REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

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

CONSTITUTIONAL APPEAL NO: 02 OF 2014

BETWEEN

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

AND

1. **ATTORNEY GENERAL**
2. **KENNETH KAKURU ::::::::::::::::::::::::RESPONDENTS**

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

JUDGMENT OF TUMWESIGYE, JSC

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

Background to the appeal

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

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

It was also their contention that the payment of bride price by men leads them to treat their wives as mere possessions. This, they claimed, perpetuates inequality between men and women which is prohibited by Article 21(1), and (2) of the Constitution. The petitioners further contended that the demand for bride price by parents of a young woman to be married portrays her as an article in a market for sale, and amounts to degrading treatment which is prohibited by Article 24 of the Constitution. They thus prayed the Constitutional Court to declare the custom and practice of demanding and paying, and also of demanding refund of bride price at the dissolution of customary marriage, unconstitutional.

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

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

They further argued that the law in Uganda recognizes several other forms of marriage such as civil marriage under the Marriage Act and church marriage under the Marriage of Africans Act which are alternatives to customary marriage and if parties to the marriage decide to contract a customary marriage in lieu of other alternatives, it is their choice to be bound by the requirements of the custom.

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

Grounds of Appeal

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

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

Grounds 8 and 9 were to the effect that the learned Justices of the Constitutional Court erred in law when they declined to declare the demand for a refund of bride price unconstitutional, despite their finding as a matter of fact and law, that the practice undermines the dignity of a woman contrary to Article 33(6) of the Constitution, and may lead to domestic violence.

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

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

Mr. Ladislaus Rwakafuuzi and Mr. Emmanuel Ocheng represented the appellants while Ms. Patricia Mutesi, Principal State Attorney, and Ms. Sarah Naigaga represented the 1st and 2nd respondents respectively. Counsel for the appellants and counsel for the 1st respondent and the 2nd respondent himself filed written submissions.

The use of the term "Bride Price".

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

The 2nd respondent, however, objected to the use of the term. He argued that the term was not appropriate as there was no sale or purchase of a bride in

customary marriages in Uganda. He stated that the term *"enjugano"* which is used in Runyankole to denote the property that a groom gives to the parents of the young woman in marriage has no English equivalent.

In their judgments both Justice Mpagi-Bahigeine (JA) (as she then was) and Justice Kavuma (JA) (as he then was) objected to the use of the term. They were of the view that the term "bride price" was coined by colonialists because of their failure to appreciate the African customary marriage and the significance of its cultural rites.

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

During British colonial administration in Africa, customary marriage was not fully recognised as marriage. This was for two reasons: their objection to polygamy and "bride price". Chief Justice Sir Robert Hamilton in **Rex v. Amkeyo**, 7 E.A.L.R. (1917) stated: **"I know no word that correctly describes it [customary marriage]; 'wife purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized people."** This position was maintained for many years during colonial rule.

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

> ***"(a) No bride is offered for sale and no bride is sold or bought …….***
>
> ***(b) No one gives up one's daughter. One's daughter remains one's daughter; she merely acquires a new status of a wife."***

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

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

Consideration of the issues

1. **Grounds 1, 2 and 3: Whether the Constitutional Court erred by declining to take judicial notice of the custom of bride price in customary marriage and its refund when the marriage breaks down.**

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

Secondly, he argued that the courts themselves have taken judicial notice of the custom of paying bride price. He cited cases such as **Aggrey Owori vs. Rosette Tagire** HCCS No. 178/2000, in which it was held that no customary marriage is valid unless bride price is paid and **Nemezio Ayiiya Pet vs. Sabina Onzia Ayiiya** HCCS No. 8/1973, where the court took judicial notice of the Lugbara custom that instalments of bride price were not fixed in terms of payment. He also mentioned the case of **Wango vs. Dominiko Manano** (1958) E.A. 124 in which the court took judicial notice of the custom of paying bride price in the West Nile District.

Counsel faulted the Constitutional Court for disregarding the affidavits on record which according to him clearly illustrated the existence of the custom and practice of demanding and paying bride price, and its refund where the marriage has broken down. The learned Justices of the

Constitutional Court should not have disregarded the affidavits without stating valid reasons for not doing so, he submitted.

