

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.16 OF 2011

(Coram: Mr. Justice Alfonse Owiny Dollo, DCJ, Mr. Justice Kenneth Kakuru JCC,
10 Mr. Justice F.M.S Egonda Ntende JCC, Mr. Justice Barishaki Cheborion JCC and
Mr. Justice Christopher Madrama JCC.)

1. CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT
(CEHURD)

2. PROF. BEN TWINOMUGISHA

15 3. RHODA KUKIRIZA

4. INZIKU VALENTEPETITIONERS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF JUSTICE BARISHAKI CHEBORION, JCC

20 **Background**

This Petition challenges actions and omissions of the Government of Uganda for failure to provide Minimum Maternal Health Services that include non provision of basic indispensable maternal health facilities, inadequate number of midwives and doctors to provide maternal health services, inadequate budget allocation
25 to the maternal Health sector, frequent stock outs of essential drugs, lack of

5 emergency obstetric services at health facilities, non-supervision of public
health facilities and the unethical behavior of health workers towards expectant
mothers which is said to have led to death of women during child birth. The
petitioners alleged that these actions and omissions are inconsistent with
Objective 1(i), XIV (b), XV and Articles 33(2) & (3), 20(1) & (2), 22(1) & (2), 24,
10 34(1), 44(a), 287,8A and 45 of the Constitution.

Broadly, the Petition Contends that;

- 15 a) *That the Governments omission to adequately provide basic maternal
health care services in public facilities violates the right to Health and
is inconsistent with and in contravention of Articles 8A, 39 and 45 as
read together with objectives XIV and XX of the National Objectives
and Directive Principles of state policy of the constitution of the
Republic of Uganda.*
- 20 b) *That the Governments omission to adequately provide basic maternal
Health care services in public health facilities violates the right to life
and is inconsistent with and in contravention of Article 22 of the
Constitution of the Republic of Uganda*
- 25 c) *That the Government's omission to adequately provide basic maternal
health care services in public health facilities violates the rights of
women and is consistent with and in contravention of Articles 33(1),
(2) and (3) of the constitution of the Republic of Uganda.*

- 5 d) *That the Government 's omission to adequately provide emergency obstetric care in public health facilities violates the right to health, life and rights of women and is inconsistent and in contravention of Articles 8A, 22 33(1), (2) and (3), 45, 287 as read with objectives XIV and XX of the Constitution of the Republic of Uganda.*
- 10 e) *That the Government's omission to adequately provide emergency obstetric care in public health facilities which results into obstetric injury subjects' women to inhuman and degrading treatment and is inconsistent with and in contravention of Articles 24 and 44(a) of the constitution of the republic of Uganda.*
- 15 f) *That the petitioners are entitled to declarations and orders sought in the petition.*

The respondent filed a reply opposing the petition but recognized that the constitution provides for the right to health and that Uganda had ratified a number of international human rights treaties which specifically guarantee and
20 protect the right to health. The respondent argued that the treaties provide for progressive realization of the full enjoyment of the rights and since the right to health was a socio economic right, the capacity of the state to fully protect and fulfill the obligation depended on availability of resources in the state. That the government had undertaken all practical measures to ensure the realization of
25 the highest attainable standard of health services within the available resources and for that, it should not be faulted.

5 Representation

When the matter first came up for hearing in 2012, the petitioners were represented by Mr. Peter Walubiri, Ibrahim Nsereko & Rose Wachikona while the respondent was represented by Ms. Patricia Mutesi a Principal State Attorney.

Ms. Mutesi raised a preliminary objection to the petition on the basis of the “the
10 political question Doctrine”. She contended that the petition was framed in a way that required the Constitutional court to make a judicial decision on political questions and thus the court would be interfering with political discretion, a preserve of the Executive and the Legislature. The Constitutional Court upheld the objection and struck out the petition on two grounds;

15 First, that the petition did not disclose competent questions that required interpretation of the Constitution. Secondly, that the Court could not look into the acts and omissions brought forth by the petitioners against the Government because of the political question doctrine.

Dissatisfied with the decision of the constitutional court, the Petitioners filed
20 Constitutional Appeal No. 01 of 2013 with the following grounds;

1. *That the learned Justices of the Constitutional Court erred in law when they misapplied the Political Question Doctrine.*
2. *That the learned justices of the constitutional Court erred in law when they held that the Petition did not raise competent questions requiring
25 their interpretation under Article 137 of the Constitution.*

5 3. *That the learned Justices of the Constitutional Court erred in law and
misdirected themselves when they decided that the petition called
upon them to review and implement the health policies.*

The Supreme Court found that the petition raised competent questions for the
Constitutional Court to hear, interpret and determine. Further, that although
10 the political question doctrine had limited application in Uganda, in this
particular case, the Constitutional Court erred when it abdicated its
constitutional duty to hear the merits of the petition before reaching the
conclusion as to whether to allow or dismiss it on the political question doctrine.

The Supreme Court directed the Constitutional Court to proceed and hear the
15 Petition on its merits.

Consideration of the Petition

The following six issues were adopted for determination;

1. *Whether the governments omission to adequately provide basic
maternal health care services in public health facilities violates the
20 right to health and is inconsistent with and in contravention of Articles
8A, 39 and 45 as read with objectives XIV and XX of the National
Objectives and Directive Principles of state policy of the constitution of
the Republic of Uganda*
2. *whether the Governments omission to adequately provide basic
25 maternal Health care services in public health facilities violates the*

5 *right to life and is inconsistent with and in contravention of article 22
of the Constitution of the Republic of Uganda*

3. *Whether the Government's omission to adequately provide basic
maternal health care services in public health facilities violates the
rights of women and is consistent with and in contravention of Articles
10 33(1), (2) and (3) of the constitution of the Republic of Uganda.*

4. *Whether the Government 's omission to adequately provide
emergency obstetric care in public health facilities violates the right to
health, life and rights of women and is inconsistent and in
contravention of Article 8A, 22 33(1), (2) and (3), 45, 287 as read with
15 objectives XIV and XX of the Constitution of the Republic of Uganda.*

5. *Whether the Government's omission to adequately provide emergency
obstetric care in public health facilities which results into obstetric
injury subjects' women to inhuman and degrading treatment and is
inconsistent with and in contravention of Articles 24 and 44(a) of the
20 constitution of the republic of Uganda.*

6. *What remedies/ reliefs are available to the parties*

Petitioners' case.

Learned counsel for the petitioners Mr. Peter Walubiri submitted that the
Governments omission to adequately provide basic Maternal Health Care
25 Services in public health facilities violated the right to health in contravention of
Articles 8A, 39 and 45 as read with objectives XIV and XX of the National

5 Objectives and Directive Principles of state policy of the constitution. That the constitution required the state to ensure that all development efforts are directed at ensuring maximum social and cultural wellbeing of all the people of Uganda including access to education and health services.

Mr. Walubiri added that Objective principle XX requires the state to take all
10 practical measures to ensure the provision of basic medical services to the population which had not been done. He referred to the decision in ***Centre for Health, Human Rights and Development (CEHURD) and Others Vs. Attorney General, Constitutional Appeal no. 1 of 2013*** where the Supreme Court held that the constitution had provided rights to citizens to access medical care.

15 Counsel further submitted that failure to promptly attend to a patient as a result of absence of the doctor on duty was a violation of the patient's right to basic medical care and cited ***CEHURD & Others v Nakaseke District Local Government & others, Civil Suit no. 111 of 2012*** to support his argument.

Counsel referred to Article 45 of the constitution which states that the rights,
20 duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in chapter IV of the constitution shall not be regarded as excluding others not specifically mentioned.

He further submitted that where the Government fails to provide Ugandans with a clean and healthy environment, a right guaranteed under Article 39 of the
25 Constitution, it contravenes the right to health.

- 5 Counsel referred to General Comment no 14 of the Committee on Economic, Social and Cultural Rights, which interprets the right to health as an inclusive right that does not only extend to timely and appropriate provision of health care but also to determinants of health that include healthy occupational and environmental conditions.
- 10 Counsel submitted that Uganda had ratified international and regional human rights treaties that guarantee and protect the right to health and argued that Article 287 of the Constitution recognizes and legitimatizes the applicability of the treaties in Uganda and to support this contention, he cited *Uganda V Thomas Kwoyelo, Constitutional Appeal no. 1 of 2012*.
- 15 He further adverted that Uganda had ratified the Convention on Economic, Social and cultural Rights (CESCR) on elimination of all forms of discrimination against women (CEDAW), convention on the rights of a child, African Charter on the Human and Peoples Rights on the rights of women in Africa (Maputo Protocol) and the African Charter .That Article 287 of the Constitution enjoins
- 20 the government honor treaties which meant that the government had an obligation to guarantee and protect the rights spelt out in these treaties.

On the right to Maternal Health, Mr. Walubiri submitted that the Government had failed to adequately provide basic maternal health care services in public health facilities which was a violation to the right to life in contravention of article

25 22 of the Constitution.

- 5 It was his contention that fundamental rights including the right to health are inherent and not granted by the state and should be upheld by all organs of state. That the right placed responsibility on the state to provide not only access to health care services but also to ensure that all organs and agencies of Government respect, promote and uphold them. He referred to the decision in
- 10 *Asero Ochieng & 2 Patricia Others V. AG HCCC Petition No. 409 / 2009* for the proposition that the state had the responsibility to ensure that it does not do anything that would in any way negatively affect access to health services which included sexual and reproductive health services, access to family planning, pre- and post-natal care, emergency obstetric services and access to information.
- 15 On issue 2 Mr. Walubiri argued that the Government had failed and or omitted to adequately provide basic maternal health care services in public health facilities which amounted to a violation of the right to life in contravention of Article 22 of the constitution. He referred to Supreme Court decision in *AG V. Susan Kigula & 417 others Const. Appeal No. 3 of 2006* where the court
- 20 observed that the right to life is the most fundamental of all rights and the state had a duty to protect it by law. Uganda as a party to the International covenant on Civil and Political Rights had a duty to avert conditions that may give rise to threat to life or which would prevent individuals from enjoying their right to life which includes the right to dignity.
- 25 The measures include access to health care, availability of effective emergency health services, campaigns to ensure access to medical examinations and

5 treatment. Counsel submitted that the government had a duty to establish functional health systems. It also had an obligation to eliminate discriminatory laws which impact on the individual's ability to seek health care and emphasized that the right to life was inextricably bound with the right to health.

The Petitioner relied on evidence deposed by Prof. Ben Twinomugisha who stated
10 that maternal death was death of a mother while pregnant or 42 hours after termination of pregnancy.

On issue 3 whether Governments omission to adequately provide basic maternal health services in public health facilities violated the rights of women in contravention of the constitution, Counsel Walubiri referred to Art. 33(2) of the
15 constitution which places an obligation on the state to provide facilities and opportunities necessary to enhance the welfare of women so as to realize their full potential.

Counsel submitted that the Government had failed to provide affordable maternal health care services which threatened the ability of mothers to afford
20 essential care. That there was shortage of mama kits at all levels of health centers and as a result mothers were dying.

On the 4th and 5th issues, Counsel for the appellant submitted that Art. 24 of the constitution provides for respect for human dignity and protection from inhuman treatment yet the Government had omitted to provide emergency obstetric care.
25 Counsel contended that there was shortage of skilled attendants and trained support staff to manage complications which required surgery. That there were

5 few functional operating theaters which had led to maternal mortality and morbidity which in turn had in some cases amounted to torture, cruel, inhuman and degrading treatment of mothers.

Respondents' case

10 The respondent filed a reply opposing the petition but recognized that the constitution provides for the right to health and that Uganda had ratified a number of international human rights treaties which specifically guarantee and protect the right to health.

Counsel for the respondent argued that the treaties provide for progressive realization of the full enjoyment of the rights. That since the right to health was
15 a socio economic right, the capacity of the state to fully protect and fulfill the obligation depended on availability of resources in the state. That while Uganda had taken steps to meet the requirements of the treaties, there were structural constraints and because the Government had undertaken all practical measures to ensure provision of health services and strengthen existing maternal health
20 services it should not be faulted.

The respondent maintained that the government had fulfilled the obligation to protect the right to Health through adoption of detailed national health plans for realization of the right to health in addition to other policies and programs.

To support its arguments, the respondent relied on the evidence of Dr. Asuman
25 Lukwango the Permanent Secretary in the Ministry of Health who deposed that Government had put in place and was implementing several polices to ensure

5 improvement in provision of maternal health services. The policies include a road map to accelerate reduction of maternal morbidity, strategies for child survival, provision of reproductive health commodities, sexual and reproductive health strategies and clinical treatment guidelines.

