & KITUMBA Ag. JJSC)

CONSTITUTIONAL APPEAL NO. 02 OF 2010

BETWEEN

MIFUMI (U) & 12 OTHERS ::::::::::::::::::::::::::::::::::: APPELLANTS

AND

1. ATTORNEY GENERAL

2. KENNETH KAKURU ::::::::::::::::::::::::::::::::::: RESPONDENTS

[An Appeal arising from the Judgment of the Court of Appeal (Byamugisha, Kavuma, Nshimye, JJ.A) dated 29th May, 2012 in Civil Appeal No.71 of 2010.]

JUDGMENT OF DR. KISAAYE, JSC.

The appellants challenged the constitutionality of the requirement of the customary practice of demanding for payment of bride price at the time of contracting a customary marriage and of its refund at the time of dissolution of a customary marriage as a condition precedent to a valid customary marriage or divorce, respectively. This appeal is against the decision of the Constitutional Court that dismissed their petition.

The background to this appeal is that the appellants filed Constitutional Petition No. 83 of 2006 in the Constitutional Court, in which they alleged that:

- 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), 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, 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 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 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 near 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 condition precedent to the dissolution of a customary marriage is contrary to the provisions of Article 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 Article 24, which guarantees that every person shall be treated with dignity.*

The Petitioners sought the following declarations from the Constitutional Court:

- a) 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 is unconstitutional;*
- b) 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;*

- c) *Any other or further declaration that this Honourable Court may grant*
- d) *No order is made to costs.*

The Constitutional Court, by a majority of 4 to 1, dismissed the petition holding that the practice of payment of bride price was not so notorious that the Court could take judicial notice of it. They held further that the demand and payment of bride price as condition precedent to the validity of a customary marriage and the demand for a refund of bride price as a condition precedent to the dissolution of a customary marriage were not barred by the Constitution. Lastly, the Constitutional Court also held that it was not essential for the Court to declare that the practice of demand for a refund of bride price on dissolution of marriage was unconstitutional because the Constitution itself under Article 50 and others appropriate law could adequately take care of any grievances arising from the abuse of the bride price custom.

Being dissatisfied with that decision, the appellants filed this appeal based on the following 12 grounds of appeal.

1. *The Justices of the Constitutional Court erred when they failed to decide the issue whether the custom of payment of bride price as a condition precedent to a customary marriage and the demand for a refund of bride price as a condition precedent to a valid dissolution of a customary marriage is judicially noticed requiring no further proof.*
2. *The learned Justices of the Constitutional Court erred when they failed to decide the issue whether bride price means different things in the different cultures of Uganda such that Court cannot make a uniform interpretation of the custom.*
3. *The learned Justices of the Constitutional Court erred when they failed to decide the issue whether bride price is commonly practiced in Uganda by all cultures.*
4. *The learned Justices of the Constitutional Court erred when they found that the custom of bride price does not promote inequality in marriage contrary to Art 21(1) (2) & (3) of the Constitution.*

5. *The learned Justices of the Constitutional Court erred when they found that bride price does not fetter free consent of persons intending to marry in violation of Art 31(3) of the Constitution.*
6. *The learned Justices of the Constitutional Court erred when they found that bride price does not perpetuate conditions of inequality in marriage contrary to Art 31(3) (b) of the Constitution.*
7. *The learned Justices of the Constitutional Court erred when they found that the refund of bride price does not fetter the free will of a person intending to leave a marriage contrary to Art 31(3).*
8. *The learned Justices of the Constitutional Court erred when they found that bride price does not commodify a woman thus lowering her dignity contrary to Art 33(1) which guarantees a woman's dignity of the person.*
9. *The learned Justices of the Constitutional Court erred when they found that bride price does not cause domestic violence.*
10. *The learned Justices of the Constitutional Court erred when they found that persons intending to marry may opt not to marry under customary law and therefore avoid payment of bride price.*
11. *The learned Justices of the Constitutional Court erred when they found that a person opting to marry under customary law must have consented to be bound by the custom of payment of bride price.*
12. *The learned Justices of the Constitutional Court erred when they found that the unfavorable aspects of the custom of bride price may be remedied through redress under any other law and not through declarations.*