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

In his written submissions, however, the 2nd respondent strongly disagreed and argued that the custom of paying bride price and its refund had to be proved by evidence because the practice is different in different cultures of Uganda. He objected to the appellants' counsel's introduction of new evidence or information that was not presented at the hearing of the petition in the Constitutional Court. He argued that the ordinances, subsidiary legislation and cases cited by the appellants' counsel did not apply to all cultures in Uganda, and that customs and cultures were specific to a particular ethnic group and that they were not uniform to the whole country.

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

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

All Justices of the Constitutional Court wrote separate judgments though it was Deputy Chief Justice Mukasa– Kikonyogo (as she was then) who wrote the lead judgment. In her judgment, she stated that the practice of bride price being customary was unwritten and diffuse and not easy to ascertain. She did not agree that the custom was notorious enough for the courts to take judicial notice of it.

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

Justice Twinomujuni, JA (RIP), on the other hand, did not expressly state in his judgment whether the custom of paying bride price was judicially noticed or not. But by implication, it is clear that he acknowledged that the custom was common in Uganda and Africa as a whole. He described bride price as property or money which a man has to pay in order to get a

bride. In most African customary marriages, he stated, a man has to pay money or property (cows, pigs, goats, e.t.c.) specified and demanded by the relatives of the bride in order to marry.

Justice Byamugisha, JA, (RIP), did not either expressly or by implication address the issue as to whether or not the custom of paying bride price was judicially noticed. She seems to have confined herself to the position that customary marriage and the rites that go with it are protected by the Constitution and should not be abolished without the consent of the people it affects. The import of her judgment, however, clearly shows that she acknowledges the existence of the custom.

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

That aside, Justice Kavuma, JA, was of the view that the custom and practice of bride price in customary marriage has been recognized in subsidiary legislations and ordinances in several districts of Uganda, and in court decisions. His conclusion was that the custom of bride price in

customary marriage in Uganda is so well known and established that it requires no formal proof in court.

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

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

> "**In my opinion, therefore, the practice of bride price, the payment of a sum of money or property by the prospective son-in-law to the parents of the prospective bride as a condition precedent to a legal customary marriage, is not barred by the Constitution. It is not *per se* unconstitutional. The Constitution does not prohibit a voluntary, mutual agreement between a**

bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to choose the bride price option…"

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

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

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

Be that as it may, since the appellants made the issue of the Constitutional Court allegedly declining to take judicial notice of the custom and practice of bride price in customary marriage one of their grounds of appeal, I will

proceed to consider it. I will start by considering the objection raised by the 2nd respondent in his written submissions that the subsidiary legislation and case law cited by the appellants' counsel were new evidence and information that was not presented at the hearing of the petition, and should not be considered in the appeal. He cited **Tanganyika Farmers vs. Unyamwezi** (1960) EA 620 where the court held that an appeal court has discretion to allow a new point to be taken on appeal, but it will permit such a course only when it is assured that full justice can be done to the parties.

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

The 2nd respondent is obviously not right in his argument against the presentation of subsidiary legislation, ordinance and case law cited by counsel for the appellants in his written submissions. It may be true that what counsel presented was new since they were not included in his arguments before the Constitutional Court. However, subsidiary legislation, ordinance and case law is not evidence but law. Law unlike new evidence, even if not presented at the trial court, can be presented at the appeal stage to help court come to a proper decision. For fair hearing, what an appellate court should be mindful of is that the opposing party

should have had an opportunity to obtain the authorities presented to court in a reasonable time to enable him prepare his case. This is not a complaint that the 2nd respondent is raising, for he was given sufficient time to read the appellants' counsel's written submissions before preparing his own written submissions.

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

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

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

different in different cultures in Uganda and hence courts cannot take judicial notice of it.