That the ministry of health had also spear-headed a multi sectoral collaboration
10 program to improve maternal health by implementing policies such as universal primary education, national youth policy, poverty eradication action plan, food and nutrition policy, rural electrification and feeder road network. That programs to address inequities in accessing maternal and child health services include peace recovery and development program, United Nations Development
15 Assistance program and most at risk population services. That the above measures show that Uganda had fulfilled the obligation to guarantee the right to health which require states to among others adopt national health policies with detailed plans for realizing the right to health.

The respondent further submitted that there had been progressive increase in
20 provision of maternal health commodities under funding for essential medicines. Uganda had adopted strategies such as the mother baby package, safe motherhood and making pregnancy safer to reduce maternal morbidity.

In the case of alleged frequent stock outs of essential drugs for maternal health, the responded adverted that the government had through the National medical
25 stores regularly procured and delivered drugs and commodities to health

5 facilities although some of it was lost through theft because of corrupt health workers.

For alleged lack of emergency obstetric care services at health centers, the respondent submitted that the government had under the health sector strategic plan improved access to obstetric services but due to limited government
10 resources there were challenges such as inadequate theatre space.

The respondent admitted that some health workers acted unprofessionally and failed to provide the required health care to expectant mothers but argued that there was regular supervision of workers. That the Government had put in place a client's charter and a monitoring unit at the Ministry of Health to solve the
15 problem.

To reduce staff absenteeism the respondent submitted that government had set out to improve workers' conditions including construction of staff houses.

In the case of maternal deaths, the government had instituted mandatory maternal death audits to identify correctable errors and had made
20 recommendations for improvement.

Counsel admitted that there was shortage of medical staff which he attributed to shortage of trained medical workers in the country and limited resources in government to pay good wages for which he argued government should not be faulted.

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5 **Jurisdiction of the Constitutional Court**

The jurisdiction of this Court to entertain Constitutional Petitions such as the present is derived from **Article 137** of the Constitution. The said article establishes this court having jurisdiction to determine questions as to the interpretation of the Constitution. While determining questions as to
10 interpretation, this Court is only called upon where the meaning of an Article(s) of the Constitution is in dispute.

Principles of Constitutional Interpretation

It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and considered alone but
15 that all the provisions bearing upon a particular subject are to be brought into view and interpreted jointly so as to effectuate the greater purpose of the instrument. The entire Constitution must be interpreted as one integrated whole.
See Smith Dakota v. North Carolina, 192 US 268 (1940).

Secondly, both purpose and effect are relevant in determining Constitutionality;
20 either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible.
25 Intended and achieved effects have been looked to for guidance in assessing the

5 legislation's object and thus the validity. *See The Queen V. Big M. Drug Mart Ltd (1986) LRC 332.*

Thirdly, it has also been held that words must be given their natural and ordinary meaning where they are not ambiguous. *See Charles Onyango Obbo & Another vs Attorney General, Constitutional Petition No.15 of 1997.*

10 The Court is also enjoined to construe the Constitution 'not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit.

Determination of the issues

It was the petitioners' case that the Government had omitted to provide basic maternal health services which violated Articles 8A, 39 and 45 read with
15 Objectives XIV and XX of the National Objectives and Directive Principles of State Policy of the Constitution of Uganda. They contend that as a result of the failure there had been unwarranted loss of life of mothers.

To demonstrate the alleged omissions on the part of Government, the petitioners relied on the evidence of Dr. Waiswa who listed the following incidents which he
20 attributed to failure by the Government to provide basic maternal health services;

35. While at Mityana Hospital, nurses asked the Late Sylvia Nahubowa's mother in law, the 3rd petitioner money and supplies, but she did not have the amount requested.

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36. As time passed, the late Nalubowa began bleeding and a doctor on call never arrived to attend to her. She and her unborn baby died at the hospital.

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37. The Late Anguko Jennifer went into Labour at 11:00am at Arua Regional Referral Hospital started bleeding at approximately 2:00pm. The nurses left Ms. Anguko unattended and told her sister and husband to try and stop her bleeding with old pieces of cloth.

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38. A doctor was not called until about 7:30pm he was delayed in arriving, and the late Anguko and her unborn child died at the Hospital.

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39. In Uganda 5840 women die in child birth every year which translates to 16 women dying every day. Uganda Demographic Health Survey (UDHS 2016) places the number of women at 336 women die for every 100,000 births due to maternal related complications most of which are preventable.

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40. These maternal deaths are largely preventable and the leading causes of maternal death in Uganda are obstetric Hemorrhage, Postpartum sepsis, obstructed labor and uterine rupture, hypertensive disease and complications from unsafe abortions all of which are avoidable. Other factors include lack of staff expertise, staff shortages, corruption, lack of equipment and supplies, insufficient referrals and inadequate data collection and reporting.

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41. Some health facilities have individual Maternal Mortality Ratios as high as 2,578 maternal deaths per 100,000 live birth.

42. While Uganda has made commitments to reduce maternal Mortality, it has failed to improve performance on key maternal health indicators.

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43. While the ministry of Health of Uganda has published roadmaps to reduce child and maternal mortality, there has not been a consistent or meaningful reduction in the leading causes of maternal death.

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44. The Government continues to fail to implement well-known, affordable, and effective approaches for reducing preventable maternal death. For example, obstetric hemorrhage-the leading cause of maternal death- can be prevented by skilled birth attendance, delivery in a properly equipped facility, and timely administration of uterotonic drugs such as oxytocin or misoprostol, which can reduce blood loss and prevent most deaths. Postpartum sepsis is readily prevented with effective infection control procedures and the timely use of antibiotics. Obstructed labor and uterine rapture can be prevented by early detection and causes of caesarean section, and hypertensive disorder can be avoided by treatment with magnesium sulfate and induction of labor.

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45. Several factors contribute to persistently high maternal mortality rates in Uganda including; lack of staff expertise, staff shortages, and worker absenteeism, inadequate infrastructure and lack of basic

5 *medical equipment and supplies, including stock outs of essential
drugs, lack of ambulances or other transportation; insufficient
referrals, including lack of an emergency referral protocol and
inadequate data collection and reporting.*

 46. *The ration of doctors, nurses and midwives is at 0.4 per 1,000
10 population in Uganda far below the World Health Organization (WHO)
recommended ration of 2.5 per 1,000.*

Objective XIV of the Objective Principles of State Policy in the Constitution provides that;

**the state shall endeavor to fulfill the fundamental rights of all Ugandans to
15 social and economic development and shall in particular ensure that all
developmental efforts are directed at ensuring maximum social and cultural
well-being of the people and all Ugandans enjoy rights and opportunities
and access to education, health services**

It is further stated in objective XX of the constitution that;

20 **the state shall take all practical measures to ensure the provision of basic
medical services to population.**

The National Objectives and Directive Principles of state Policy in objectives XIV and XX read together with Article 8A of the constitution which states that Uganda shall be governed based on principles of national interest and common
25 good enshrined in the directive principles of state policy oblige the government to provide health and basic medical services to the people of Uganda.

5 It was the respondent's submission that all the international and regional treaties provide for "progressive realization" of the full enjoyment of the right to health and the "highest attainable standard" of health. Ms. Mutesi argued that the standards are based on the recognition that the right to health is a social economic right, thus the capacity of state parties to fully protect, respect and
10 fulfill this right is dependent on their prevailing conditions or development standards and available resources in state.

I agree with the submission by the respondent that the provision of services depends largely on the availability of resources in the country but this should not be used as a blanket excuse and defense for failure to provide basic services
15 to save life because provision of some of these services do not require money for example, it did not require the state to spend money to save the life of the late Sylvia Nalubowa at Mityana Hospital. The staff wanted a bribe and because the family did not have money and the bribe was not paid, the doctor delayed to come to hospital and as a result Nalubowa bled to death. Corruption killed
20 Nalubowa and not lack of resources.

Article 2 of the International Convention on Economic, Social and Cultural Rights (ICESCR) states that each state party to the convention undertakes to individually through international assistance and cooperation, especially economic and technical, to the maximum of its valuable resources to
25 progressively achieve the full realization of the rights recognized in the charter

5 which include adoption of legislative measures for its people to enjoy the best attainable standard of physical and mental health.

Article 12(1) of the ICESCR and article 16 of the African Charter on Human and peoples' rights places an obligation on states parties to take necessary measures to protect the health of their people and to ensure that they receive medical
10 attention when they are sick. Medical attention includes delivery and maternity care.

State parties undertake to take all appropriate measures to provide adequate, affordable and accessible health services and to establish and strengthen maternal health services for women under Article 14(2) (a) of the Protocol to the
15 African Charter on Human and People's Rights on the Rights of Women in Africa.

The right to health is to be understood as the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health and without wholly exonerating Uganda, it should be appreciated that the full realization of the right to health is difficult to attain
20 because of structural and other obstacles resulting from factors beyond the control of States and Uganda is no exception.

The respondents submitted that the precise application of the elements of the right to health is dependent on the prevailing conditions in a particular state as stated in paragraph 12 of the affidavit of Doctor Lukwango. The respondent
25 further argued that whereas the essential element of availability requires states to have sufficient quantity of functioning public health and health care facilities,

5 goods and services, as well as programs, the precise nature of the said facilities,
goods and services will vary depending on numerous factors, including the states
party's development level.

It is true that states require sufficient resources to realize economic, social and
cultural rights because without both human and financial resources, nothing
10 can be done. In the case of Uganda with vast natural resources any claim by
state actors that there is lack of resources cannot be an excuse because the
government has responsibility to harness the resources including application of
equitable taxation and properly apply the proceeds to meet constitutional
demands which include provision of health care services.

15 According to Dr. Waiswa, many health facilities in Uganda have inadequate
infrastructure, lack functioning basic medical equipment and have inadequate
trained staff. The Health Sector Development Plan for 2015 showed that only
33% of the medical equipment in Uganda general hospitals was functional while
63% required repair or replacement. This is an absurd situation which cannot
20 enable provision of basic health care to be carried out.

The ICESCR requires states to take measures to reduce infant mortality and
improve maternal health services which include access to family planning, pre
and post-natal care, emergency obstetric services and access to information, as
well as to resources necessary to act on that information.

25 It was submitted for the respondent that the attainment of the highest reliable
standard of health services can only be realized over a period of time. This should

5 not be a shield to greater scrutiny because the law requires that the state must demonstrate in clear and concrete terms that it has taken all practical measures to ensure that basic medical services are available to its people.

The ICESCR provides for progressive realization of provision of the health services and acknowledges the constraints due to limitation of available
10 resources but imposes on states parties' various obligations of immediate effect. One such obligation which may not require resources is the guarantee that the right will be exercised without discrimination of any kind.

The concept of progressive realization means that States must implement a reasonable and measurable plan with set achievable benchmarks and time
15 frames for the enjoyment over time of economic, social and cultural rights within the resources available to the state party.

The right is to be realized progressively but the state has to meet minimum core obligations for example a state cannot pass legislation which takes away health benefits from its people. Some obligations in relation to progressive realization
20 are immediate an example is the obligation on state parties to take concrete and targeted steps to realize economic, social and cultural rights.

In **The Centre for Health, Human Rights and Development (CEHURD), Mubangizi Micheal and Musimenta Jennifer v The Executive Director, Mulago National Referral Hospital & Attorney General HCCS No. 212 OF**
25 **2013**, it was stated that *"...Central to any meaningful discussion of the right to health are the concepts of resources and progressive realization. The African*

5 Commission in its principles and guidelines explained that the obligation to progressively and constantly move towards the full realization of economic, social and cultural rights, within the resources available to a State, including regional and international aid, is referred to as progressive realization. While the African Charter does not expressly refer to the principle of progressive realization this
10 concept is widely accepted in the interpretation. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights.

The court added that "States need sufficient resources to progressively realize economic, social and cultural rights. There are a variety of means through which
15 states may raise these resources, including taxation. The duty of the individual to pay taxes imposed by the African Charter implies that there is an obligation on the State to institute an effective and fair taxation system and a budgeting process that ensures that economic, social and cultural rights are prioritized in the distribution of resources."

20 Mulumba Moses in his affidavit in support of the answer to the petition deposed that the right to maternal Health requires timely quality reproductive health service interventions that ensure safe passage to motherhood and reduction of thousands of needless death each year.

Article 14(2) (b) of the protocol to the African Charter on Human and Peoples
25 rights on the rights of women in Africa (Maputo Protocol) requires states parties to take all appropriate measures to establish and strengthen existing pre-natal

5 health and nutritional services for women during pregnancy and during breast feeding.

