

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

Coram Hon. A.E.N Mpagi-Bahigeine, DCJ/JCC
Hon. Justice C.K Byamugisha, JA/JCC
Hon. Justice S.B.K Kavuma, JA/JCC
Hon. Justice A. S Nshimye, JA/JCC
Hon. Justice Remmy Kasule, JA/JCC

CONSTITUTIONAL PETITION No. 16 OF 2011

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

VS

ATTORNEY GENERAL ::::::::::: RESPONDENT

RULING OF THE COURT

The four petitioners filed the instant petition under the provisions of **Articles 137(3), (4) and Article 45** of the Constitution of the Republic of Uganda, 1995 and Rule 3 of the Constitutional Court (Petitions and References) Rules, SI No. 91 of 2005.

The petition contains 11 averments. For purposes of this ruling, the main averments are embedded in paragraphs 5, 10, and 11 of the petition which are reproduced below:

"5" *That your petitioners and the public are affected by the Non provision of basic indispensable health maternal commodities in Government health facilities and the imprudent and unethical behaviour of health workers toward expectant mothers and they contend that such acts and omissions are inconsistent with the Constitution.*

"10" *That the unacceptable higher maternal deaths in Uganda which are due to Government's non provision of the basic minimum maternal health care and the non attendance and improper handling by the health workers to expectant mothers are unconstitutional in as far as they run contrary to and against Objectives 1(1), xiv(b) xx vii (b), Articles 33(2) and (3), 20(1), and (2), 22(1) and (2), 24, 34(1), 44(a), 287, 8A and 45 of the Constitution as enumerated and outlined below;*

(a) The death of a one Sylvia Nalubowa in Mityana hospital due to non availability of the basic maternal health commodities in the district hospital violated her Constitutional rights to health and life guaranteed under objective XIV (b) and Articles 8A, 45, 287 as articulated in the affidavit of Rhoda Kukkiriza, the third petitioner herein;

(b) The death of Anguko Jennifer in a regional referral hospital in Arua also due to non provision of the basic maternal commodities and the reluctance of the health workers toward this expectant mother leading to her death was an infringement of her rights to life and health guaranteed under the Constitution.

(c) Non provision of basic maternal health commodities to expectant mothers and the failure on the part of health workers to exercise the requisite health care leads to death of children hence an infringement of their rights guaranteed under Articles 22, 33 and 34 of the Constitution.

(d) Uganda continues to face unacceptably high maternal mortality at 435/100,000 Live births, newborn (29/1000) and a high infant mortality (76/1000) and this is because of the inadequate human resource for maternal health specifically midwives and doctors, frequent stock-outs of essential drugs for maternal health and lack of emergency obstetric Care (EMOC) services at Health Centres II, IV and hospitals and this infringes the mother's and the child's right to life guaranteed under Article 22 of the Constitution.

(e) The inadequate human resource for maternal health specifically midwives and doctors, frequent stock-outs of essential drugs for maternal health and lack of emergency

obstetric care (EMOC) services at Health centres III, IV and hospitals is an infringement of the right of access to health services under objective XX, XIV(b), XV and Article 8A of the Constitution.

(f) An estimated Ushs. 1.5 trillion is required annually to deliver the Uganda National minimum Health Care Package. However the public per capital expenditure has averaged at 8.9 USD over the last ten years. The percentage of government allocation to health as a proportion of the total budget has not significantly increased which costs the county citizen's lives contrary to Article 22 of Constitution.

(g) When the government and its agents – the health workers neglect, refuse and or fail to take care of the expectant mothers, this non provision of minimum health care package has led and will frequency lead to death of the vulnerable poor women who constitute the bigger percentage of the population and are bread winners in many rural families contrary to Articles 33 and 34.

(h) The State has failed in its obligation to provide the basic health facilities and opportunities necessary to enhance the welfare of women to enable them realise their full potential and advancement which contravenes Articles 33(1) of the Constitution.