It is true that there was a preponderance of subsidiary legislation from the eastern part of the country which can be explained by the fact that MIFUMI (U) Ltd, the 1st appellant, operates mainly in Eastern Uganda. But decided cases which were cited by the appellants' counsel and by Justice Kavuma, JA, in his judgment, are not confined to the eastern region. Some of them like **Nemezio Ayiiya Pet vs. Sabina Onzia** (supra) and **Wango vs. Dominiko Manano** (supra), originated from north-west Uganda, while others such as **Peteconia Mpiriirwe vs. Oliver Ninsabimaana**, HCCS No. MKA 5 of 1990 and **Florence Kantungo vs. Yolamu Katuramu**, Civil Suit No. MFP 6 of 1991, originated from western Uganda. Therefore, the custom of bride price is not confined to eastern Uganda alone but it is a Ugandan custom, found and practiced in many communities.

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

> **"Judicial notice is taken of facts which are familiar to any judicial tribunal by virtue of their universal notoriety or regular occurrence in the ordinary course of nature or business. As judges must bring to the consideration of the questions they**

have to decide their knowledge of the common affairs of life, it is not necessary on the trial of any action to give formal evidence of matters with which men of ordinary intelligence are acquainted whether in general or to natural phenomenon"

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

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

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

insurgency it stands at 2-7 heads of cattle and cash money. The report goes on to say that in Buganda, the mandatory items are kanzu (long white tunic for men) for the father-in-law, gomesi (dress) for mother-in-law, mwenge bigele (local brew), a cock which is given to the brother-in-law and "mutwalo" (a specified sum of money). Other writers such as Dr. Peter Atekyereza in his Article "**Bride Wealth in Uganda: A Reality of Contradictions**" The Uganda Journal, November 2001, include meat or a cow among items in the bride price of the Baganda.

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

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

Learned counsel for the appellants submitted that the bride price "agreement" violates Article 21(1) (2) and (3) of the Constitution which provides for equality of persons. He argued that in so far as bride price is paid only by the groom and not the bride, inequality is thereby established in the marriage.

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

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

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

I agree that the Constitutional Court did not make any finding on it. It should have made a specific finding one way or the other on the issue of whether bride price results in violation of equality guaranteed by Article 21 of the Constitution since it was included not only in the appellants' petition but also in the submissions of the appellants' counsel before the Constitutional Court.

Many affidavits were sworn in support of the petition to show how payment of bride price by men resulted in unequal relationship between men and their wives and the immense suffering the women have

experienced at the hands of their husbands. Out of several affidavits that were sworn, I will only mention that of Fulimera Abbo, Abbo Florence and Felicity Atuki Turner.

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

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

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

In 2004, her husband abused her and beat her so much that she tried to commit suicide by taking poison. She returned to her parents' home to

recover but after her recovery her father forced her to go back to her marital home because he feared that her husband would ask him to refund the bride price.

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

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

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

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

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

Dr. Yusuf Mpairwe who deponed in support of the 2nd respondent's answer to the petition stated that the petitioners' claim that bride price contributes to violence and abuse of women was unsubstantiated. He cited a paper "*Domestic Violence in Developing countries. An intergenerational Crisis*" by Robert Lalasc, published on the internet in 2004, which shows that domestic violence is a worldwide problem and it

does not mention bride price as a contributing factor. That the claim that bride price promotes suicide among women is false as most recent figures published by WHO in 2003 on suicide did not show this.

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

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

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

> "**At the International level, the statistics on domestic violence from different countries continue to be alarming. For example, in South Africa, one out of every six women is assaulted by her mate. In Pakistan, 99% of housewives and 77% of working**

women are beaten by their husbands. In Brazil, 70% of all reported incidents of violence against women take place in a home. In Tanzania, six out of 10 women in Dar es Salaam have experienced physical abuse from their partners. In USA, a woman is beaten every 15 seconds. In Lusaka, Zambia, women aged between 20 and 40 years admitted being regularly beaten by their partners."

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

"In Uganda society, men have higher status than women by virtue of being male and consequently husbands are, to paraphrase Mushanga (1974:48), given absolute superiority over their wives in all family matters. As Gilles (1983:158) has pointed out, a woman who questions her husband's authority takes a risk of being subject to physical violence, since patriarchy does not only demand that power be vested in men to dominate and control others (women) but also allows men to use whatever means (violence) necessary to maintain their authority."