The right to health is a fundamental right which states ought to respect, protect, uphold and promote. The petitioners cited Patricia **Asero Ochieng & 2 others V AG HCCC Petition no 409/2009** where it was held that the states obligation
10 on the right to health encompasses not only positive duty to ensure that its citizens have access to health care services and medication but also a negative duty not to do anything that would in any way affect access to such health care services and medicines.

International and Regional Human Rights instruments that obligate states
15 parties to respect, protect and promote the right to health also require state parties to take positive action inter alia refrain from denying or limiting access to Health care for all persons. The ICESR obligates states to give sufficient recognition to the right to Health in national, political and legal systems through legislation and adoption of health policies with detailed plans aimed at realizing
20 the right to health.

The African Charter imposes an obligation on state parties to ensure that all branches of government do not violate the right to health and take positive steps to move their machinery towards actual realization of the right.

The CESCR and the African Commission both identify *minimum core obligations*
25 that parties to the ICESCR and the African Charter must fulfil to ensure minimum essential levels of economic, social and cultural rights. The Charter

5 defines minimum core obligations as those that enable reduction of maternal mortality rate, still birth, infant mortality and taking measures to ensure health development of children. Uganda should ensure that it provides adequate equipment and supplies for preventive, diagnostic and curative services if it has to reduce the challenges. It also has to train medical staff and develop treatment
10 guidelines and protocols for the management of maternal complications. It is the responsibility of government to ensure that the services are physically accessible to women across the country especially in rural areas. It cannot under any circumstance justify noncompliance with the core obligations which derive from economic social and cultural rights of the individual or group.

15 Indeed, progressive realization takes into account a state parties available resources and requires the state to move as expeditiously and effectively as possible and take deliberate steps to realize them. Unimplemented policies and strategies in Uganda as pointed out by Prof Waiswa cannot be said to be expeditious and effective steps towards realization of the right to health.

20 The respondent advanced the issue of resource constraints as an excuse for failure by the government to meet its minimum core obligations. Paragraph 10 of General comment 3 of CESCR requires a state party to demonstrate every effort taken to utilize resources at its disposal to satisfy, as a matter of priority, the core obligations.

25 The ICESCR imposes on the states parties positive and negative obligations with regard to the right to health. For the negative obligation to be realized, an

5 obligation is cast upon a state party to respect or refrain from interfering with the right while the positive obligation the maximum extent of on is realized by putting in place measures to ensure realization of the right; this requires resources. From the evidence on record, the respondent largely relies on the positive obligation to ensure the realization of the right to health.

10 General recommendation 24 of the CEDAW notes that the duty of state parties is to ensure women's rights to safe motherhood and emergency obstetric services and the allocation of available resources to the maximum extent possible to these services.

The respondent submitted that the Government had taken measures to
15 adequately provide and improve maternal health services. Dr. Lukwago deposed that the Government had passed policies and made strategies that ensure provision of the services to wit;

- a) Road Map to accelerated Reduction to Maternal and Neonatal
Mobility
- 20 b) Child survival strategy
- c) Adolescent health commodity security strategy
- d) Road Map to accelerated Reduction to Maternal and Neonatal
Mobility
- e) Child survival strategy
- 25 f) Adolescent health commodity security strategy
- g) Reproductive health commodity security strategy

- 5 h) Management Protocols for emergency Obstetric care and
 i) The Uganda clinical Treatment guidelines.

He further averred that the Ministry of Health had spear headed a multi-sectoral collaboration scheme to improve maternal Health by implementing the following policies and strategies;

- 10 a) Universal Primary education under the ministry of health
 b) The National youth policy under the ministry of Gender.
 c) Poverty eradication Action (PEAP)
 d) Food and nutrition policy under the ministry of Health
 e) Rural electrification program under the Ministry of Energy
15 f) Feeder Road Network improvement under the ministry of works.

Dr. Lukwago further averred that the Ministry of Health had faced challenges in implementation of the policies and programmes but government had been proactive in addressing them.

It is true the Government is jointly implementing programs with development
20 partners to address inequities in accessing maternal and child health services
.The programs include; peace, recovery and development (PRDP), United Nations
Development Assistance Framework (UNDAF), Most At Risk Population
Services(MARPS) and the Joint Program on Population(JPP).

Without much explanation the respondent admits that implementation of these
25 policies remains a challenge. It is not sufficient to merely state that there are
challenges impeding implementation of the policies. The respondent did not

5 address court on what measures or steps the government has undertaken to realize provision of Maternal Health care services to women in Uganda. Dr. Lukwago's statements were a mere replication of statements in reports made to attract donor funding.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted by the UN General Assembly on the 18th of June 2008 provides guidance on what constitutes concrete, deliberate and targeted steps which states parties have to take to meet the obligation to fulfill the right to health. They have to be reasonable and actionable.

In the **Government of the Republic of South Africa v Grootboom 2001(1) SA**,
15 the court stated that; *"To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavor to realize. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realization of the right. It may not be sufficient to meet the test of reasonableness to show that the*
20 *measures are capable of achieving a statistical advance in the realization of the right. Furthermore, the constitution requires that everyone be treated with concern."*

Similarly in **S v Manamela 200 (3) SA 1** the court held that *while interpreting reasonableness, as a general rule, the more serious the impact of the measure on*
25 *the right, the more persuasive or compelling the justification must be. The question is one of degree to be assessed in the concrete legislative and social setting of the*

5 *measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.*

I find the decisions persuasive and relevant to the resolution of this issue.

The respondents contend that Government has put in place several policies and programs which have led to improvement of maternal Health and as a result the
10 maternal mortality rate has declined from 537 deaths per 100,000 live births in 1995 to 435 deaths per 100,000 live births in 2006. That contraceptive prevalence rate has also increased from 5% to 23% and adolescent pregnancy rate decreased from 43% to 25% in the same period.

Contrary to what Doctor Lukwango stated in his affidavit, Dr. Peter Waiswa
15 deposed that according to the 2016 Uganda Demographic Health Survey (UDHS), the maternal mortality ratio (MMR) in Uganda stood at 336 deaths per 100,000 live births, and the pregnancy-related mortality ratio (PRMR) at 368 deaths per 100,000 live births. He emphasizes that both these ratios are unacceptably high.

Even if Dr. Lukwango is encouraged by the reduction, the levels reached are still
20 not good enough taking into account the resources available to the government. Much more ought to have been achieved. The situation is not as rosy as Dr. Lukwango would wish to portray for example the ministry of Health's annual Health Sector Performance Report for 2015-16 found that some facilities in Uganda had individual maternal mortality rates as high as 2,578 maternal
25 deaths per 100,000 live births.

5 It is not in dispute that the Ministry of Health has published plans, policies and strategic frameworks relating to maternal and child health for example, in 2007 it published the roadmap for accelerating the reduction of maternal and neonatal morbidity and mortality rate in Uganda which outlined the strategy to reduce child and maternal mortality and to meet the United Nations Millennium
10 Development Goals on schedule.

The document served as the National blueprint for reducing maternal mortality from 2007 to 2015; but since then the Ministry has not published an updated roadmap extending beyond 2015. In 2013, the same ministry published a report
15 entitled "*A Promise renewed: Reproductive Maternal, New born and child Health Sharpened Plan for Uganda*", which sought to recommit and accelerate the country's slow progress toward achieving the Millennium Development Goals related to maternal and child health but the undertakings were not fulfilled.

Although the Government developed the 2007 roadmap aimed at accelerating the reduction of maternal mortality in Uganda, it is now over ten years since the
20 roadmap was published and the policies have not lead to any meaningful reductions in the leading causes of maternal death. Reports from the Ministry of Health show that the leading direct causes of maternal deaths as published in the 2007 roadmap remained the leading causes of death in 2015-2016.

It was submitted for the respondent that several steps have been taken to
25 address the lack of basic maternal Health commodities and services leading to a reduction in maternal mortality. However, applying the reasonableness test,

5 statistical data advanced by the respondent cannot add up when the leading causes of maternal deaths in Uganda remain the same. It is clear that the measures taken do not take into consideration the needs and rights of the marginalized and vulnerable members of society in this case the women who form a sizeable majority in the country.

10 The Petitioners' further contented that unethical behavior and non-professionalism of health workers continues to put the lives of pregnant and expectant mothers in jeopardy. The respondent did not adduce any evidence to challenge the petitioners' assertion that when the late Anguko Jennifer started bleeding she was not attended to by a medical professional. She was left in the
15 care of her sister and husband who were not in a position to attend to her health care needs at that given time since they were not qualified medical personnel and they could not do much. As a result, her and her child died at Arua regional referral hospital. The doctor on duty was delayed for several hours after she started bleeding. Similarly, the late Sylvia Nalubowa also bled to death at
20 Mityana Hospital in absence of the doctor on duty. These were not isolated incidents for according to Dr. Waiswa, in Uganda staffing across most levels of the health care system fall short of the required staffing norms and standards. Shortage of services are most acute at parish level where the most vulnerable portion of the population lives and are caused mainly by inadequate and
25 unpredictable wages.

5 Regarding absenteeism, Dr. Waiswa deposed in his supplementary affidavit that the ministry of health had failed to manage absenteeism in the health sector which the Inspectorate of Government in a 2014 report termed "quiet corruption" or corruption stemming from behaviors that may be hard to observe and track. Absenteeism leads to delays in care, high rates of emergency surgery,
10 unnecessary referrals and a multitude of other negative health outcomes.

In a 2010 report by the ministry of health, the high rates of absenteeism contribute to negative health worker attitude towards patients and low levels of accountability to the community.

According to Dr. Waiswa, although the Ministry of Health has identified
15 numerous measures to improve health worker performance, including performance monitoring and appraisal, absenteeism management strategies, and managerial training, the most recent Health Sector Development plan in 2015 aimed for 50-65% of health facilities to meet workforce improvement goals by 2020. The goals were limited and lacked enforcement mechanisms to enable
20 significant improvements in absenteeism or to any meaningful performance accountability in the sector. These averments as serious as they are remained unexplained and unchallenged by the respondent and for that I take all of them as truthful.

Dr. Lukwago admits in his affidavit that some health workers acted
25 unprofessionally in execution of their duties and failed to provide the requisite health care to expectant mothers but was quick that the actions were not

5 condoned by Government. That there was constant supervision at the public health facilities and management structures such as Top Management committee, National and District Maternal and perinatal Death Review, Medicine therapeutic committee had been set up in addition to the regular supervision mechanisms employed by government.

10 The respondent further contends that an on-going pre-service and in-service trainings and continued medical education programs to develop professional skills and ensure sustained quality performance of workers is a measure that has been taken by the Government. Also, that client-patient charter has been developed to ensure that patients' rights are upheld, instituted and implemented
15 policies to that ensure effective planning and budgeting by health facilities.

Dr. Lukwago further stated that the ministry of health had instituted mandatory maternal death audits with an aim to review and determine causes of deaths in order to identify correctable errors and make recommendations to improve provision of health care.

20 I have no doubt that the government has made attempts to address the omissions by putting in place policies, programs as reflected in the respondents submissions however for the right to maternal health to be realized, subsequent implementation of all the above mentioned policies and programs, their extension and evaluation has to be done which to a large extent has not been
25 the case. Adverse effects on maternal health impact negatively on society's

5 wellbeing especially on its health which in this case has resulted in breach of the obligations vested upon the state.

The evidence before court showed that the ministry of health published plans and strategic frameworks in respect of maternal and child health. In 2007 it published what it called roadmap for accelerating the reduction of maternal and neonatal morbidity and mortality in Uganda which outlined the strategy to
10 reduce child and maternal mortality to meet the United Nations Millennium Development Goals. Although the document served as a national blue print for reducing maternal mortality, it ended in 2015.

In 2013, the Ministry had published another report this time titled, a promise
15 renewed: "*Reproductive maternal new born and child health sharpened plan for Uganda.*" The 2013 report sought to recommit and accelerate the country's slow progress towards achieving the millennium development goals relating to maternal and child health but according to Dr. Waiswa the undertakings were never fulfilled.

20 For the above reasons I find that the Government's omission to provide adequate basic maternal health care services in public health facilities violate the right to health in contravention of Articles 8A, 39 and 45 read together with objectives XIV and XX of the constitution.

Issue 2

25 The Petitioners complaint was that the Government had omitted to adequately provide basic maternal Health care services in public health facilities which

5 violates the right to life in contravention of article 22 of the Constitution of Uganda

Article 22 provides that no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda.

10 Article 6 of the International Convention on Civil and Political Rights states that every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrary deprived of his life.

Article 4 of the African Charter, human beings are inviolable and every human being is entitled to respect for his life and the integrity of his person.

15 The Supreme Court in *Attorney General V Susan Kigula & 417 others, Constitutional Appeal no. 3 of 2006*, recognized the right to life as the most fundamental of all rights.