- (i) The expectant mothers are maltreated with lots of insults and harsh handling by the health workers in many of the government health centres all in contravention of Article 24 which guards against inhuman cruel degrading treatment.*
- (j) The non provision of essential maternal kits, the non supervision of the public health facilities and resultant omission and un professionalism of health workers contravene Article 33 (3) which requires the State to protect women and their rights, taking into account their unique status and natural maternal functions in society.*
- (k) Expectant mothers have continued to die in government hospitals under similar circumstances. Nurses and doctors solicit for money out of them and other maternal health consumables and in the event that they fail to raise the money or other materials, they are left unattended to which leads to their death and this violates their right to life.*
- (l) The death of mothers in government health centres due to non provision of basic maternal commodities leaves their families and the new born child in devastation and resultantly with no person to look after them thus infringing their right guaranteed under Article 34 of the Constitution.*
- (m) The World Health Organisation's safe Motherhood Programme to which Uganda is a member developed the*

Mother-baby package in 1994 to help countries to indentify nationally appropriate packages of essential interventions to reduce maternal and new born mortality and morbidity.

(n) In implementing a comprehensive safe motherhood programme aimed at reducing maternal and neonatal morbidity and mortality in the country, Uganda Ministry of Health decided to implement the WHO Mother –Baby Package, an essential cluster of maternal and newborn health interventions and to date has never taken course.

(o) The Ugandan Government presently spends only on US\$ 0.50 per capita on maternal and newborn health care instead of the minimum US\$1.40 per capital set in the mother-baby package, and the funds allocated to the Health Sector are too inadequate to fund the Uganda National Minimum Health Care Package. This contravenes objective Xiv and Article 8A of the constitution.

(p) The provision of basic minimum maternal health care to vulnerable poor women in government hospitals is of comparable priority under various regional and international instruments and of particular interest is Article 12 of the ICESCR and comment 14 to which Uganda is a party and its failure contravenes objective XXVIII, Article 8A and 45 of the Constitution.

(q) The impugned acts and omissions referred to above are by virtue of Article 45 of the Constitution contrary to and against the spirit of the international legal instruments which Uganda has ratified particularly the International Convention on Economic Social and Cultural Rights' article 12.

- 11. *The Constitution is the Supreme Law of the land under Article 2(1) and the non provision of basic minimum maternal health care and the constant neglect by health workers towards expectant mothers which results into unacceptable high maternal mortality rate are unconstitutional to the extent that they infringe several rights guaranteed under the Constitution.***

The petitioners prayed for the following declarations and orders.

- a) A declaration that the acts and/or omissions of the respondent's agents (ministry of health and health workers) stated in this petition are in contravention of and inconsistent with the petitioner's and women rights that are insured by the constitution in Articles 33(2) and (3), 20(1), and (2), 22(1) and (2), 24, 34(1), 44(a), 287, 8A & 45.*
- b) That it's a violation of the right to life guaranteed under Article 22 of the Constitution when death of expectant of mothers result from non provision of the basic maternal health care packages in government hospitals.*

- c) *That it's the violation of the right to health when health workers and government fail to take the required health essential care during pre- and post-natal periods.*
- d) *That the inadequate human resource for maternal health specifically midwives and doctors, frequent stock outs of essential drugs for maternal health and lack of emergency Obstetric Care (EmOC) services at Health Centres III, IV and hospitals is an infringement of the right to health under Objective XX,XIV(b),XV and Article 8A of the Constitution,*
- e) *That the unacceptable higher maternal deaths in Uganda which are as a result of non provision of the basic minimum maternal health care and non attendance of the health workers to the expectant mothers are unconstitutional in as far as they are contrary and against Articles 33(2) and (3), 20(1), and (2), 22(1) and (2), 24, 34(1), 44(a), and 8A of the Constitution of the Republic of Uganda.*
- f) *A declaration that the families of the mothers who have died due to negligence of the government health workers and the Government's non provision of basic maternal health care package be compensated because of the rights violations.*
- g) *An order that the families of Sylia Nalubowa and Jennifer Anguko who died in Mityana District and Arua Regional Referral Hospital respectively due to negligence of the Government health workers and the*

Government's non provision of the basic maternal health care package be compensated because of their rights violation.

The petition is supported by the affidavit sworn by Mr. Mulumba Moses, the Executive Director of the 1st Petitioner and Ben Twinomugisha, a board member of the 1st petitioner and the 3rd and 4th petitioners. The 3rd petitioner is a mother in law of the late Sylvia Nalubowa who died on 19th August 2009 at Mityana Hospital after she was not attended to by the medical staff during delivery. The 4th petitioner is the spouse of the late Anguko Jennifer who died in Arua Hospital on 10th December 2010 due to the nurses' negligence.

The petitioners alleged non provision of basic indispensable health maternal commodities in Government Health Facilities and the imprudent and unethical behaviour of health workers towards expectant mothers; that such acts and omissions are in contravention of the Constitution.