Uganda Law Reform Commission Report mentioned earlier, p. 201 lists causes of domestic violence to include: mutual misunderstandings, economic difficulties, jealousy, disrespect, break down of communication

between partners, sex denial, unfaithfulness, lazy female partners, lack of co-operation, claim of equal status, alcoholism, etc.

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

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

The Constitutional Court considered bride price as a token of gratitude to the bride's family for the girl's nurturing and upbringing. The 2nd respondent views bride price as gifts which are reciprocated by the girl's family. In fact in some communities today, the family of the bride may give back a lot more property in form of gifts than the bride price it receives from the groom's side. Bride price, apart from being gifts, has

also been said to be good for the stability of the marriage. Professor Arthur Phillips in "*Marriage Laws in Africa*", p.7 writes:

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

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

Commercialization of bride price which is mentioned in some of the affidavits in support of the petition, and decried by Justice Mpagi-Bahigeine in her judgment, has also served to undermine respect for the custom. In his book "*Obushwere n'Amagara Gaabwo*" translated as

"Marriage and Life in It" in English, Fountain Publishers Ltd, 1996, authored by the late Bishop Amos Betungura (written in Runyankole/Rukiga), he writes (as translated in English) on page 22 as follows:

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

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

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

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

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

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

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

Counsel for the appellants argued that in the case of **Pamela Sabina Mbabazi vs. Henry Bazira** Civil Appeal No. 44 of 2004, the Court of Appeal had underscored the necessity of the couple's consent to marry and that if the Constitutional Court had considered this authority which was cited during the hearing of the petition, and correctly applied Articles 21 and 31(3) of the Constitution, the Court would have found that the bride price practices are unconstitutional because they fetter the parties' free consent to enter into marriage.

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

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

In their reply, counsel for the 1st respondent supported the Constitutional Court, and submitted that Deputy Chief Justice Mukasa-Kikonyogo rightly held in her judgment that the Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement because a man and a woman have the constitutional right to choose the bride price option as the way they wish to get married. She further submitted that the Deputy Chief Justice had also rightly held that where persons intending to marry were given no alternative to customary marriage or the bride price arrangement, this would contravene their right to enter into a marriage under Article 31 of the Constitution, as persons could not be lawfully compelled to enter into bride price arrangement by the demands of a third party. No evidence was adduced by the appellants whereby a valid customary marriage was

entered into by payment of bride price, without the consent of the prospective bride or groom, 1st respondent's counsel argued.

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

Counsel further argued that people freely choose the customary marriage option from other types of marriage which the law recognizes, and which unlike the customary marriage, do not require the payment of bride price for their validity. If they choose the customary marriage option, they will be taken to have agreed to observe the customs and rites that go with it, and this includes payment of bride price. This will be in line with Article 37 of the Constitution which guarantees all persons the right to enjoy, practice and protect any culture in community with others.

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

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

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

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

It is true, as counsel for the appellants argued, that Mukasa-Kikonyogo, DCJ, wrote in her judgment that, in her words, **"in the narrow instance where one or both the man and woman wishing to get married is given no other alternative to customary marriage and a bride price agreement, such an arrangement contravenes one's constitutional right to freely and voluntarily enter into a marriage relationship (Articles 20, 31(3). To be clear: "Marriage shall be entered into with the free consent of the man and woman intending to *marry*."**

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

> **"….the cultural practice of bride price, the payment of a sum of money or property by the prospective son-in-law to the parents of the prospective bride as a condition precedent to a lawful customary marriage, is not barred by the Constitution. It is not per se unconstitutional. The Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to choose the bride price option as the way they wish to get married."**

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

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

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

The issue of parents in some communities in Uganda removing their under age daughters from school and forcing them to marry in order for the parents to get bride price (forced marriages) has been reported by Non Governmental Organizations (NGOs) concerned with children's welfare, and given wide coverage by the media. Clearly, this is an abuse of the

custom of bride price and a reflection on the poor enforcement of the law by the law enforcement agencies. The Constitution prohibits marriage (whether customary or not) of persons below the age of 18 years, and section 129 of the Penal Code punishes any person who performs a sexual act with another person who is below the age of 18 years to a maximum sentence of life imprisonment and even to death where a person is below the age of 14 years.