General Comment No.36 on Article 6 of the ICCPR regards the right to life to include a constituent right to health. Among the measures taken by states
20 parties to safeguard the right to life are measures that ensure access to health care, availability of effective emergency health services and campaigns intended to improve access to medical examinations and treatment all designed to reduce maternal and infant mortality.

Maternal death is death of a mother while pregnant or within 42 days after
25 termination of pregnancy irrespective of the duration and site of pregnancy from

5 any cause related to or aggravated by the pregnancy or its management but not from an accident or incidental cause.

According to the Petitioners the tragedy of maternal death is not just that it is a death that occurs at the time of expectation and joy; it is one of the most terrible ways to die. A woman can see herself bleeding to death with no help able to stop
10 the bleeding. Severe sepsis after delivery exhausts the woman already weakened by trauma of child birth. Seeing a woman in agony of convulsive fits in eclampsia is a terrible scene that one cannot forget. In obstructed labor, the uncountable involuntary severe uterine contractions continue until the uterus gives way and is ruptured, with internal hemorrhage taking place.

15 The 3rd Petitioner Rhoda Kukiriza pleaded with health workers to handle her daughter in law but in vain until she finally died. In her averment expectant women die while yearning for support of a health worker- nurse or doctor.

The 4th Petitioner, Inziku Valenti believes that if nurses had the requisite expedience in the matter and offered care to her daughter Jennifer, she would
20 not have died.

I am persuaded by the holding of Justice Mumbi Ngugi of the High Court of Kenya in *P.A.O & 2 others v Attorney General, High court of Kenya Petition No. 409 of 2009(2012) eKLR*, that the right to health, life and human dignity are inextricably bound. There can be no argument that without the right to
25 health, the right to life is in jeopardy.

5 In **Serac v Nigeria, AHRLR 60 (ACHPR 2001)** the court went further to say that the right to health and other human rights are inseparably linked.

General Comment no. 22 of the ESCR on the right to sexual and reproductive health (2016), states that lack of emergency obstetric care, which often leads to maternal mortality and morbidity, constitutes a violation of the Right to life. In
10 **Alyne da Silva Pimentel, communication 17/2008** the CEDAW committee made a determination that Brazil's lack of appropriate maternal health services had a negative impact on the right to life.

In India, the Delhi High Court, in **Laxmi Mandal V Deen Dayal Harinager Hospital & Ors Writ Petition No. 8853/2008(2010)** held that the state had
15 violated the right to life by failing to provide a minimum standard of maternal health care to a woman who died in child birth.

The respondent admitted and did not dispute any facts relating to the deaths of Ms. Jennifer Anguko in Arua referral hospital and of Ms. Sylvia Nalubowa in Mityana hospital as a result of non-availability of basic maternal Health services
20 and negligence of health workers. These acts violated the deceased's right to life.

Expectant mothers need the utmost basic maternal health care services in our hospitals during delivery not only to guarantee safe delivery but also their lives and those of their new born babies. In many incidences this has not been done and lives which would otherwise be safe have been lost. I answer this issue in
25 the affirmative.

5 Since neither the ministry of health nor the hospitals or the respondent adduced any evidence to dispute the omissions and acts of negligence alleged by the petitioners, I allow this issue and hold the Government and respondent accountable for the loss of two lives and in violation of the right to life of Ms. Jennifer Anguko and Ms. Sylvia Nalubowa.

10 **Issue 3**

It was submitted for the Petitioners that the Government had omitted to adequately provide basic maternal health care services in public health facilities which violated the rights of women in contravention of Articles 33(1), (2) and (3) of the constitution.

15 The Petitioners contend that maternal Health is a service unique to women and where Government fails to provide maternal Health care services and, rights of women are violated and its omission is inconsistent with and in contravention of Articles 33(1), 33(2) and 33(3).

Rights of Women in Uganda are guaranteed under Article 33(1) of the
20 constitution which states that women shall be accorded full and equal dignity of the person with men. Article 33(2) of the constitution enjoins the state to provide facilities and opportunities necessary to enhance the welfare of women to enable them realize their full potential and advancement, and article 33(3) requires the state to protect women and their rights taking into consideration their unique
25 status and natural maternal functions in society.

The Petitioners' listed a number of omissions by the Government to wit;

5 74. High out of pocket expenditure threatens the ability of mothers to afford and receive essential care.

75. At the national level, there is a 40% out of pocket expenditure out of total health expenditure

10 76. Stock out of mama kits; 62% at health center level and 67% at regional referral level

77. Expectant mothers are dying in labour due to absence of basic maternal Health commodities.

15 78. Government has failed to implement the roadmap for accelerating the reduction of maternal mortality in Uganda as adopted from the world Health Organization strategy.

79. There is lack of staff with expertise, staff shortages, insufficient referrals in Uganda's health facilities.

80. There are stock out of life saving maternal commodities in many public facilities.

20 When addressing the rights of women, one should have a global perspective and be guided by internationally recognized principles.

Article 3(1) the Protocol to the African Charter on Human and People's Rights on Rights of Women in Africa (Maputo Protocol) states that every woman shall have the right to dignity inherent to a human being and to the recognition and
25 protection of her human and legal rights.

5 Article 12 of the Convention on the Elimination of All forms of Discrimination
against Women makes it an obligation on state parties to take all appropriate
measures to eliminate discrimination against women in the field of health care
in order to ensure on a basis of equality of men and women, access to health
care services. State parties are expected to provide women with appropriate
10 services in relation to pregnancies, confinement and the post-natal period,
granting free services where necessary, as well as adequate nutrition during
pregnancy and lactation.

The Petitioners contend that under General Comment no. 14 of the ESCR, the
committee states that acceptability of health care facilities requires all health
15 care institutions to be gender sensitive, respectful of medical ethics and designed
to improve the health status of women. The CEDAW committee under General
Recommendation no. 24 defines acceptable services as those that are delivered
in a way that respects the dignity and are sensitive to the needs and perspectives
of women.

20 The Petitioners' submitted that under Article 2(2) of the ICESCR, Article 18(3) of
the African Charter, Article 2 of the Maputo Protocol, and Article 12 of the
CEDAW, states parties are under obligation to respect, protect, and fulfill the
right to health without any form of discrimination on the basis of sex. That to
achieve Gender parity in access to health, states parties have to provide for the
25 unique health needs of women. Paragraph 21 of General Comment No 24 of the
CESR requires parties to implement a comprehensive national Health strategy

5 that enables women access a full range of high quality and affordable health care
that includes sexual and reproductive health services. The committee further
explains in General comment no 22 on the Right to Sexual and Reproductive
Health that Gender equality requires that women's unique health needs,
different from men, are taken into account and appropriate services are provided
10 for women in accordance with their life cycles.

According to the Petitioners, for time immemorial women have been
systematically discriminated against in society making them a vulnerable group.
That 16 women in Uganda die every day as a result of lack of basic maternal
health commodities and services since they are the ones that perform the natural
15 maternal function in society. That the steps taken by government don't take into
account the disadvantaged and vulnerable position of women.

According to Dr. Waiswa various initiatives have acknowledged the reality of
supply shortages and proposed innovative solutions. Mama kits, one of the best
known initiatives were invented in the 1990's as a way to ensure availability of
20 basic supplies for clean and safe delivery for mothers delivering at facilities facing
shortages. These kits are supposed to be issued free of charge to pregnant women
at antenatal care visits. However, in 2016, the Ministry of Health reported that
stock-outs of mama kits ranged from 62% at the clinic and 67% at the regional
referral Hospital level. Mama Kits were also stocked out at the National Medical
25 store in August to September 2016 and again in December of the same year.

5 Inzikuru Valente deposed that expectant mothers were dying in labor due to lack of basic maternal health commodities such as blood for transfusion.

It is not disputed that Ms. Jennifer Anguko' death was as a result of shortage of blood supply at Arua Regional Referral Hospital. It is also true that many women's lives continue to be in danger with the frequent stock-outs of essential
10 drugs for maternal health care.

The petitioners further contended that high out of pocket expenditures continue to threaten the ability of mothers to afford and receive essential Maternal Health care especially when Uganda does not have National Health Insurance.

The respondent submitted that the government had made significant
15 improvement in delivery of drugs to health centers, districts, and national referral Hospitals but admitted that a large amount of drugs, commodities and equipment destined for hospitals was lost through theft, and further that some health workers demanded for payment for drugs and commodities which patients are entitled to receive free of charge. This no doubt put expectant
20 women's lives at risk, first by denying them essential drugs for maternal health care and secondly violating their right to sexual reproductive health rights which encompass maternal Health care. This is a crucial area that the Government needs to dedicate focus on to ensure that drugs destined for Government health facilities are indeed delivered and available for patients in the facilities.

25 The WHO recommends that low-income countries spend at least 3% of their GDP on health related expenditure of which at least 25-30% on sexual reproductive,

5 maternal, newborn, child and adolescent health. The Uganda's Health Sector Development plan published in 2015 reported that only 1.3 % of the country's GDP was spent on health in the financial year 2011/12.

Women suffer a lot due to shortages or short comings in the delivery of maternal health care services caused by stock-outs of maternal health care packages, drugs, professional negligence. Limited budgetary provisions to the health sector all of which deprive them of opportunity to safely deliver babies. Preventable deaths of pregnant women at Government hospitals deprive Women of the right to enjoy and realize their sexual reproductive rights.

I thus resolve Issue 3 in the affirmative.

15 **Issues 4 & 5**

The Petitioners submitted that the Government had omitted to adequately provide emergency obstetric care in public health facilities in violation of the right to health, life and rights of women in contravention of That this failure on articles 8A, 22 33(1), (2) and (3), 45, 287 as read with objectives XIV and XX of the Constitution. Further that the omission subjected women to inhuman and degrading treatment which was inconsistent with Articles 24 and 44(a) of the constitution.

The Petitioners put forth the following as example of omissions by the government;

5 87. The emergency obstetric care (EMOC) needs an assessment for
Uganda at 15% for all pregnancies in Uganda where women develop
life threatening complications and yet the utmost need for EMOC is at
40% with only 11.7 % women giving birth in a fully functional EMOC
facility.

10 88. The sad reality is that the nearest facility to give EMOC for women is
a HC III but only 14% of these HC III have the facilities to provide
EMOC and only 8.1% of facilities in Uganda can provide
comprehensive EMOC which are life-saving procedures which should
be available at the 1st referral facility. Caesarean section is at 2.7 %
15 as opposed to the required 5% which means many women who need
a C-section do not get one and the absence of blood in health facilities
for transfusion has not helped the situation.

20 89. In the 2015, the Ministry of Health reported that only 33% of medical
equipment at General hospital was in "good condition and use" while
63% was in need of repair or replacement.

25 90. Mama kits, which ensure availability of basic supplies for clean and
safe delivery, were reported as stocked-out at 67% at the regional
referral hospital. In 2016, 25% of country-level healthcare facilities
were stocked out of misoprostol, 14% were stocked out of oxytocin,
and 29% were stocked out of nifedipine-essential medications.

91. Arual Regional Referral Hospital Referral Hospital confirmed absence
of blood contributed to death of the Late Anguko Jennifer.

5

92. The Late Sylvia Nalubowa had an obstruction but Manyi Health III could not provide a cesarean section.

Dr. Asuman Lukwago admits that as a result of limited government resources, challenges such as lack of adequate theatre space made it impossible to provide the required and expected emergency obstetric services to every expectant
10 mother. Further that the government had implemented policies to improve emergency obstetric care and that under the support to the health sector strategic plan project and the Uganda health systems strengthening project the Government had constructed and rehabilitated health Centers including theater's and maternity units which had improved access to emergency obstetric
15 care. That the Government had procured and distributed ambulances to regional referral hospitals, general hospitals and health centre II and IV facilities so as to improve access. That the number of obstetricians recruited and posted to the regional referral hospitals had also increased progressively.

Dr. Peter Waiswa in his supplementary affidavit in reply responded thus;

20

*35. That in response to paragraphs 23 and 24, 15% of all pregnancies develop life threatening complications and require emergency obstetric care EMOC). According to the 2004 uganda EMOC assessment needs, the national met need for EMOC was 24% whereas it should be 100%, if all women with complications were treated. In 2009, the national met
25 need for EMOC in Uganda was estimated at 40%, approximately 11.7%*

5 of women give birth in fully functional EMOC facilities as opposed to 15% which is the minimum required.

36. That in reality the nearest health facility to the community at which basic EMOC is provided is Health Centre III and yet only 14% of Health Centre II facilities provide this service. Comprehensive EMOC is available
10 in 8.1% of the facilities, while signal functions such as use of parenteral sedatives (64%), manual removal of placenta (63), removal of retained products (80%) and assisted vaginal delivery (95%) are predominately missing. These are lifesaving procedures, which should be available at any first referral health facility if mothers are to be saved.