In response to the petition, the respondent filed his answers to the petition which are contained and supported by the affidavits of Mr. Gantungo Daniel and a supplementary affidavit of Dr. Lukwago Asuman, the permanent secretary of the Ministry of Health. The respondent argued that the petition was speculative and disclosed no question for Constitutional interpretation.

The parties held a scheduling conference before the Registrar and framed the following issues for court's determination.

1. *Whether the right to the highest attainable standard of health is a constitutional right by virtue of Article 45 of the Constitution.*
2. *whether the inadequate human resource for maternal health specifically midwives and doctors, frequent stock –outs of essential drugs for maternal health and lack of Emergency Obstetric Care (EmOC) services at Health Centres III, IV and hospitals is an infringement of the right of health.*
3. *Whether non provision of basic maternal health care services in health facilities contravenes Article 8A objective XIV and XX of the constitution.*
4. *Whether the Governments' non provision of basic maternal health care package in government hospitals resulting into the death of expectant mothers and their children is a violation of the right to life as guaranteed under Article 22 of the Constitution.*
5. *Whether the health workers and government failure to attend to expectant mothers subjects them to degrading and inhuman treatment and there by contravening Article 24 and 44(a) of the Constitution.*
6. *Whether the High rates of maternal mortality rates in Uganda contravene Article 33(1), (2) and (3) of the Constitution.*
7. *Whether the families of Sylvia Nalubowa and Jennifer Anguko who died in Mityana District hospital and Arua Regional referral Hospital due to*

non availability of basic maternal commodities respectively are entitled to compensation.

The petitioners were represented By Mr. Kabanda David while Ms. Mutesi Patricia, a Principal State Attorney, represented the respondent. At the commencement of the hearing of the petition, Ms. Mutesi Patricia raised a preliminary objection based on the legal doctrine known as “political question.” She contended that, the way the petition was framed, requires this court to make a judicial decision involving and affecting political questions. In so doing the Court would in effect be interfering with political discretion which by law is a preserve of the Executive and the legislature. Court should not deal directly with questions that the Constitution has made a sole responsibility of another branch of Government. She stated that for the court to determine the issues in the petition, it has to call for a review of all the policies of the entire health sector and the sub sector of the maternal health care services and make findings on them, while implementation of these policies is the sole preserve of the Executive and the Legislature.

Ms. Mutesi referred us to the affidavit of Dr. Lukwago Asumani, the Permanent Secretary Ministry of health, in which he outlined the efforts and strategies undertaken by Government to ensure high standards in the health sector in a bid to improve maternal health despite the available scarce resources allocated to the sector. She cited several constitutional provisions that reserve the right of formulating, reviewing and implementing policies and resource allocation to the Executive and the Legislature. For example **Article 111 (2)** of the Constitution of the Republic of Uganda which provides;

"(2) The functions of the Cabinet shall be to determine, formulate and implement the policy of the Government and to perform such other functions as may be conferred by this Constitution or any other law."

and

Article 176(2) (e) on the Local Government system which provides that;

"appropriate measures shall be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdictions"

She cited the cases of Baker Et AL Vs Carr ET AL 369 US 186 (1962), RV Cambridge Health Authority ex PB [1995] 2 ALL ER 129 and the Ugandan case of Attorney General Vs Major General David Tinyenfunza Supreme Court Constitutional Appeal No. 1 of 1997 which deal with the doctrine of political question.

In conclusion, counsel contended that the issues as framed by the petitioners fall under the doctrine of a "political question" and therefore the Court is prohibited from hearing such a case on the grounds of non justifiability. She prayed that the preliminary objection be decided upon by this honourable Court before they delve into the merits of the petition.

In reply, Mr. Kabanda argued that the preliminary objection was misconceived as the petitioners pray to court to determine whether the acts and omissions are in contravention with the Constitution and not the determination of a political question. He pointed out that government budget allocation to the health sector has for the last 10 years been 9.6% of the national budget, lower than the required 15%. He argued that the different Conventions to which Uganda is a

party spell out the obligations to the parties which the Government must respect. He, however, cited no authorities to support his arguments.