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

According to Uganda Law Reform Commission, Report, earlier referred to, p. 71, the courtship period in Ateso does not involve much detail. When a boy and a girl decide to marry, they inform their respective parents and on a pre-arranged day, the boy's relatives visit the girl's relatives to discuss bride price. On another pre-arranged day, the cattle (bride price) are handed over to the girl's relatives before witnesses. Other ethnic groups follow more or less the same pattern as the two ethnic groups to formalize a valid customary marriage. It is the consent of the boy and girl that sets the ceremonies including payment of bride price in motion and which culminates in the marriage.

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

I think the point Fr. Deo Eriot is making is that couples are prevented from marrying in church, or marry with difficulty in church, because of demands of bride price by the girl's parents. This is different from saying, as the appellant's counsel argued, that a man or a woman is forced to marry because of bride price.

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

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

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

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

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

Section 29 of the Marriage Act which provides for conversion of customary marriage into marriage under the Marriage Act cannot be interpreted to be such an extension. Equally, it would not be correct, in my view, to interpret S.4 of the Marriage of Africans Act that provides: "**The formalities preliminary to marriage established, usual or customary for the Africans in the religion to which the parties belong shall apply to marriages under this Act…**" to mean that marriages celebrated under the Act must adhere to African culture and its rituals. To me, this section recognizes that there are different Christian denominations in Uganda, but allows each denomination to apply its own formalities, customs or rules in the celebration of marriage, provided the provisions of the Act are complied with.

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

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

I would, accordingly, decline to grant a declaration that the custom and practice of demand for payment of bride price fetters free consent of persons intending to marry, thereby violating Article 31(3) of the Constitution.

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

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

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

Counsel argued that Uganda had obligations under (a) Domestic Law (b) International Law and (c) Regional Protocol, to protect the rights of women. Under domestic law, Articles 20(2) and 33(3) of the Constitution oblige all organs of government to uphold and protect women and their rights. Therefore, the Constitutional Court had an obligation to make a declaration on the constitutionality of refund of bride price, given its findings on the manner in which the refund violates Articles 31(1) and 33 of the Constitution.

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

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

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

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

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

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

The 2nd respondent argued further that there was no hard and fast rule to guide in deciding the issue of refund of bride price, and that it was the duty of the court to assist in the growth of equitable customary rules. Courts, for example, can intervene taking into account the length of marriage and the number of offsprings to the marriage. Each case must be judged on its own facts, he argued.

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

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

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

> **"I am in agreement with the view that the customary practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman…. Moreover, the demand of a refund violates a woman's entitlement to equal rights with the man in marriage, during marriage and at its dissolution.**
>
> **Further, a refund demand fails to honour the wife's unique and valuable contribution to a marriage. A woman's contribution in a marriage cannot be equated to any sum of money or property, and any refund violates a woman's constitutional right to be an equal co-partner to the man."**

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

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

Most ethnic groups in Uganda, apart from the Baganda ethnic group, practice the custom of refund of bride price at the dissolution of customary marriage. Refund of bride price has been covered in several books and journals written on marriage in Uganda. See, for example, "*Marriage and Divorce in Uganda*" by H.E Morris, the Uganda Journal, Sept. 1960, "*The Chiga of Western Uganda*" by May Mandelbaum (MA, Ph.d (Columbia), 1957, and "*The Lango a Nilotic Tribe of Uganda"* by J.H. Driberg, 1954, among others. There is also case law which has taken cognizance of the custom. See, for example **Nemezio Aiiya vs Sabina**

Onziya Ayiiya, Divorce cause No. 8 of 1973 and **Muhinduka vs. Kabere**, Civil Suit No. 1 of 1971.