15 37. That in addition to the National average caesarean section rate is 2.7 % as opposed to the minimum of 5% indicating that many of the women who should benefit from this operation are missing out. Apart from implications for maternal health, this low unmet need for need for caesarean section also implies increased neonatal morbidity and
20 mortality because some of the indications for this operation are due to fatal needs.

38. That obstetric hemorrhage has been identified as the major cause of maternal deaths in Uganda. However, the absence of blood for transfusion, absence of doctors and lead clinicians to make decisions
25 and interventions are also contributing factors to the maternal deaths.

The respondent did not dispute the facts contended by the petitioners in Dr. Waiswa's supplementary affidavit but instead admitted that there were

5 structural challenges in the provision of emergency obstetric care to women in
Uganda. It is these same challenges which led to the death of Sylvia Nalubowa.
When Manyi health centre III could not provide a cesarean section to her after
she had developed an obstruction, she had no other chance of survival but to
die. When Arua regional referral hospital could not provide blood for Anguko
10 Jennifer, her and her born child had no chance of survival but to die.

The respondent admitted to shortage of medical staff which contributed to
reduced quality of health in the country. She attributed it to inadequate trained
health workers. The respondent provided numbers of health workers graduating
annually without explaining how the graduates performed after they left medical
15 or nursing schools. It may be true that the number of highly specialized
obstetricians is limited but it is also true that many go out the country in search
of greener pastures while some of those who remain in the country join the
private sector which offers better remuneration as opposed to the Ministry.

The respondent argued that the amount of money allocated to the maternal
20 health sector depended on the overall available resources in the government.
That government had an obligation to fund other areas of the health sector, and
various other budget sectors that equally affect other human rights. Dr Lukwago
deposed that;

25 *35. "...Government is constrained by various competing interest and
priorities where the state is equally under a duty to invest. However,
within limited resources available, Government has consistently*

5 *increased budget allocation to health and there has been a*
progressive increase in per capita expenditure on health from 7.8 USD
in 2005/06 to 11.1USD in 2009/10. Further the Government set
maternal health sector as a priority and consistently increased its
resource allocation e.g. through the uganda Health system
10 *strengthening project. The Health sector strategic plan III 2010-11-*
2014-15 has also prioritized the fight against maternal death and in
2011-12, there was significant increase in allocation to maternal
health in the National Budget which was expected to consolidate the
progress made in reducing maternal mortality. In particular, the
15 *increased budget allocation made for maternal health is expected to*
improve critical interventions including increased antenatal care,
emergency care at delivery, postnatal care and improved delivery of
maternal health supplies.

The respondent further contended that Government had received support from
20 developing partners for instance the World Bank to strengthen health systems
and fight maternal death, improve access to and quality of maternal health. The
respondent further submitted that the Government had secured funding to equip
health centers with the necessary equipment to save mother's lives and this
covered traditional birth attendants.

25 Obstetric care services are defined under the monitoring and emergency
obstetric care handbook to mean services required to improve the availability,

5 accessibility, quality and use of services for the treatment of complications that arise during pregnancy and child birth.

General comment no. 22 of 2016 of the ECSR under discussion on sexual reproductive health noted that the lack of emergency obstetric care service often led to maternal mortality and morbidity. This in turn constitutes a violation of
10 the right to life, security, and can amount to torture, cruel, inhuman and degrading treatment.

To be able to provide proper obstetric services the Government must have enough skilled attendants covering 24 hours a day, seven days a week with support staff assisting them. There ought to be functional operating theatres
15 with competent staff able to administer safe blood transfusions and anesthesia.

With its available resources if properly applied, Uganda has capacity to significantly reduce maternal mortality by identifying and implementing strategies that reduce preventable deaths even in absence of significant funding. The petitioners cite examples from other low-income countries in Eastern Africa
20 that have managed to significantly reduce maternal mortality with almost the same budget to the Health sector.

The petitioners further contended that the significant increases in budget allocation cited by the respondent were neither consistent nor significant. That only 2.1% of Uganda's GDP is spent on Health care and also that Government's
25 expenditure on health care fluctuated between 5.3% and 7.3% since 2015. More significantly that the amounts allocated to the health care sector do not indicate

5 and reflect the amounts released and spent. That out of the 6.3% allocated to
the health sector in the FY 2015/16 only 93% was actually spent. The
respondent did not dispute these facts which rises concern about the unspent
budget lines of 7% that could significantly contribute to improvement in
maternal care. No credible explanation was given about the unreleased funds
10 amounting to 37% for the FY 2015/16. The shortfall denied the health care
sector an opportunity to provide basic maternal health care services and more
importantly emergency obstetric care services that are still lacking in most
health centre III's and IV's where most Uganda women seek antenatal and
postnatal care services every day.

15 While the respondents cited improved service delivery between 2005 and 2009,
improved antenatal attendance from 42%-58%, increased coverage of pregnant
women sleeping in insecticide treated mosquito nets, improved coverage of
prevention of HIV transmission from Mother to Child from -50% to 93% in 2010
and lastly improved focus on antenatal care at all Health center III and IV's with
20 provision of necessary supplementary medicines and vaccines, the petitioners
maintained that this was a rosy picture painted by the respondent to mislead
court

The petitioner maintained that Government had failed to comply with its
undertaking under the Abuja Declaration to allocate at least 15% of its annual
25 budget to the health sector.

5 While it is true that the government has continued to receive donor funding to cover shortfalls in the National budget, I do not agree with the Petitioners submission that the government had ceded the role of provision of health care services to external partners.

10 It was argued for the Petitioners that the omission by Government to adequately provide for Emergency Obstetric care in public health facilities had resulted in obstetric injury which subjected women to inhuman and degrading treatment in contravention of articles 24 and 44 of the constitution.

In **The Centre for Health, Human Rights and Development (CEHURD), Mubangizi Micheal and Musimenta Jennifer v The Executive Director, Mulago National Referral Hospital & Attorney General HCCS No. 212 OF 2013**, the learned trial judge stated that. *“Uganda is a state party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) and the African Charter on Human and People’s Rights (the African Charter) which provide for the right to freedom from torture, inhuman and degrading treatment. The Constitution also guarantees this right for all persons. Any issues regarding domestication of the international and regional conventions do not arise since freedom from torture is embedded in Articles 24 and 44 of the Constitution and the right to health envisaged in the Directive Principles in the Constitution.*

15
20
25

5 I am persuaded by the conclusion reached by the judge and it is on this basis that I evaluate whether the alleged inadequacy to provide emergency obstetric care services subjects women to inhuman and degrading treatment.

Article 24 of the constitution provides for respect for human dignity and protection from inhuman treatment. The article emphasizes that no person shall
10 be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. Under article 44 there should be no derogation from the enjoyment of freedom from torture and cruel, inhuman or degrading treatment or punishment. General comment no. 2 on Articles 14.1 (a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol on the African Charter on Human and
15 People's Rights on the rights of women in Africa emphasizes that parties to the African charter must ensure that women are not subjected to cruel, inhuman and degrading treating.

The UN special rapporteur on torture and other cruel, inhuman or degrading treatment stated in the Juan E. Mendez' report of February 2013 that medical
20 care which causes severe suffering for no justifiable reason can be considered cruel, inhuman and degrading treatment.

The petitioners further contended that high out of pocket expenditures continue to threaten the ability of mothers to afford and receive essential Maternal Health care especially when Uganda does not have National Health Insurance

25 The inter-American Court of Human Rights opined the case of **Miguel Castro—Castrol V Peru, Inter-Am Ct. H.R (Ser.C) NO. 60**, that failure by the Prison

5 authorities to provide regular antenatal and prenatal care to women who required it amounted to inhuman treatment by the prison.

The deaths of Ms. Jennifer Anguko at Arua regional referral hospital and Ms. Sylvia Nalubowa at Mityana district hospital were a result of non-availability of basic maternal health services and negligence of Health workers. The actions
10 caused utmost pain, degrading and cruel treatment of the deceased for the period they spent in the said hospitals fighting for their lives with no hope of survival until they died. This also caused untold suffering and loss to their families.

The omissions by the employees of the said hospitals amounted to inhuman, cruel and degrading treatment of the victims and as a result a violation of their
15 rights protected under articles 22 and 44 of the Constitution.

I resolve issues 3 & 4 in the affirmative.

Remedies.

The mandate of the constitutional court to grant redress where appropriate is derived from Article 137(3)(b) of the constitution which grants any aggrieved
20 person a right to petition the court for a declaration or redress where appropriate.

The right to health, human dignity and life of women is protected both under International law and our constitution. The right encompasses access to adequate Maternal Health care. Access includes access to functional hospitals with equipment and professionals willing to enhance and preserve the lives of
25 mothers and women during antenatal and postnatal periods.

5 Maternal health has a direct relation to the physical attributes of women and as such their reproductive health forms an integral part of the health of a woman and for this reason, it is considered as part and parcel of human rights of women. The right to health of a woman forms part of her right to life, right to equality, right against torture, cruel degrading and inhuman treatment.

10 As a fundamental right, the right to health of women should be made available and accessible by the state through the formulation of necessary laws and programs. In absence of any mechanisms, these rights become ineffective and would constitute a breach of obligations vested upon the state. When this arises, the court may issue necessary orders or directives for the state to fulfill its
15 responsibilities see *Advocate Prakash Mani Sharma V Government of Nepal, Supreme Court of Nepal (1999)*,

The Petitioners prayed for both declarations and orders. They were able to prove that the government had omitted to adequately provide basic maternal health care services in public health facilities which resulted in the violation of the right
20 to health in contravention of Articles 8A, 39 and 45 and objectives XIV and XX of the constitution. That the omission to adequately provide basic maternal health care services violated the right to life in contravention of article 22 of the Constitution. That the omission also violated the rights of women which was inconsistent with Articles 33(1), (2) and (3) of the constitution. The Petitioners
25 ably demonstrated that the Government had omitted to adequately provide emergency obstetric care in public health facilities which violated the right to

5 health, life and rights of women. This contravened Articles 8A, 22 33(1), (2) and (3), 45, 287 as read with objectives XIV and XX of the Constitution. That the failure to adequately provide emergency obstetric care in public health facilities had resulted in inhuman and degrading treatment of women in contravention of Articles 24 and 44(a) of the constitution.

10 It is not in doubt that financial resources are a constraint to the provision of adequate maternal health care services in Uganda however the constitutional obligation of the state to provide these services to uphold the rights of women and fulfill their reproductive rights and needs cannot be ignored. What the Government failed to do was to annually at the time of budgeting prioritize
15 funding to the Maternal Health Sector and disburse all the budgeted amounts to the specific centres.

Regarding the prayer for general damages, the law will presume them to be a direct and natural consequence of the act complained of. In quantification of general damages, the court must bear in mind the fact that the plaintiff must be
20 put in the position he would have been had he not suffered the wrong. Thus the basic measure of damages is restitution *Dr. Denis Lwamafa V Attorney General HCCS No. 79 of 1983[1992] 1 KALR 21*. Thus the award of damages is at the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's acts or omissions *See Fredrick*
25 *Nsubuga V Attorney General, HC Civil Suit No 13 of 1993*.

5 In the case of exemplary damages also referred to as punitive damages, they represent a sum of money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are aimed at curbing the repeat of the offending act and given without reference to any proved actual loss suffered by the plaintiff *WSO Davies V Mohanlal Kramshi Shsah*
10 *[1957] 1 EA 352*). Exemplary damages should only be awarded in two categories of cases: in cases where the wrong complained of was an oppressive, arbitrary or unconstitutional by a servant of the government, or cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant.

15 In this Petition the exemplary damages follow an instance where the actions of the servants of the Government to wit; medical personnel who left Sylvia Nalubowa and Anguko Jennifer to bleed to death without effort to save their lives and that of the unborn child of Anguko. Such acts justify an award of exemplary damages.

20 The Petitioners have not provided sufficient evidence and authorities to guide the Court on award of damages but doing the best we can and taking into account all the circumstances of this case, I consider that UGX 70,000,000/= for the 3rd and 4th Petitioners to be fair and adequate in respect of general damages and
25 UGX 85,000,000/= for each as fair and reasonable in respect of exemplary damages.