The appellants prayed that this Court finds that:

- a) *Bride price is a custom judicially noticed requiring no further proof.*
- b) *Bride price means the same thing for all the different cultures in Uganda*
- c) *Bride price is commonly practiced in Uganda by all cultures.*

The appellants further prayed that this Court allow the appeal and declare:

- a) *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;*

b) *That 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 Honourable Court may grant.*

I have had the benefit of reading in draft the Judgment of my brother, Tumwesigye, JSC. I partially agree with his observations about the mischaracterization of the customary marriage as wife-purchase by the judges during the colonial days. Furthermore, I agree with his decision, declaring the custom of refund of bride price as a condition precedent to the dissolution of a customary marriage unconstitutional.

I am however unable to agree with him with respect to his decision to dismiss the remainder of the appeal. With due respect to the learned Justice, I would allow this appeal. My reasoning and findings appear in this judgment.

Consideration of this Appeal

As I commence the consideration of this appeal, I wish to point out that I have considered the submissions of both parties which were fully reflected in the lead judgment of Tumwesigye, JSC. I will not repeat them in this judgment but only reiterate those submissions and arguments where I find it necessary to do so.

Before I proceed to consider the merits of this appeal, it is important to point out and discuss the provisions of the law that are of critical importance to resolving the issues raised by this appeal.

I wish to state at the onset that I am fully aware that Article 37 of our Constitution grants Ugandan citizens the right to enjoy and practice their culture as follows:

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

On the other hand, Article 2 of the same Constitution entrenches the supremacy of the Constitution by providing as follows:

- “(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.*
- “(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”*

Similarly Article 33(6) prohibits cultures and customs that undermine the dignity of women in the following terms:

“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.”

This is further reinforced by the obligation imposed on the State under Objective XXIV (a) which provides as follows:

“The State shall promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans.”

Whether requiring payment of bride price as a condition precedent to a valid customary marriage is inconsistent with the Constitution

This was one of the major issues which were raised by the Petition and which the Constitutional Court was required to pronounce itself on.

I agree with the learned Justices of the Constitutional Court and my colleagues at this Court that the voluntary exchange of gifts at marriage between the groom to be and his wife's parents or relatives and vice versa is not unconstitutional. In my view, this is permissible under Article 37 of the Uganda Constitution.

On the other hand, Article 2 of the same Constitution entrenches the supremacy of the Constitution by providing as follows:

- “(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.*
- (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”*

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This was one of the major issues which were raised by the Petition and which the Constitutional Court was required to pronounce itself on.

I agree with the learned Justices of the Constitutional Court and my colleagues at this Court that the voluntary exchange of gifts at marriage between the groom to be and his wife’s parents or relatives and vice versa is not unconstitutional. In my view, this is permissible under Article 37 of the Uganda Constitution.

The aspirations of the people of Uganda as expressed in Articles 21, 31 and 33 of the Constitution are that Ugandan women would enjoy equal status in all spheres of life with their male counterparts. Women will not be able to enjoy equal status at marriage and in marriage if they come into marriage with a price over their heads, which may be stated in the number of cows, goats, sheep or other forms of property or their money equivalent.

Several reasons were advanced by the respondents and were accepted by the Constitutional Court regarding the institution of bride price. For example, it was argued that payment of bride price is an essential rite for contracting a customary marriage and that it is this characteristic that distinguishes it from other forms of marriage recognized in Uganda.

Secondly, it was argued on behalf of the respondents and the majority Justices in the Constitutional Court agreed with them that bride price is paid as appreciation given by the groom to be to the bride's parents/guardians for the efforts they put in raising and grooming the bride to be.

There is no single constitutional provision which gives any right whatsoever to any parent to put a price (in form of bride price) on a daughter intending to marry either to recover or to demand to be "appreciated" by his prospective son in law or his future son in law's parents for raising, educating, feeding their daughter or for any other expenses incurred towards a daughter intending to be married. Appreciation, in my view, is a social concept which cannot be legally enforced. It is even worse where the party seeking to enforce it is a 3rd party to the marriage.