There is affidavit evidence on record which was not contradicted to show that the custom of refund of bride price is oppressive to women. Okia Zadoki, an Atesot, deponed, for example, that his daughter, Amuge Ann Grace, was married customarily for 25 years. She produced 7 children with her husband. Misunderstandings developed between her and her husband and the husband started subjecting her to beatings and eventually chased her from her matrimonial home. He then filed a suit in Pallisa Chief Magistrate's Court for refund of bride price and the court ordered the deponent to refund the cows and the Kanzu (tunic) which the husband had paid as bride price. Since he did not have cows, a warrant of attachment was issued by the court to sell one of his pieces of land.

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

When her first husband learnt that she was married to another man, he started demanding for refund of his bride price from her and her new husband since her parents had died. They were arrested and spent four

days in police custody. MIFUMI Project intervened and they were released. Her first husband is still demanding refund of his bride price and she fears she will be arrested again.

Nakiriya Stella, from Pallisa, deponed that her husband used to beat her and one day he cut her with a panga on the face and disfigured it. He forcefully chased her from her matrimonial home. He then sued her brother for refund of bride price in Pallisa Chief Magistrates Court. The court ordered her brother to refund the cows.

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

In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term "bride price" is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price

constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded.

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

It is also my view that refund of bride price is unfair to the parents and relatives of the woman when they are asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund. As Professor Tibatemwa Ekirikumbinza wrote in her "*Women's Violent Crime*" cited earlier, on p.82:

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

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

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

It is my firm view that the custom of refund of bride price, when the marriage between a man and a woman breaks down, falls in the category that is provided under Article 32(2) of the Constitution which states:

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

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

The appellant's grounds 8 and 9 accordingly succeed.

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

This complaint by the appellants is about what the Constitutional Court held after declining to declare the custom of refund of bride price which the court found to be unconstitutional but at the same time went on to hold that an aggrieved party's redress does not lie in constitutional declarations but in pursuing criminal proceedings or civil action. I fully discussed this issue under ground 8 and 9 and agreed that the Constitutional Court should have granted the declaration sought by the appellant about refund of bride price. It would, therefore, be superfluous for me to say more on this.

To recapitulate, below are my findings:

1. On Grounds 1, 2 and 3 relating to the issue of whether the Constitutional Court erred by declining to take judicial notice of the custom of bride price, this question is resolved in the affirmative. It is

my finding that the custom of bride price in customary marriage is so notorious in its generic form that the courts should take judicial notice of it.

2. On Grounds 4, 5, 6 and 7 relating to the issue of firstly whether bride price promotes inequality in marriage, it is my finding that it does not. I would, therefore, decline to grant the declaration prayed for by the appellants that the custom of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution. And secondly on the issue of whether bride price fetters the free consent of persons intending to marry, it is my finding that the Constitutional Court did not err in holding that payment of bride price does not fetter the parties' free consent into marriage. I would, accordingly, decline to grant a declaration that the custom of bride price fetters the free consent of persons intending to marry, thereby violating Article 31(3) of the Constitution.

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

it should be prohibited. The appellants' grounds 8 and 9, therefore, succeed.

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

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

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

Dated at Kampala this……*06*……day of……*Aug*….2015

Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CONSTITUTIONAL APPEAL NO. 02 OF 2010

BETWEEN

MIFUMI (U) & 12 OTHERS ::
APPELLANTS

AND

1. ATTORNEY GENERAL
2. KENNETH KAKURU ::
RESPONDENTS

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

JUDGMENT OF DR. KISAAKYE, JSC.

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

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

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

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

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

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

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

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

The Petitioners sought the following declarations from the Constitutional Court:

a) The custom and practice of demand and payment of bride price as a condition sine qua non of a valid customary marriage practiced by several tribes in Uganda is unconstitutional;

b) The custom and practice of refund of bride price as a condition sine qua non of a valid dissolution of a customary marriage practiced by several tribes in Uganda, is unconstitutional;

c) Any other or further declaration that this Honourable Court may grant

d) No order is made to costs.

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

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

1. The Justices of the Constitutional Court erred when they failed to decide the issue whether the custom of payment of bride price as a condition precedent to a customary marriage and the demand for a refund of bride price as a condition precedent to a valid dissolution of a customary marriage is judicially noticed requiring no further proof.