5 I therefore, make the following declarations and orders;

a) That the Government's omission to adequately provide basic maternal health care services in public health facilities violates the right to health and is inconsistent with and in contravention of Articles 8A, 39 and 45 read together with objectives XIV and XX of the National Objectives and Directive Principles of state policy of the constitution.

b) That the Government's omission to adequately provide basic maternal Health care services in public health facilities violates the right to life and is inconsistent with and in contravention of article 22 of the Constitution.

c) That the Government's omission to adequately provide basic maternal health care services in public health facilities violates the rights of women and is consistent with and in contravention of Articles 33(1), (2) and (3) of the constitution.

d) That the Government's omission to adequately provide emergency obstetric care in public health facilities violates the right to health, life and rights of women and is inconsistent and in contravention of Article 8A, 22 33(1), (2) and (3), 45, 287 read together with objectives XIV and XX of the Constitution.

e) That the Government's omission to adequately provide emergency obstetric care in public health facilities which results into obstetric injury subject's women to inhuman and degrading treatment and is

5 inconsistent with and in contravention of Articles 24 and 44(a) of the
constitution.

f) In order to meet the constitutional obligation of the state to uphold the
rights of women and fulfill their reproductive rights, the Government
should in the next financial year prioritize and provide sufficient funds
10 in the national budget for maternal health care

g) Government of Uganda through the Minister responsible for Health is
directed to ensure that all the staff who provide maternal health care
services in Uganda are fully trained and all health centers are equipped
within the next 2 financial years (2020/2021 and 2021/2022).

15 h) In order to maintain a consistent and deliberate effort to improve the
status of Maternal Health Care in Uganda, the Government through the
Minister responsible for Health is directed to compile and submit to
Parliament with a copy to this Court of a full audit report on the status
of Maternal health in Uganda at the end of each of the next two financial
20 years (2020/2021 and 2021/2022).

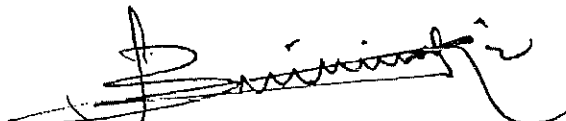
i) The 3rd and 4th Petitioners are awarded UGX 70.000.000/= each as
general damages for the psychological torture, violation of the rights to
life, health and cruel and degrading treatment of their loved ones.

j) The 3rd and 4th Petitioners are each awarded as exemplary damages
25 shs. 85,000,000/= for the loss suffered as result of acts and omissions
of the medical personnel at Mityana Hospital and Arua Regional
Referral Hospital.

- 5 k) The Attorney General is directed to submit a report at the end of the financial year 2020/2021 showing progress and implementation of the orders in (h) above.
- l) This was public interest litigation in which the Petitioners did not pray for costs. I therefore make no order regarding costs.

10 **It is so ordered.**

Dated at Kampala this^{19th} day of^{Aug}..... 2020


Cheborion Barishaki

15

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

20

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Barishaki Cheborion and Madrama, JJCC/JJA]

CONSTITUTIONAL PETITION NO. 16 OF 2011

BETWEEN

Center For Health, Human Rights and Development
Professor Ben Twinomugisha
Rhoda Kukiriza
Inziku Valente

} Petitioners

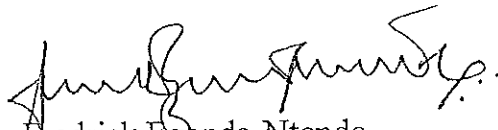
AND

Attorney General = Respondent

Judgment of Fredrick Egonda-Ntende, JCC

I have had the opportunity of reading in draft the Judgment of my brother, Barishaki Cheborion, JCC. I agree with it.

Dated, signed and delivered at Kampala this ¹⁴19 day of AUG 2020



Fredrick Egonda-Ntende
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. NO.16 OF 2011

BETWEEN

1. CENTRE FOR HEALTH, HUMAN RIGHTS
AND DEVELOPMENT (CEHURD)
2. PROF. BEN TWINOMUGISHA
3. RHODA KUKIRIZA
4. INZIKU VALENTE.....PETITIONERS

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA/ JCC

Hon. Mr. Justice F.M.S Egonda-Ntende, JA/ JCC

Hon. Mr. Justice Cheborion Barishaki, JA/ JCC

Hon. Mr. Justice Christopher Madrama, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Cheborion Barishaki, JA/JCC.

I agree with him that this petition ought to succeed for the reasons he has set out in his judgment.

I also agree with the declarations and orders he has proposed. I have nothing useful to add.

Dated at Kampala this 19th day of Aug 2020.

.....
Kenneth Kakuru
JUSTICE OF APPEAL

5

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: OWINY - DOLLO, DCJ; KAKURU, EGONDA-NTENDE, BARISHAKI
CHEBORION, MADRAMA IZAMA JJA/JJCC.

CONSTITUTIONAL PETITION No. 16 OF 2011

10

BETWEEN

1. CENTER FOR HEALTH, HUMAN RIGHTS,
AND DEVELOPMENT (CEHURD)}

2. PROF. BEN TWINOMUGISHA } PETITIONERS

3. RHODA KUKIRIZA }

15

4. INZIKU VALENTE }

AND

ATTORNEY GENERAL } RESPONDENT

JUDGMENT OF OWINY - DOLLO, DCJ.

20

I have had the benefit of reading the judgment of my learned brother, Barishaki Cheborion JCC, in draft. I agree with his reasoning, findings, and the conclusion he has reached that this petition must succeed. I would, however, not award any damages to the Petitioners; because this is a public interest litigation. I would have, instead, awarded costs to them had they pleaded for such relief.

25

However, since the other members of the Court sitting in this petition agree with Barishaki Cheborion JCC, in toto. Accordingly, orders are hereby given in the terms proposed by Barishaki Cheborion JCC.

30

Dated, and signed at Kampala this ...19th day of ...Aug..... 2020

Alfonse C. Owiny - Dollo

Deputy Chief Justice

5 THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 16 OF 2011

(Coram: Mr. Justice Alfonse Owiny – Dollo, DCJ, Mr. Justice Kenneth
Kakuru JCC, Mr. Justice F.M.S Egonda – Ntende JCC, Mr. Justice
10 Barishaki Cheborion JCC and Mr. Justice Christopher Madrama, JCC)

1. CENTER FOR HEALTH, HUMAN RIGHTS

& DEVELOPMENT (CEHURD)}

2. PROF. BEN TWINOMUGISHA}

3. RHODA KUKIRIZA}

15 4. INZIKU VALENTE}PETITIONERS

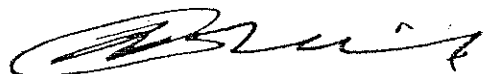
VERSUS

ATTORNEY GENERAL}RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

20 I have read in draft the judgment of my learned brother Hon. Barishaki
Cheborion, JCC and I agree with the facts he has set out, the analysis of the
issues arising and substantially his conclusions on the right to life and
maternal health care and the acts and omissions which are inconsistent with
the Constitution. I would like to add some words of my own on the issues
arising as stated below.

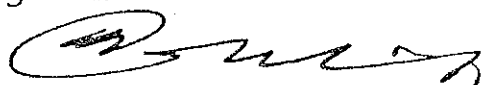
25 The thrust of the petition gravitates on the question of whether there are in
place adequate provisions for maternal health care services provided by the
Government of Uganda or conversely whether no adequate provisions for
maternal health care have been put in place in violation of cited provisions
of the Constitution of the Republic of Uganda. Secondly, on a matter of fact



5 whether the acts or omissions of the government of Uganda are inconsistent with the provisions of the Constitution that are set out below.

The material issues for interpretation of the Constitution set out in the conferencing notes of the petitioner are:

- 10 1. Whether the Government's omission to adequately provide basic maternal healthcare services in public health facilities violates the right to health and is inconsistent with and in contravention of Articles 8A, 39 and 45 as read with objectives XIV and XX of the National Objectives and Directive Principles of State Policy of the Constitution of the Republic of Uganda.
- 15 2. Whether the government's omission to adequately provide basic maternal healthcare services in public health facilities violates the right to life and is inconsistent with and in contravention of article 22 of the Constitution of the Republic of Uganda.
- 20 3. Whether the government's omission to adequately provide basic maternal healthcare services in public health facilities violates the rights of women and is inconsistent with and in contravention of article 33 (1), (2), (3) of the Constitution of the Republic of Uganda.
- 25 4. Whether the government's omission to adequately provide emergency obstetric care services in public health facilities violates the rights of women and is inconsistent with and in contravention of articles 8A, 22, 33 (1), (2), and (3), 45, 287 as agreed with objectives XIV and XX of the national objectives and directive principles of state policy of the Constitution of the Republic of Uganda.
- 30 5. Whether the government's omission to adequately provide emergency obstetric care in public health facilities resulting into obstetric injury subjects women to inhuman and degrading treatment and is inconsistent with and in contravention of articles 24 and 44 (a) of the Constitution of the Republic of Uganda.



5 Issue 1 subsumes issues 3, 4 and 5 in that it deals with the issue of whether
there are in place adequate provision for maternal healthcare services. Issue
number 2 though partly subsumed in issue 1 can be handled on its own using
the effect analysis of government measures in place leading to the state of
10 healthcare facilities in terms of physical and personnel facilities in the
country. In the answer to the petition the respondent stated *inter alia* that
the allegations regarding the supposed unethical standards of health
workers can be handled by the disciplinary committee of the Nurses and
Midwives Council and the Disciplinary Committee of the Medical and Dental
Practitioners. Secondly, there are competing interests/priorities which also
15 entail other fundamental human rights and which have to be catered for from
the meagre resources at the States disposal. Thirdly, that in as much as the
state may have ratified certain treaties/conventions, the treaties are not self
- executing but their provisions have to first be incorporated in the domestic
laws of Uganda. The respondent further contended that the isolated acts and
20 omissions contained in the petition cannot be used to dim the untiring
efforts made in the health sector to better the well-being of Ugandans.
Further considering the limited resources at its disposal, the state has always
performed reasonably well to stem the infant mortality and morbidity rates.
Last but not least the respondent contended that the petitioners had a
25 remedy under the laws of Uganda catering for the deaths of their family
members.

On a matter of fact, the respondent does not deny that certain acts or
omissions alleged in the petition took place. The denial of the respondent
only relates to the issue of whether the state has taken *reasonable* steps in
30 the provision of maternal healthcare services as well as to stem infant
mortality. It follows that the matters in controversy are narrower. In as much
as they relate to the violation of human rights, these could be matters of
enforcement. The petition deals more with matters of policy of whether



5 adequate provision by the government of Uganda are in place for the provision of necessary maternal healthcare services in the country.

It should further be pointed out that the respondent conceded that Uganda has ratified certain international human rights conventions namely; The International Covenant on Economic, Social and Cultural Rights, The African
10 Charter on Human and People's Rights (African Charter), The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

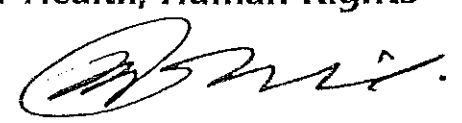
As stipulated in the international instruments, the respondents case is that the fulfilment of the obligations of the state in making adequate provision
15 for maternal healthcare depends on availability of resources and the government has also undertaken practical measures to ensure the full realisation of the highest attainable standard of health care services within available resources. The respondent contends that the realisation of the ideals in the international treaties it has ratified is supposed to be progressive
20 depending on the circumstances of the country.

On the other hand, the petitioner has pointed out certain violations of the right to life and the right to health which facts have been summarised in the lead judgment of my learned brother Hon Justice Barishaki Cheborion, JCC and I do not need to repeat them here. In my judgement, the deplorable
25 healthcare status in the undisputed facts which have been set out and which the respondent dubbed isolated the events is the evidence for consideration of whether reasonable steps have been taken by the government for the provision of healthcare services. This focus appears in the judgment of the Supreme Court in this very matter and I would refer to it later on.

30 Obviously, the first concern I have is whether there are sufficient facts to establish whether the government has progressively ensured the highest possible attainable standard of health care services in the circumstances of

5 Uganda. This is a matter that requires evidence and my learned brother has
dealt with the issue on the ground of the standard of proof required to prove
a matter of fact in controversy in civil cases and which standard of proof is
that on the balance of probabilities. I do not wish to differ from his
conclusions that the petitioners have demonstrated that there are several
10 instances where mothers have met deplorable health service situations
showing that the measures in place were not adequate for the provision of
reasonable maternal healthcare services. Secondly, the rights of mothers in
maternity were subject to violations or infringement of their fundamental
rights. I wish to differ on whether those violations of human rights are
15 sufficient to reach a conclusion on whether adequate resources have been
dedicated by the government in the provision of maternal healthcare services
in light of other priorities of government. I agree with the judgment in the
context of violation or infringement of the Constitution but would hesitate
to reach a conclusion on whether adequate resources were committed for
20 the provision of healthcare services with particular reference to maternal
healthcare services at the policy level. I can in the premises, only consider the
effect of whatever policies are in place for maternal health care services. I
confine my conclusion on infringement of those rights.