The claims that bride price is demanded by the girls' parents as an appreciation for raising her actually runs contrary to Article 31(1) and (4) of the Constitution of Uganda, which provide as follows:

"It is the right and duty of parents to care for and bring up their children."

Article 34(4) on the other hand provides as follows:

“Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.”

These articles place the constitutional obligation on parents to look after and take care of their children.

I agree that the bride price custom is still a strongly rooted customary practice and that many men and women may still cherish it and wish to continue with it, unregulated by the law. Lastly, I also agree that domestic violence is not a preserve of customary marriages where bride price has been paid.

However, it is also important to note, based on the provisions I have already cited in this Judgment, that Article 37 does not, in my view, validate all customs and cultural practices practiced by the different tribes and ethnic groups in Uganda. Rather, it is only those customs and cultural practices that meet the Constitutional test that are preserved under this Article. The net effect of the provisions cited above, in my view, is that the only customs and cultural practices that were permitted under the Constitution of Uganda to be *enjoyed, practiced, professed, maintained and promoted under Article 37* are those cultural practices and customs that meet the constitutional standards laid out in the above provisions.

This is evidenced by various provisions of the Constitution. These include Objective XXIV of State Policy, which provides as follows:

“Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.”

It should also be noted that Article 45 of the Constitution also provides that the rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms that are specifically mentioned in the Constitution shall not exclude those which were not specifically mentioned therein.

Apart from Article 45 of the Constitution, it should also be remembered that Uganda is a signatory to all the major human rights Conventions which require it to put in place laws and measures that prevent discrimination and perpetuate inequality.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides but one example of such Convention imposing obligations on Uganda to take action in line with the prayers made in this Petition. Under Article 2 (f) of this Convention, Uganda as a state party condemned discrimination against women in all its forms, and agreed to:

“pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

Uganda also made specific undertakings under the CEDAW Convention to tackle discrimination occurring at the time of contracting the marriage under Article 16(1) (b), which provides as follows:

“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same right freely to choose a spouse and to enter into marriage only with their free and full consent.”

Lastly, under Article 16 (1)(c) of the CEDAW Convention, Uganda is also obligated to ensure that women enjoy equal rights and responsibilities during marriage. It provides thus:

“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage and at its dissolution.”

In my view, that the learned majority Justices of the Constitutional Court erred in law and fact when they failed to consider the constitutional challenges to bride price as alleged by the Petitioners vis a vis the cited constitutional provisions. I find that while the practice of voluntary exchange of gifts between the groom to be, the bride to be and their respective parents is not unconstitutional. However, I find that the practice of demanding for any “gifts” by the parents of the girl intending to marry and their payment, which “gifts” in essence form the bride price, and the making of the payment of these gifts a condition precedent to a valid customary marriage, unconstitutional.

In *Uganda Association of Women Lawyers & 5 Others v. Attorney General*, [Constitutional Petition No. 02 of 2003], Mpagi-Bahigeine, JA (as she then was) made the following spot on observations while striking down several discriminatory sections of the Divorce Act. She held as follows:

“These sections have the effect of negating the concept that equality is a core value of the Constitution. The preamble to the Constitution makes it clear that the framers intended to build a popular and desirable Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.

...

It is in substance a colonial relic whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role of being a mere appendage of the husband, without a

separate legal existence. This concept of the family has been drastically altered in recent decades. Marriage is now viewed as an equal partnership between husband and wife. Still, the old ideas and patterns persist, as do their psychological and economic ramifications. That notwithstanding, women are entitled to full equality in respect of the right to form a family, their position within the functioning family, and upon dissolution of the family so proclaims Article 33(1): Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution...

It is well to remember that the rights of women are inalienable, interdependent human rights which are essential in the development of any country and that the paramount purpose of human rights and fundamental freedoms is their enjoyment by all without discrimination. ...