2. ***The learned Justices of the Constitutional Court erred when they failed to decide the issue whether bride price means different things in the different cultures of Uganda such that Court cannot make a uniform interpretation of the custom.***

3. ***The learned Justices of the Constitutional Court erred when they failed to decide the issue whether bride price is commonly practiced in Uganda by all cultures.***

4. ***The learned Justices of the Constitutional Court erred when they found that the custom of bride price does not promote inequality in marriage contrary to Art 21(1) (2) & (3) of the Constitution.***

5. ***The learned Justices of the Constitutional Court erred when they found that bride price does not fetter free consent of persons intending to marry in violation of Art 31(3) of the Constitution.***

6. ***The learned Justices of the Constitutional Court erred when they found that bride price does not perpetuate conditions of inequality in marriage contrary to Art 31(3) (b) of the Constitution.***

7. ***The learned Justices of the Constitutional Court erred when they found that the refund of bride price does not fetter the free will of a person intending to leave a marriage contrary to Art 31(3).***

8. ***The learned Justices of the Constitutional Court erred when they found that bride price does not commodify a woman thus lowering her dignity contrary to Art 33(1) which guarantees a woman's dignity of the person.***

9. ***The learned Justices of the Constitutional Court erred when they found that bride price does not cause domestic violence.***

10. ***The learned Justices of the Constitutional Court erred when they found that persons intending to marry may opt not to marry under customary law and therefore avoid payment of bride price.***

11. ***The learned Justices of the Constitutional Court erred when they found that a person opting to marry under customary law must have consented to be bound by the custom of payment of bride price.***

12. The learned Justices of the Constitutional Court erred when they found that the unfavorable aspects of the custom of bride price may be remedied through redress under any other law and not through declarations.

The appellants prayed that this Court finds that:

a) Bride price is a custom judicially noticed requiring no further proof.

b) Bride price means the same thing for all the different cultures in Uganda

c) Bride price is commonly practiced in Uganda by all cultures.

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

a) That the custom and practice of demand and payment of bride price as a condition sine qua non of a valid customary marriage as practiced by several tribes in Uganda is unconstitutional;

b) That the custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is unconstitutional;

c) Any other or further declaration that this Honourable Court may grant.

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

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

Consideration of this Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Several reasons were advanced by the respondents and were accepted by the Constitutional Court regarding the institution of bride price. For example, it was argued that payment of bride price is an essential rite for contracting a

customary marriage and that it is this characteristic that distinguishes it from other forms of marriage recognized in Uganda.

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

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

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

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

Article 34(1) on the other hand provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is in substance a colonial relic whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role of being a mere appendage of the husband, without a separate legal existence. This concept of the family has been drastically altered in recent decades. Marriage is now viewed as an equal partnership between husband and wife. Still, the old ideas and patterns persist, as do their psychological and economic ramifications. That notwithstanding, women are entitled to full equality in respect of the right to form a family, their position within the functioning family, and upon dissolution of the family so proclaims Article 33(1): Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution…

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

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

equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises."

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

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

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

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

There is no doubt that for the majority of tribes in Uganda, payment of bride price is one of the preliminaries required to be fulfilled before the parties will be considered to be validly married under a customary marriage. It should however be noted that the marriage rites observed by each tribe in Uganda are not only restricted to the demand and payment of bride price but are as diverse. Some of these rites are performed in the preliminary stages of preparing for marriage, while some others are performed during the actual giving away of the girl to the groom. In other communities, there are yet more rites which are even performed after the giving away of the girl has taken place. The totality of these marriage

rites together with other aspects of life that relate to food, dress, language, values, etc. is what constitutes culture. From the time Ugandans came into contact with other forms of civilizations introduced by Arabs, Europeans and Asians, among others, they have been adopting new ways of living, feeding, dressing up, mode of communication, etc.