The second issue of concern should be whether this was not a question for
25 enforcement of the obligations of the state as stipulated in several
international covenants. The constitutional court has the primary obligation
of interpreting the constitution and may consequentially grant redress to any
aggrieved party. Enforcement on the other hand can be done by other
competent courts. Particularly the enforcement of treaty obligations is not
30 necessarily a matter for the interpretation of the Constitution. How does the
court distinguish between negligence and inadequate resources for
provisions for maternal healthcare? Several decisions of the High Court are a
case in point that the High Court is a competent court for the enforcement
of fundamental rights and freedoms. In **Centre for Health, Human Rights**



5 **and Others versus Executive Director Mulago Hospital and Another;**
High Court Civil Suit No 212 of 2013 Lady Justice Lydia Mugambe
considered the application of International Instruments that have been
ratified by Uganda and their domestication in Uganda when she held that:

10 Uganda is a state party to the International Covenant on Civil and Political Rights
(ICCPR), the International Covenant on Economic, Social and Cultural Rights
(ICESCR), the Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment (CAT) and the African Charter on Human and People's Rights (the
15 African Charter) which provide for the right to freedom from torture, inhuman and
degrading treatment. The Constitution also guarantees the right of all persons. All
issues regarding domestication of the international and regional conventions do
not arise since freedom from torture is embedded in articles 24 and 44 of the
Constitution and the right to health envisaged in the directive principles in the
Constitution.

20 Whereas the High Court dealt with a specific case, the declarations that are
sought in this petition are still declarations of inconsistency with articles that
are enforceable by the High Court. I have respectfully taken into account the
fact that there was a preliminary objection to the petition initially and the
petition had been struck out on the question of jurisdiction and whether the
court could determine policy matters in the preserve of Parliament and the
25 Executive whereupon the petitioners appealed to the Supreme Court and the
Supreme Court delivered a binding decision requiring the petition to be tried
on the merits. This was in **Centre for Health, Human Rights and
Development & Others versus Attorney General; Supreme Court Appeal
No 1 of 2013**. In the appeal Bart Katureebe CJ held that the critical issue was
30 whether under the Constitution of the Republic of Uganda, the courts may
decline to exercise the jurisdiction on the matter because the determination
of that issue has been committed by law to either the Executive or the
Legislature among other things. Secondly the constitutional court had held
that it had no power to determine or enforce its jurisdiction in matters that
35 require analysis of the health sector government policies, make review of

5 some let alone their implementation. They held that this breached the doctrine of separation of powers. Dr. Kisaakye, JSC held at pages 9 – 11 of her judgment that:

With all the greatest respect to the learned justices of the constitutional court, I disagree with the reasoning and the conclusions they reached.

10 The appellants in paragraph 5 of the petition contends that the non-provision of basic indispensable health maternal commodities in government health facilities and the imprudent and unethical behaviour of health workers towards expectant mothers constituted acts and omissions which contravened and were inconsistent with the Constitution.

15 Furthermore, in paragraph 10 of the petition, the appellants also set out the acts and omissions of government and maternal health workers, which they alleged were inconsistent with or in contravention of the Constitution...

20 ... All these averment is, in my view, give rise to the competent questions for the constitutional court to hear, interpret and determine, with a view to establishing whether the petitioner's allegations had been proved to warrant of the constitutional court to issue the declarations sought by the petitioners and either grant the petitioners prayers or to refer the matter to the High Court with the appropriate directions, in accordance with the dictates of article 137 (4).

25 It is clear from the decision of the Supreme Court that what is required of the constitutional court is to consider the evidence and interpret the Constitution to establish whether the allegations that the acts or omissions of the government violate the rights of the petitioners or the other persons whose behalf they brought the petition to health care at a policy level as well as at a personal level has been proved so as to grant the declarations for
30 consequential remedies or to dismiss the petition if not. Dr. Kisaakye JSC further held at pages 25 – 26 of her judgment that:

the political question doctrine has limited application in Uganda's current Constitutional order and only extends to shield the Executive arm as well as Parliament from judicial scrutiny where either institution is properly exercising its



5 mandate, duly vested in it by the Constitution. It goes without saying that even in
these circumstances, factual disputes will always come up where as private citizen
challenges either the Executive or Parliament action or inaction and the resultant
outcome of such actions and inactions in respect of either institution's
10 implementation of its respective constitutional mandate and whether such action
or inaction contravenes or is inconsistent with any provision of the Constitution. It
is my considered view that it was for this very purpose that the constitutional court
was established and given powers under article 137 (1) and (3) to consider these
allegations and determine them one way or another.

Further Bart Katureebe, CJ held that

15 With great respect to the constitutional court, I think they misunderstood what was
required of the court. I do not think the court was required to determine, formulate
or implement the health policies of government. In my view, the court is required
to determine whether the government has provided or taken **"all practical
measures to ensure the basic medical services to the population"**. In this case,
20 it is maternity services in issue. The allegation by the petitioners is that the
government has failed to do so. If the court says it has no constitutional mandate
to hear and determine this allegation within the constitution, then where does the
citizen to go?

There is duality in the approach which may blunt the focus of the
25 constitutional court. This duality was addressed by Bart Katureebe CJ when
he held at page 19 of his judgment that:

I do not agree with the constitutional court that these are not matters for
constitutional interpretation. I have already observed that the petition was clumsily
drafted and is a mixed bag of all sorts of allegations.

30 There are matters such as alleged negligence or rude behaviour or incompetence
on the part of health staff which can appropriately be litigated in the High Court.
There are known laws that can handle cases where servants of the government
commit torts and the government can be sued under the Government Proceedings
Act. It is inconceivable that any reasonable person would contend that the
35 government would have a policy of recruiting and deploying negligent or rude
officers. These persons found to be guilty of negligence or mistreating patients can

5 even be disciplined under the laws of Uganda. This sort of allegation could not conceivably be one that calls for interpretation of the Constitution. The constitutional court would be right to reject that type of allegation. But the court has to take care not to throw out the baby with the bathwater, as the saying goes...

10 Last but not least Bart Katureebe CJ sets out at pages 16 and 17 of his judgment as follows:

15 In the instant case the petition raises matters touching on the provision of medical services in this country. No one disputes that the Cabinet, under article 111 (2) of the Constitution, has the power and mandate "to determine, formulate and implement the policies of the government." This includes the policies regarding the provision of medical services. At the same time the Constitution as provided for certain rights to citizens to access medical services.

Objective No. XIV of the Constitution states as follows:

20 **"The state shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that –**

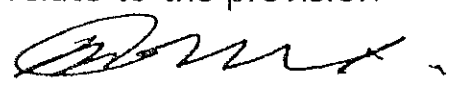
(c) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, dissent shelter, adequate clothing, food, security and pension and retirement benefits."

Furthermore, Objective XX states as follows:

25 **"The state shall take all practical measures to ensure the provision of basic medical services to the population."** (Emphasis added)

30 If a citizen alleges that the implementation of the health policy or actions and omissions made under that policy are inconsistent with the provision of the Constitution as given above, then, in my view, the constitutional court has a duty to come in, hear the petition and determine whether indeed there is any act that is being implemented which is inconsistent with the Constitution.

The question for determination therefore is whether there are acts based on a policy which is being implemented that is inconsistent with any provision of the Constitution. These acts or omissions actually relate to the provision



5 of healthcare services and the violation of the fundamental rights of persons seeking the services should be shown to be a consequence of the inaction or action of the government. It can also be shown that the infringement of fundamental rights and freedoms is the effect of the policy leading to the inadequate provision of healthcare services. While the issue of the fundamental rights and freedoms enshrined in the international instruments may not necessarily raise questions for interpretation of the Constitution, it may be evidence of inadequate policy or implementation of policies which infringes the constitutional mandate to provide basic medical services to the population.

15 With regard to the international conventions, specific provision has been made in the Constitution itself for recognition of international treaties and the question is whether those treaty obligations are matters for interpretation of the Constitution of the Republic of Uganda. More so article 287 of the Constitution of the Republic of Uganda clearly separates the provisions of treaties, agreements and conventions from the Constitution and stipulates that the coming into force of the Constitution shall not affect or be affected by the coming into force of the Constitution and Uganda shall continue to be a party to the treaties. There are provisions for enforcement of international agreements, treaties and conventions. For emphasis I quote article 287 of the Constitution of the Republic of Uganda for ease of reference and it provides that:

287. International agreements, treaties and conventions.

Where—

30 (a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or



5 (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it.

10 The Constitution of the Republic of Uganda came into force on 8 October 1995, by which time Uganda was a party to several international conventions relevant to the matter before the court on the issue of a provision of adequate healthcare facilities for maternal healthcare. I would set out in these international covenants on the provision of health care services while making
15 it clear that the correct approach for interpretation of international covenants is whether they have been domesticated or whether the government has taken the appropriate steps to implement its provisions according to the dictates of the material international convention.

I will start with the **Universal Declaration of Human Rights**, which came
20 into force on the 10th of December 1948 and in article 25 thereof it is provided that:

Article 25

25 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

30 The declaration only declares the right of everyone to a standard of living and provision of housing and medical care and necessary social services. Having that in mind, declarations of the inalienable rights of man are recognised in article 45 of the Constitution of the Republic of Uganda by way



5 of a general provision that any human rights and freedoms which are not
specifically mentioned in the Constitution shall not be regarded as excluding
others not specifically mentioned. However, the question of what the
necessary social services are may be subjective because evidence has to be
taken to consider the peculiar circumstances of each nation state. I will
10 however leave the question open because of the instruments that we going
to examine also stipulate how the provisions are to be domesticated or
applied by the state parties to the covenants.

In the **International Covenant on Economic, Social and Cultural Rights**,
which came into force on 3rd January 1976 there are some salient provisions
15 on maternal health services in articles 2 and 10.

Article 2

1. Each State Party to the present covenant undertakes to take steps, individually and
through international assistance and cooperation, especially economic and
technical, to maximum of its available resources, with a view to achieving
20 progressively the full realisation of the rights recognised in the present covenant
by all appropriate means, including particularly the adoption of legislative
measures.
2. The State Parties to the present covenant undertake to guarantee the rights
enunciated in the present covenant will be exercised without discrimination of any
25 kind as to race, colour, sex, language, religion, political or other opinion, national
or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and the national economy,
may determine to what extent they would guaranteed economic rights recognised
in the present covenant to non-nationals.

30 The convention places a duty on state parties to the maximum of its available
resources to provide the full realisation of the rights recognised in the
convention. This leads to Article 10 which is material to the matter before the
court in that it is stipulated that:

The State Parties to the present covenant recognise that:



- 5 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
- 10 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mother should be accorded paid leave or leave with adequate Social Security benefits.
- 15 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of a parent age or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to the morals of health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

20 Article 10 (2) provides that special measures of protection and assistance will be given to mothers before during and after childbirth. This international obligation binding on Uganda can be implemented as a treaty obligation and is not necessarily a matter for interpretation of the Constitution. On the other hand, article 33 of the Constitution clearly provides for the special
25 protection of women inclusive of all those in maternity because it provides as follows:

33. Rights of women.

- (1) Women shall be accorded full and equal dignity of the person with men.
- (2) The State shall provide the facilities and opportunities necessary to enhance the
30 welfare of women to enable them to realise their full potential and advancement.
- (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
- (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

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

10 (6) 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.

15 Article 33 (2) clearly provides that the state of Uganda shall provide the facilities and opportunities necessary to enhance the welfare of women. This must include, maternal healthcare services. This is further catered for by article 33 (3) and which requires the state to protect the women with particular regard to their unique status and natural maternal functions. It follows that the provision of healthcare services must have a special focus on the unique status of women and their natural maternal functions. Contrary to the submissions of the Attorney General, Uganda has in effect domesticated several international instruments and in the circumstances of this case that affect the rights of women and their maternal health. We may be as bold as saying that Uganda has domesticated several international conventions with special focus on the rights of women and their health during maternity. This can be illustrated further *inter alia* by the following provisions in the international treaties read together with article 33 of the Constitution of the Republic of Uganda.

25 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Came into force on 3 September 1981 and as far as the matter before court is concerned stipulates that:

Article 12

- 30 1. State parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.



- 5 2. Notwithstanding the provisions of paragraph 1. of this article, state parties shall ensure to women appropriate services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

10 While article 12 (1) of CEDAW places the duty on the states to take the appropriate measures, article 12 (2) specifically provides that the state shall ensure to women appropriate services in connection with pregnancy, confinement and postnatal period, and granting free services where necessary as well as adequate nutrition during pregnancy and lactation. Further, the African Charter on Human and People's Rights which came into
15 force on 21st October 1986 also has specific provisions and particularly articles 1, 16 and 18 which are pertinent to the matter before court and which stipulate that:

Article 1

20 The Member States of the organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 16:

- 25 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick.