The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender. Legal rules, however, continue to be made gender neutral so much so that there are no more husbands or wives, only spouses. This step is in the right direction. It is further important to note and appreciate that the 1995 Constitution is the most liberal document in the area of women's rights than any other Constitution South of the Sahara... It is fully in consonance with the International and Regional Instruments relating to gender issues. (The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which is the women's Bill of Rights and the Maputo Protocol on the Rights of Women in Africa [2003]). Be that as it may, its implementation has not matched its spirit. There is urgent need for Parliament to enact the operational laws and scrape all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantial equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises."

It is my view that Her Lordship's observations were not only true to the need to end discrimination occurring at divorce in marriages contracted under the Marriage Act, but are also applicable to the legal requirement that bride price must be paid before a valid customary marriage can be contracted and refund before it is dissolved, in those communities which require its refund.

Section 1(b) of the *Customary Marriages (Registration) Act, Cap 248 Laws of Uganda* defines a customary marriage as follows:

“a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part III of this Act.”

According to Wikipedia Free Encyclopedia, a rite is “an established, ceremonial, usually religious, act.”

There is no doubt that for the majority of tribes in Uganda, payment of bride price is one of the preliminaries required to be fulfilled before the parties will be considered to be validly married under a customary marriage. It should however be noted that the marriage rites observed by each tribe in Uganda are not only restricted to the demand and payment of bride price but are as diverse. Some of these rites are performed in the preliminary stages of preparing for marriage, while some others are performed during the actual giving away of the girl to the groom. In other communities, there are yet more rites which are even performed after the girl has taken place. The totality of these marriage rites together with other aspects of life that relate to food, dress, language, values, etc. is what constitutes culture. From the time Ugandans came into contact with other forms of civilizations introduced by Arabs, Europeans and Asians, among others, they have been adopting new ways of living, feeding, dressing up, mode of communication, etc.

I am therefore not persuaded that by this Court striking out the custom of a girl's parents demanding for bride price from her husband to –be, before allowing her to get married, will necessarily result in a denial of their rights to practice their culture enshrined in Article 37.

It should further be recalled that the appellants did not seek from the Constitutional Court an order to declare that customary marriages are unconstitutional. Rather, the appellants only challenged the aspect that makes the payment of the bride price as a condition precedent to the contracting of a valid customary marriage, as well as the aspect that makes the refund of bride price a condition precedent for dissolution of customary marriages among some tribes in Uganda.

Furthermore, it should also be noted Ugandans seeking to practice their culture would still be able to voluntarily exchange marriage gifts before, during or after the contracting of the customary marriage between the groom to be and his wife's or her parents or relatives and vice versa. Such a voluntary exchange of gifts is permissible under Art. 37 and therefore are not unconstitutional.

Whether payment of bride price fetters free consent to marry

I will now proceed to consider grounds 5, 7, 10 and 11 of appeal. All these grounds touch on the question whether payment of bride price fetters parties' consent to marry and to remain married.

The Constitutional Court rejected the appellant's submissions that among other things, the demand for payment of bride price by a woman's parents negatively impacts on the free consent of both the man and woman intended to marry.

With due respect to the learned Justices, I wish to respectfully differ. The issue of consent by the parties to the proposed marriage requires, in my view, a deeper analysis beyond its outward expression, than was given to it by the learned Justices of the Constitutional Court. Their Lordships argued that since there are many ways of contracting a marriage in Uganda which are permitted by law, parties can and do freely choose to contract a customary marriage in preference to other equally available options which do not require bride price payment.

That having done so, they agree to be bound by the rites attendant to the contracting and dissolution of a customary marriage, of which demand for payment and refund of bride price before the contracting or dissolution of marriage is part and parcel.

With due respect to the learned Justices of the Constitutional Court, I respectfully wish to differ with their holding. It is common knowledge that the majority of Ugandans live in the countryside following their traditional ways of life, as passed down to them from their parents and grandparents. Unfortunately, most of these traditions are unwritten. For young men and women, they are socialized by their families to know that they are expected to get married. When they do grow up and identify a person to marry, the choice of where and how to marry is, to the best of my knowledge, influenced by several factors, which include their level of education, income, the extent to which they personally and/or their families subscribe to their religious faith, where they live and generally their exposure to other values other than their own traditional way of living.