Findings of the Court

This petition was brought to this Court under **Article 137(3) (4) and Article 45** of the Constitution. The parameters within which this court is required to operate are established in **Article 137(1) and (3)** of the Constitution. It provides as follows:-

"Article 137; Questions as to the interpretation of the Constitution

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

(2)

(3) Any person who alleges that:

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

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

This Court has jurisdiction on matters where the petition, on the face of it shows that an interpretation of a provision of the constitution is required. See **Ismail**

Serugo Vs Kampala City Council Attorney General Constitution appeal No. 2 of 1998

The petitioners' contention is that the state has failed to provide basic indispensable health items in Government facilities for expectant mothers taking into consideration their unique status and their natural maternal function in the society. They argue that as a result of Government's failure in its duties, together with the imprudent and unethical behaviour of the health workers, there has been a higher maternal mortality rate in Uganda. In the petitioners' opinion, this is in violation of the National objectives and Directive Principles of State policy Numbers **1(i), XIV(b) XXVIII(b), 33(2) and (3), 20(1) and (2), 22(1) and (2), 24, 34(1), 44(a), 8(a) and 45** of the Constitution of Uganda and Articles.

Ms. Patricia contended that the petition as framed, requires Court to determine matters falling under this doctrine of political question and requires this Court to substitute its discretion for that granted by law, to the Executive and the Legislature. This court is required to analyze the policies in the health sector, in relation to the allocation of resources to the other sectors and their implementation.

The doctrine of "political question" emanated from the concept of separation of powers. This doctrine was a creation of court in the case of **Marbury Vs Madison, 5 US. 137**, as part of the broader concept of justification- whether or not it is appropriate for court to review the business of other branches of government.

Definition of a political question

"Questions of which Courts will refuse to take cognisance, or to decide on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative powers".

"Political question doctrine" holds that certain issues should not be decided by courts because their resolution is committed to another branch of government and /or because those issues are not capable, for one reason or another, of judicial resolution. Its purpose is to distinguish the role of the judiciary from those of the Legislature and the Executive, preventing the former from encroaching on either of the latter. Under this rule, courts may choose to dismiss the cases even if they have jurisdiction over them.

In the case of **Coleman Vs miller, 307 U.S 433,454-455**, it was held that in determining whether a question falls within the political question category, the appropriateness under the system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations. It is apparent that several formulations which vary slightly according to the settings in which the question arises may describe a political question, although each has one or more elements which identify it as essentially a function of separation of powers.

This doctrine was defined as the determination by court that an issue raised about the conduct of public business is a "political" issue to be determined by the

legislature or the executive branch of Government and not by the court. see Baker Et Al Vs Carr ET AL (supra). The Supreme court of Uganda adopted this doctrine in the case of Attorney General Vs Major David Tinyenfuza (supra) in which Kanyeihamba, JSC (as he then was) went to great length in explaining the extent to which courts should go in interpreting and concerning themselves with matters which are, by the Constitution and law assigned to the jurisdiction and powers of Parliament and the Executive.

Citing Luther Vs Border 7 HOW 1 (1849) and Hirabayashi Vs United States 320 US 81 (91-92) (1943), Kanyeihamba, JSC noted the following:-

"The rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the Legislature or the Executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the legislature and administrative decisions of the executive when challenged on the grounds that the rights or freedoms of the Individuals are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.

... in Ex-parte Matovu (op.cit) the supreme Court of Uganda observed that in stating the rule in the American case of Marbury Vs Madison (supra) and others like it, the explosion of legal principles on the wisdom of the courts resist the temptation of interfering in the matters outside their own normal jurisdiction cannot be faulted. The definition of the term "political" appears in the same passage and is said to be a question relating to the possession of political power of sovereignty of

Government, the determination of which is based on congress in our case parliament, and on the president whose decisions are conclusive on the courts. The more common classifications of cases involving political questions include whether or not courts should demand proof whether a statute of the legislature was passed properly or not, conduct of foreign relations and when to declare and terminate wars and insurgences. These are matters that courts should avoid in adjudicating upon unless very clear cases of violation or threatened violation of individual liberty or infringement of the Constitution are shown.

.....the accepted principle is that courts will not substitute their own view of what is public interest in these matters especially when the other coordinate powers of Government are acting within the authority granted to them by the constitution and the law.”

We are in agreement with the respondent’s argument that the petition deals generally with all hospitals, health centres, and the entire health sector and broadly covers all expectant mothers. The Role of this Court as stated in **Article 137** is to interpret the provisions of the Constitution. The petitioner must prove before court that the constitutional provisions have been violated.