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

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

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

<u>Whether payment of bride price fetters free consent to marry</u>

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

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

With due respect to the learned Justices, I wish to respectfully differ. The issue of consent by the parties to the proposed marriage requires, in my view, a deeper analysis beyond its outward expression, than was given to it by the learned Justices of the Constitutional Court. Their Lordships argued that since there are many ways of contracting a marriage in Uganda which are permitted by law, parties can and do freely choose to contract a customary marriage in preference to other equally available options which do not require bride price payment. That having done so, they agree to be bound by the rites attendant to the contracting and dissolution of a customary marriage, of which demand for payment and refund of bride price before the contracting or dissolution of marriage is part and parcel.

With due respect to the learned Justices of the Constitutional Court, I respectfully wish to differ with their holding. It is common knowledge that the majority of Ugandans live in the countryside following their traditional ways of life, as passed down to them from their parents and grandparents. Unfortunately, most of these traditions are unwritten. For young men and women, they are socialized by their families to know that they are expected to get married. When they do grow up and identify a person to marry, the choice of where and how to marry is, to the best of my knowledge, influenced by

several factors, which include their level of education, income, the extent to which they personally and/or their families subscribe to their religious faith, where they live and generally their exposure to other values other than their own traditional way of living. Whatever their individual or common views and/ or preferences about where and how they may wish to get married, it is common practice for both the girl and the body to inform their respective parents and/or other relatives such as the paternal auntie in Buganda, at a very early stage may be, that they have indeed found someone they would like to marry.

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

Given the above background, it would be wrong for courts, in my view, to construe a couple's decision to marry under customary law, as a decision to subscribe to all the rites and customs of their respective tribes, including even those that may not meet the constitutional test set for customs and other cultural practices.

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

contracted under the Marriage Act. This subtle power can manifest itself in several ways.

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

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

The inevitable consequence of this is that both the man and the woman may either end up cohabiting and not getting legally married or they may choose to marry other persons, respectively. In the case of the man, he may marry another woman whose parents have either not demanded for any bride price to be paid or one whose parents have made modest demands for bride price which the man can afford to pay. In the case of the woman, she too may lose the opportunity to get married at all or she may end up marrying another man who can meet her

parent's/families' high bride price demands. Such a marriage may not necessarily be out of choice, but out of necessity and sometimes even out of frustration!

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

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

I will now turn to consider the second issue arising under these grounds of appeal: that is whether the demand for a refund of bride price before the dissolution of a customary marriage does not fetter the free consent of the parties to remain in the marriage.

Apart from their pleadings, the appellants relied on affidavit evidence of men and women who had suffered dire consequences as a result of this customary practice of requiring refund of bride price by husbands. There was also affidavit evidence of women who feared to leave abusive marriages for fear that their

husbands would go ahead and demand a refund of the bride price they paid from their parents. One of the affidavits also brought out a custom where, if bride price is not paid, the husband will lay a claim on the children his wife may give birth to with another man, after she has left her first marriage.

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

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

Whether payment of bride price promotes inequality in marriage?

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

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

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

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

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

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

Conclusion

In conclusion, I find, for all the reasons given in this judgment, that the majority Justices of the Constitutional Court erred in law and fact when they dismissed

the petition against the payment of bride price and its refund at the contracting and dissolution of marriage, respectively, as conditions precedent to the contracting of a valid customary marriage and the dissolution of customary marriage among various tribes in Uganda.

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

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

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

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

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

a) The voluntary exchange of gifts at marriage or during marriage between the groom to be and his wife to be and/or her parents and relatives and vice versa is not unconstitutional.

b) That the custom and practice of demand of bride price by a woman's parents or her relatives from her husband to be as a condition precedent to a valid customary marriage practiced by several tribes in Uganda is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.

c) The payment of bride price, as a condition precedent for the validity of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.

d) That the custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.

e) That the payment of bride price as a condition precedent to a valid customary marriage, and of its refund as a condition precedent to the dissolution of a customary marriage which has been demanded for by a woman's parents and/or relatives undermines the dignity & status of women and is therefore inconsistent with Article 32(2), 33(1) and (4), and 21(1) & (2) of the Constitution.

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

DATED this …*06*… day of ……*Aug*…… 2015

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HON. DR. ESTHER KISAAKYE, JSC

JUSTICE OF THE SUPREME COURT.