Whatever their individual or common views and/ or preferences about where and how they may wish to get married, it is common practice for both the girl and the boy to inform their respective parents and/or other relatives such as the paternal auntie in Buganda, at a very early stage may be, that they have indeed found someone they would like to marry.

It is at this stage that the parental/relatives' demands and wishes set in and when bride price will be specified and later demanded before to formalize the union or to get their parents' blessing. Even though it is not a legal requirement for church or civil marriages, parents' blessing will be culturally and socially required, even where the couple have already expressed a preference to contract a church or civil marriage.

Given the above background, it would be wrong for courts, in my view, to construe a couple's decision to marry under customary law, as a decision to

subscribe to all the rites and customs of their respective tribes, including even those that may not meet the constitutional test set for customs and other cultural practices.

In my view, it is also important for courts to recognize the subtle but very deeply felt influence and authority parents and close family members, especially in African families, can and usually wield over their children, even though such children may no longer be legal minors. This parental/family influence usually manifests itself in times of marriage and can have impact on the man and woman intending to contract a customary marriage or even a marriage proposed to be contracted under the Marriage Act. This subtle power can manifest itself in several ways.

The first way is through the girl's family (especially the father) collecting bride price in advance from the man's family even before the consent of either one or both parties to the marriage has been given. The consequence of this will be that the girl's family will exert pressure or influence on her to enter into that marriage just because bride price was already been paid, sometimes, in extreme cases even before she became of age! It is therefore not surprising that forced marriages, especially of girls who have not yet come of age in this country are not uncommon in rural areas where poverty levels are high and literacy levels are relatively much lower than in urban areas.

The second way is where the parties to the marriage have consented to it but the bride's father and/or other relatives/guardians object to the marriage and decline to give their blessing on grounds that the bride price demanded has not yet been paid. Despite the man and woman being agreeable to enter into the marriage without any conditionality, such a marriage may end up not taking place because the man intending to marry cannot afford to pay the high bride price set by the girl's father and/or her family.

The inevitable consequence of this is that both the man and the woman may either end up cohabiting and not getting legally married or they may chose to marry other persons, respectively. In the case of the man, he may marry another woman whose parents have either not demanded for any bride price to be paid or one whose parents have made modest demands for bride price which the man can afford to pay. In the case of the woman, she too may lose the opportunity to get married at all or she may end up marrying another man who can meet her parent's/families' high bride price demands. Such a marriage may not necessarily be out of choice, but out of necessity and sometimes even out of frustration!

It is evident that in all the possible scenarios I have highlighted, the demand for bride price by the girls' family will have fettered the free consent of a man and a woman intending to marry, contrary to Article 31(3) of our Constitution, because their subsequent marriages will not be an exercise of their free consent to marry, contrary to Article 31(3) of the Constitution.

Therefore, with due respect to the learned Justices of Constitutional Court, I find that they erred when they held that the demand and payment of bride price before contracting a customary marriage does not fetter the free consent of the parties to the marriage. I wish to point out that not all tribes in Uganda have this custom of demanding refund of bride price at the end of a customary marriage. However, in my view, this should not have stopped the Constitutional Court from considering and determining whether the custom of refund of bride price is constitutional in those tribes that practice that culture.

I will now turn to consider the second issue arising under these grounds of appeal: that is whether the demand for a refund of bride price before the

dissolution of a customary marriage does not fetter the free consent of the parties to remain in the marriage.

Apart from their pleadings, the appellants relied on affidavit evidence of men and women who had suffered dire consequences as a result of this customary practice of requiring refund of bride price by husbands. There was also affidavit evidence of women who feared to leave abusive marriages for fear that their husbands would go ahead and demand a refund of the bride price they paid from their parents. One of the affidavits also brought out a custom where, if bride price is not paid, the husband will lay a claim on the children his wife may give birth to with another man, after she has left her first marriage.

In my view, the appellants provided the Constitutional Court with adequate evidence to show the negative impact of this custom of refund of bride price on women's decision to remain in failed marriages. Given the dire consequences that a woman, her family and partner may face from a husband who is demanding refund of his bride price, it is not farfetched to envisage that the requirement to refund bride price may force women to remain in abusive/failed marriage against their will.