The Constitution has clearly streamlined the roles of each of the organs of Government. I.e. the Legislature, the Executive and the Judiciary as follows:

“Article 79 Functions of Parliament

- (1) "Subject the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.
- (2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under the authority conferred by an Act of Parliament".

and

"Article 111. The Cabinet

(1).....

- (3) The functions of the Cabinet shall be to determine, formulate and implement the policy of the Government and to perform such other functions as may be conferred by this Constitution or any other law".

Also

"Article 126 Exercise of judicial power

- (1) *"Judicial power is derived from the people and shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people." (Emphasis is ours)*

These articles clearly stipulate the different roles assigned to each of the three organs of Government by the Constitution.

According to **Halsbury's Laws of England, 4th edn. Butterworths, London, 1989, Para5**, the doctrine of separation of powers implies that;

1. A particular class of function ought to be confided only to the corresponding organ of Government.
2. The personnel of the three organs of Government must be distinct.
3. The autonomy of each branch of government must be immune from undue encroachment from any of the others.

This court, while executing its duties, is bound to follow the principles of Constitutional interpretation laid out in **Paul Kawanga Ssemwogerere & 2 others Vs Attorney General constitutional Appeal No. 1 of 2001 (SC)**. The constitutional provisions must not be read and considered in isolation but as a whole so as to complement each other.

Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with guidance from the above discussions reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these policies except in the Executive.

This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some

and let on, their implementation. If this Court determines the issues raised in the petition, it will be substituting its discretion for that of the executive granted to it by law.

In matters which require any court to draw an inference, like in the instant petition, an application for redress can best be entertained by the High Court under **Article 50** of the Constitution. An application for redress can only be made to the constitutional Court in the context of a petition under **Article 137** brought for the interpretation of the Constitution. See Ismail Serugo Vs Kampala City Council supra.

From the foregoing, the issue raised by the petitioners concern the manner in which the Executive and the Legislature conduct public business/issues, affairs which is their discretion and not for this court. This court is bound to leave certain constitutional questions of a political nature to the Executive and the Legislature to determine.

We appreciate the concerns of the petitioners as regards what to them is the unsatisfactory provision of basic health maternal commodities and services towards expectant mothers that motivated them to lodge this petition. But with the greatest respect, we find the solution to the problem is not through a Constitutional petition that is in the nature of requiring this Court to resolve a political question like this one is. There are other legal alternatives that the Constitution and other laws provide for resolution of such.

Section 33 of the Judicature Act, Cap 13 provides;

“33. General provisions as to remedies.

The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act on any written law, grant absolutely or on such terms and conditions as it thinks just ,all such remedies as any of the parties to a cause or matter is entailed to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all malpractices of the legal proceedings concerning any of those matters avoided.”

Among the remedies that the High Court may grant is the one of the prerogative order of Mandamus requiring a public officer to carry out public duties that relate to this or her scope and course of employment in a public office. There are also the other prerogative remedies of prohibition, certiorari and injunctions. See **Section 36, 37, and 38 of the Judicature Act.**

Likewise the Government proceedings Act Cap 77 vests in any person a right to claim and to seek remedies, compensations inclusive against the Government, whether the claim be in contract (Section 2) or in tort (Section 3) as long as the acts complained of were carried out by authorised officers, employees and/or representatives of the Government.

It would appear to us that the petitioners to this petition have available remedies that they can pursue in the law we have pointed out, other than resorting to this petition, which calls upon us to resolve what we have appreciated to be a political question.

Further, we are also of the view that the petitioners who aver that they are being aggrieved by the respondent can apply for redress under **Article 50** of the Constitution.

Accordingly, we do not find any competent questions set out in the petition that require interpretation of Constitution by this court. The acts and omissions complained of fall under the doctrine of “**political question**”.

We therefore, uphold the respondent’s preliminary objection. The petition is accordingly struck out. We make no order as to costs, as in our view, the petitioners were motivated by their respective concerns for the plight of maternal mothers, and not for personal considerations in lodging and prosecuting the petition.

Dated at Kampala this...05th ...day of ...June...2012.

**A.E.N MPAGI-BAHIGEINE
DEPUTY CHIEF JUSTICE/JCC**

**C. K. BYAMUGISHA
JUSTICE OF APPEAL/JCC.**

S.B.K KAVUMA
JUSTICE OF APPEAL/JCC.

A.S NSHIMYE
JUSTICE OF APPEAL/JCC

REMMY KASULE
JUSTICE OF APPEAL/JCC