Article 18

- 30 1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and moral.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.



- 5 3. The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

10 The African Charter emphasises specifically the protection of the rights of women and the child as stipulated in international declarations and conventions. The African Charter on Human and People's Rights is followed up by the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the assembly of the Union Maputo, 11th of July 2003 and articles 14 and 24 thereof are pertinent.

15 Article 14: Health and Reproductive Rights

1. State parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

(a) the right to control their fertility;

20 (b) the right to decide whether to have children, the number of children and the spacing of children;

(c) the right to choose any method of contraception;

(d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

25 (e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually-transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

(f) the right to have family planning education.

2. State parties shall take all appropriate measures to:

30 (a) provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas;

(b) establish and strengthen the existing prenatal, delivery and postnatal health and nutritional services for women during pregnancy and while they are breastfeeding;

5 (c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Article 24:

The State Parties undertake to:

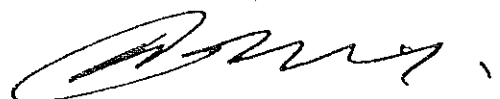
10 a) ensure the protection of poor and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and a special physical, economic and social needs;

15 B) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

What I need to emphasise is that the conventions cited above came into force before the promulgation of the Constitution of the Republic of Uganda 1995 which came into force on 8 October 1995. In the interpretation of the rights and freedoms under chapter 4 of the Constitution of the Republic of Uganda,
20 the international conventions to which Uganda is a party and which came before the promulgation of the Constitution are antecedents which can be taken into account to give realisation to the fundamental rights and freedoms enshrined in the Constitution of the Republic of Uganda 1995.

Similarly, in **Minister of Home Affairs and another v Fisher and another**
25 **[1979] 3 All ER 21** it was held by the Privy Council that the bill of rights was influenced in many countries by the United Nations Charter on Human rights and calls for a generous and purposive interpretation. Lord Wilberforce at pages 25 – 26 stated that:

30 It is known that this chapter, as similar portions of other Constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by



5 the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. (3) Section 11 of the Constitution forms part of Chapter I. It is thus to 'have effect
10 for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest'.

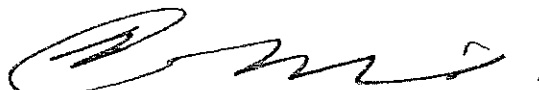
15 In **The Queen v Big M Drug Mart [1986] LRC 332** the Supreme Court of Canada held that in interpreting the charter on rights the courts should adopt a generous rather than a legalistic approach aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charters protection.

20 It follows that because the Constitution of the Republic of Uganda was promulgated after Uganda became a party to several international conventions which have been cited above, chapter 4 which deals with fundamental rights and freedoms has to be interpreted in light of the international instruments and conventions which in many ways became domesticated in chapter 4 of the Constitution of the Republic of Uganda. The
25 antecedents give the court an indication of the purpose of enacting *inter alia* the two provisions of the Constitution of the Republic of Uganda with regard to the matter at hand and specifically articles 33 and 45 of the Constitution have to be brought into view.

Article 45 provides that:

30 45. Human rights and freedoms additional to other rights.

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



5 It is therefore my conclusion that article 45 incorporates all rights, duties,
declarations and guarantees relating to fundamental and other human rights
and freedoms not specifically mentioned in the Constitution of the Republic
of Uganda. Specifically, it is deemed to have incorporated the above
10 mentioned international conventions that Uganda ratified before the
promulgation of the Constitution of the Republic of Uganda in 1995.
Therefore, when read in context article 33 of the Constitution of the Republic
of Uganda and particularly article 33 (2) and (3) of the Constitution requires
the state to provide the facilities and opportunities necessary to enhance the
15 welfare of women to enable them to realise their full potential and
advancement. Particularly the welfare of women includes the provision of
maternal health care services which can lead to high mortality in women if
such facilities for maternal healthcare before and after childbirth are not
provided. Secondly, the protection of women and their rights taking into
20 account their unique status and natural maternal functions in society under
Article 33 (3) requires the state to provide adequate maternal healthcare
services.

The above article should be read together with the National Objectives and
Directive Principles of State Policy relied on by the petitioners and particularly
directive principles of state policy XX cited by the Supreme Court which
25 provides that the state shall take all practical measures to ensure the
provision of basic medical services to the population. Secondly directive
principles of state policy XIV provides that:

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social
justice and economic development and shall, in particular, ensure that –

- 30 (a) all development efforts are directed at ensuring the maximum social and
cultural well-being of the people; and
(b) all Ugandans enjoy rights and opportunities and access to education, health
services, clean and safe water, work, decent shelter, adequate clothing, food
security and pension and retirement benefits.



5 Generally, the National Objectives and Directive Principles of State Policy in
objective number 1 provides that the objectives and principles shall guide all
organs and agencies of the state, all citizens, organisations and other bodies
and persons in applying or interpreting the Constitution or any other law and
in taking and implementing any policy decisions for the establishment and
10 promotion of a just, free and democratic society. Of further interest is article
8 A which provides for the national interest in the following words:

8A. National interest.

- 15 (1) Uganda shall be governed based on principles of national interest and
common good enshrined in the national objectives and directive principles of
state policy.
- (2) Parliament shall make relevant laws for purposes of giving full effect to clause
(1) of this Article.

The national objectives and directive principles of state policy required a
government to provide adequate facilities for healthcare. I shall of course
20 pause here to state that healthcare facilities are not necessarily free
healthcare services provided by the government. Healthcare services may
include a system of healthcare which may be provided by insurance of
workers et cetera. It depends on the government policy of the day as to how
healthcare services shall be provided. What is material being that article 33
25 (2) and (3) of the Constitution of the Republic of Uganda, read together with
article 45, the international conventions cited above as well as the national
objectives and directive principles of state policy are sufficient to place on
the state a duty to provide the basic healthcare facilities and particularly with
emphasis on the special protection of women in light of the natural maternal
30 functions in society. It is in the context of the Constitution and the principles
of interpretation that the international conventions give guidance on the
issue. I therefore agree with the conclusions of my learned brother that the
deplorable health care conditions faced by women leaves a lot to be desired
and the government policies which deal with funding and provision of

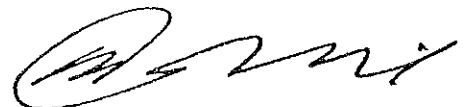
5 healthcare services were not adequate to fulfil the obligations of Uganda enshrined in the Constitution of the Republic of Uganda and the petition of the petitioners ought to be allowed.

Finally, I wish to amplify the conclusion of my learned brother Justice Barishaki Cheborion, on the agreed issue No 2 which is:

10 Whether the government's omission to adequately provide basic maternal healthcare services in public health facilities violates the right to life and is inconsistent with and in contravention of article 22 of the Constitution of the Republic of Uganda.

The right to life under article 22 of the Constitution of the Republic of Uganda
15 has been the subject of interpretation in other jurisdictions. Particularly, the right to life includes the right to nurture that life. Any cruel, inhuman and degrading treatment or punishment can be considered to be an infringement of the right to life as well if it threatens that life or the quality of that life. The deplorable status of healthcare with particular reference to maternal
20 healthcare in which many women may lose their lives as a result of the status of healthcare facilities and personnel is clearly an infringement of the right to life enshrined in article 22 of the Republic of Uganda and has been the subject of decisions in other jurisdictions which decisions have been cited with approval in Uganda. In **Olga Tellis & Others v Bombay Municipal**
25 **Council (1987) LRC (Const) 351**, Supreme Court of India stated that

As we have stated while summing up the petitioner's case, the main plank of their argument is that the right to life which is guaranteed by article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, the eviction is tantamount to deprivation
30 of their life and hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they would be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The



5 strip of the right to life conferred by article 21 is wide and far-reaching. It does not
mean merely that life cannot be extinguished or taken away as, for example, by the
imposition and execution of the death sentence, except according to procedure
established by law. That is but one aspect of the right to life. An equally important
10 facet of that right is the right to livelihood because, no person can live without the
means of living, that is, the means of livelihood. If the right to livelihood is not
treated as a part of the constitutional right to life, the easiest way of depriving a
person's right to life would be to deprive him of his means of livelihood to the
point of abrogation. Such deprivation would not only denude the life of its effective
15 content and meaningfulness it would make life impossible to live. And yet, such
deprivation would not only have to be in accordance with the procedure
established by law, if the right to livelihood is not regarded as part of the right to
life. That, which alone makes it possible to live, leave aside what makes life livable,
must be deemed to be an integral component of the right to life. Deprive a person
20 of his right to livelihood and you should have deprived him of his life, indeed, that
explains the massive migration of the rural population big city. They migrate
because they have no means of livelihood in the villages. The motive force for
which people their desertion of their hearths and homes in the village is that
struggle for survival, that is, the struggle for life. So unimpeachable is the evidence
25 of the Nexus between life and the means of livelihood. They namely, eat, only if
they have the means of livelihood. That is the context in which it was said by
Douglas J, in Baksey that the right to work is the most precious liberty because, it
sustains and enables a man to live and the right to life is a precious freedom. "Life",
as observed by Field, J, in Munn versus Illinois, (1877) 94 US 113, means something
30 more than mere animal existence and the inhibition against the deprivation of life
extends to all those limits and faculties by which life is enjoyed. This observation
was quoted with approval by this court...

Article 39 (a) of the Constitution, which is the directive principle of state policy,
provides that the state shall, in particular, direct its policy towards securing that the
citizens, men and women equally, have the right to an adequate means of
35 livelihood. Article 41, which is another directive principle, provides, inter alia, that
the state shall, within the limits of its economic capacity and development, make
effective provision for securing the right to work in the cases of unemployment
and of undeserved want. Article 37 provides that the directive principles, though
not enforceable by any court, are nevertheless fundamental in the governance of

5 the country... The state may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21.

10 This decision was cited with approval in **Salvatore Abuki vs Attorney General, Petition No 2 of 1997**, when the Constitutional Court of Uganda considered that the right to life was infringed by denying a person the right to livelihood through banishment affecting access to the means of sustenance. Justice Egonda – Ntende Ag JCC, as he then, was cited with
15 approval **Tellis and Others versus Bombay Municipal Corporation** (supra) when he said:

An exclusion order in our circumstances will have the effect, of threatening the right to life of the person banished. The only place where shelter and means of livelihood are available, at his home, are denied to the person banished. As was
20 observed by the Supreme Court in India, *Tellis & others versus Bombay municipal Corporation and others* 1987 LRC (Const) 351 at page 368...

"... The question we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching..."

25 Further Tabaro Ag JCC stated that:

It cannot be contended that the deprivation of one's means of sustenance is not a threat to one's life. And of course, as a matter of axiom, a threat to life is cruel and inhuman. Once one is deprived of subsistence one can only survive by the grace of God as the mercy of his people will no longer be available, except, perhaps
30 through begging – very degrading indeed.

Specifically, the Supreme Court of India held that failure to provide the essential life-saving facilities to a person in need of healthcare violates the right to life in **Paschim Banga Khet Mazdoor Samity v State of West**



5 **Bengal & Another, 1999 SCC (4) 37, JT 1996 (6) 43.** The Supreme Court of India Stated that:

10 Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under article 21. In the instant case there was breach of the said right of Hakim Seikh guaranteed under article 21 when he was denied treatment at various government hospitals which were approached even though his condition was very serious at the time and he was in need of immediate medical attention.

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...

20 It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the state to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this court has held that the state cannot avoid its constitutional obligation in that regard on account of financial constraints.... The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the state to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the same constitutional obligation of the state has to be kept in view. It is necessary that time bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same. The state of West Bengal alone is a party to these proceedings. Other states, though not parties, should also take necessary steps in light of the recommendations made by the committee, the directions contained in the memorandum of the government of West Bengal dated August 22, 1995 and the further directions given herein.

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5 In the premises, failure to provide sufficient healthcare facilities through
effective policy or failure to implement policy and which leads to the threat
to the life of mothers, which threats could be averted is a violation of the
right to life as well as the Constitutional obligations of the State of Uganda
as I have set out above and I concur with the finding of my learned brother
10 Justice Barishaki in that regard.

In the final analysis, I agree that the petition be allowed with the orders
proposed by my learned brother Hon. Justice Barishaki Cheborion, JCC and I
have nothing further to add.

Dated at Kampala the 19th day of Aug 20

15



Christopher Madrama Izama

Justice of Court of Appeal/Constitutional Court