I agree that the customary practice of refunding bride price is not practiced by all tribes in Uganda. However, the affidavit evidence on record showed that it is indeed practiced by some tribes. It would therefore have been in order for the court to pronounce itself on the impact of the custom of seeking refund of bride price, for those communities that practice it.

Whether payment of bride price promotes inequality in marriage?

I will now proceed to consider grounds 4, 6, 8 and 9 of appeal. The issue that these four grounds of appeal raise is whether the demand and payment of bride price before contracting a customary marriage and the demand for a refund of

bride price before the dissolution of a customary marriage promotes inequality and undermines the welfare and dignity of women in marriage?

Article 31(1)(b) of the Constitution guarantees equal rights for men and women “*at and in marriage, during marriage and at its dissolution.*”

Furthermore, the payment of bride price is also inconsistent with *inter alia* Article 21 of the Constitution because only one party to the marriage is obligated to pay bride price. It therefore discriminates between man and woman on the grounds of sex, yet under Article 21 of the Constitution, all persons are equal before and under the law and a person shall not be discriminated against on the ground of sex, among others.

Bride price also promotes inequality in marriage in as far as the customs only subjects men to paying bride price. This also runs contrary to clear provisions of Articles 21 and 31 which provides for men and women to have equal rights in marriage, during marriage and its dissolution; as well to Article 33 which provides for women to have full and equal dignity with men.

Lastly, I will briefly consider ground 12 of appeal. Under this ground, the appellants contended that the learned Justices of the Constitutional Court erred when they held that the unfavorable aspects of the custom of bride price may be remedied through redress under any other law and not through declarations.

Article 137 requires the Constitutional Court to make a declaration where it finds that an allegation made in a petition brought before it has been proven. This is because the Constitutional Court has a legal and mandatory duty to do so. The discretion granted to the Constitutional Court was reserved only in respect to the power to grant redress where it deems it appropriate or to refer the matter to the High Court to investigate and determine the appropriate redress.

Conclusion

In conclusion, I find, for all the reasons given in this judgment, that the majority Justices of the Constitutional Court erred in law and fact when they dismissed the petition against the payment of bride price and its refund at the contracting and dissolution of marriage, respectively, as conditions precedent to the contracting of a valid customary marriage and the dissolution of customary marriage among various tribes in Uganda.

I find that the majority Justices of the Constitutional Court also erred in law and fact when they held that bride price means the same thing for all the different cultures in Uganda and failed to find that bride price is commonly practiced in Uganda by all cultures.

I also find that the majority Justices of the Constitutional Court erred when they found and held that they could not take judicial notice of the custom and practice of paying bride price.

I also find that the majority Justices of the Constitutional Court erred when they failed to find that the payment and refund of bride price promote inequality in marriages and that it is one of the causes of domestic violence in customary marriages.

Lastly, I also find that the majority Justices of the Constitutional Court erred when declined to issue the declaration on the undesirable effects of bride price on the basis that these could be remedied by other laws and means, other than declarations.

I would accordingly allow this appeal and make the following declarations:

- a) The voluntary exchange of gifts at marriage or during marriage between the groom to be and his wife to be and/or her parents and relatives and vice versa is not unconstitutional.
- b) That the custom and practice of demand of bride price by a woman's parents or her relatives from her husband to be as a condition precedent to a valid customary marriage practiced by several tribes in Uganda is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.
- c) The payment of bride price, as a condition precedent for the validity of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.
- d) That the custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.
- e) That the payment of bride price as a condition precedent to a valid customary marriage, and of its refund as a condition precedent to the dissolution of a customary marriage which has been demanded for by a woman's parents and/or relatives undermines the dignity & status of women and is therefore inconsistent with Article 32(2), 33(1) and (4), and 21(1) & (2) of the Constitution.

The appellants wisely prayed to the Constitutional Court not to make any order as to costs. This petition and appeal concerned matters of public interest. It is only befitting that each party should bear their respective costs. I would so order.

DATED this *6th* day of *August* 2015

Esther Kisaakye

HON. DR. ESTHER KISAAKYE, JSC
JUSTICE OF THE SUPREME COURT.