THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Mulyagonja, Kitariisibwa Katunguka, Musisi, Byaruhanga-Rugyema & Nambayo, JJCC)

CONSOLIDATED CONSTITUTIONAL PETITIONS NO. 34, 37 & 42 of 2022

1. **ALTERNATIVE DIGITALK LIMITED**
2. **TUMUHIMBISE NORMAN**
3. **MUSOKE ARNOLD ANTHONY**
4. **BIKOBERE FARIDA**
5. **MUKIIBI JERIMIAH**
6. **TUMUSIIME KATO**
7. **LUWEDDE LILLIAN**
8. **TULYAHABWE ROGERS**
9. **NABUKEERA TEANGEL TEDDY**
10. **NAMIREMBE ANGELLA**
11. **ESOMU SIMON PETER**
12. **ODUR ANTHONY**

PETITIONERS

AND

1. **HUMAN RIGHTS NETWORK FOR JOURNALISTS-UGANDA (HRNJ-U)**
2. **CHAPTER FOUR UGANDA**
3. **COLLABORATION ON INTERNATIONAL ICT POLICY FOR EASTERN AND SOUTHERN AFRICA**
4. **CENTRE FOR CONSTITUTIONAL GOVERNANCE**
5. **UNWANTED WITNESS UGANDA**
6. **CENTRE FOR PUBLIC INTEREST LAW**
7. **STRATEGIC RESPONSE INTERNATIONAL**
8. **AFRICAN CENTRE FOR MEDIA EXCELLENCE**
9. **EDITORS GUILD**
10. **HON WINNIE KIIZA**
11. **AGATHER ATUHAIRE**
12. **WANDERA ANDREW**
13. **MUHINDO MORGAN**
14. **LILIAN DRABO**

PETITIONERS

AND

UGANDA LAW SOCIETY ::: PETITIONER

VERSUS

THE ATTORNEY GENERAL ::RESPONDENT

JUDGEMENT OF IRENE MULYAGONJA, JCC

The petitioners brought three petitions before this court under Article 137 (1), (3) (a) and (b), and 4 of the Constitution of the Republic of Uganda and the Constitutional Court (Petitions and References) Rules, SI 91 of 2005. They sought declarations that all of the provisions of the Computer Misuse (Amendment) Act, 2022 were inconsistent with and/or in contravention of several provisions of the Constitution. They further sought orders that the said provisions be struck out for being null and void.

Background

The petitioners are non-governmental organisations, Advocates and lawyers, journalists, politicians, human rights activists, specialists in technology, intellectual property and cyber law, who all stated that they are advocates of the rule of law, good governance and constitutionalism in Uganda.

The genesis of the three petitions was that on 8th September 2022, the Parliament of Uganda passed the Computer Misuse (Amendment) Act, Act No 24 of 2022. His Excellency the President assented to it on 14th October 2022.

The petitioners in CPC 34 of 2022 complained that sections 1 and 2 of the Computer Misuse (Amendment) Act (hereinafter also referred to as "the Amendment") were inconsistent with Articles 2, 29 (1) (a) and (b), 40 (2), 41 (1) and 43 (2) of the Constitution. Further, that the provisions that were inserted by section 3 of the Amendment were inconsistent with the same provisions of the Constitution, but they added that some of them were also inconsistent with Articles 28 (3) (a) and (12), 44 and 79 (1) and (3) of the Constitution.

The petitioners in CPC 34 of 2022 also complained that the passing of the Amendment violated certain aspects of the Preamble and principles that

relate to participatory democracy in the Constitution. They contended that the insertion of the clause on misuse of social media was not subjected to consultation with the general public.

The petitioners in CPC 37 of 2022 complained that Parliament passed the Amendment without ascertaining that the requisite quorum was present in the House before voting on each clause of the Bill, and at its passing by the Committee of the Whole House. They further raised similar issues to those in CPC 34 of 2022 about the provisions of the impugned Act. However, they added that several of the new provisions were overly broad and ambiguous in nature. The complaints included that certain provisions were inconsistent with Articles 28 and 29 of the Constitution.

Similar to the petitioners in CPC 37 of 2022, the petitioners in CPC 42 of 2022 complained that the Amendment was passed without the requisite quorum required by Articles 8A, 88 and 94 of the Constitution. That at the passing of the Bill into an Act, the Speaker did not take any steps to ascertain that the requisite quorum was present in Parliament, which was contrary to rule 24 (1) and (3) of the Rules of Procedure of Parliament. They went on to challenge all of the provisions of the impugned Amendment in the same fashion as the petitioners in CPC 34 and 37 of 2022 did. The combined effect of the three petitions was to challenge all of the provisions of the Computer Misuse (Amendment) Act, 2022.

Representation

At the hearing of the petitions on 8th May 2025, the petitioners were represented by Messrs Eron Kiiza, George Musisi, Aboneka Michael, Paul Wasswa, Henry Byansi and Kakuru Tumusiime. The respondent was represented by Ms Charity Nabasa, Senior State Attorney.

Mr Eron Kiiiza informed court that between the parties in CPC No 34 and 37 of 2022, it was agreed that since the two petitions challenged the same provisions of the Amendment they ought to be consolidated and heard together. Ms Nabasa agreed. Court thus ordered that CPC 34 and 37 of 2022 be consolidated.

When CPC 42 of 2022 was subsequently called on for hearing on 16th September 2025 before another Panel, Mr Jude Byamukama and Mr Paul Katunguka represented the petitioner. Ms Claire Atukunda, Principal State Attorney and Mr Natuhwera represented the Attorney General.

Court observed that CPC 42 of 2022 was similar to CPC 34 and 37 of 2022 that were consolidated on 8th May 2024 and heard together. It was proposed the CPC 42 of 2022 be stayed to await the result in CPC 34 and 37 of 2022 whose judgment was about to be delivered. However, Mr Byamukama applied to have CPC 42 of 2022 consolidated with CPC 34 and 37 of 2022 so that the petitioners in CPC 42 of 2022, if not satisfied with the decision, are availed the automatic right to appeal against it. Ms Atukunda for the respondent did not object. Court thus ordered that CPC 42 of 2022 be consolidated with CPC 34 and 37 of 2022 and judgment be rendered at the same time.

CPC 42 of 2022 was thus called on for hearing on 14th October 2025 before the panel that heard CPC 34 and 37 of 2022. Counsel for all the parties were summoned and on that day, Misses Charity Nabasa and Claire Kukunda represented the Attorney General. The petitioners in CPC 34 of 2022 were represented by Mr Kato Tumusiime while the petitioners in CPC 37 of 2022 were represented by Mr Paul Wasswa. Counsel for the petitioners in the latter two petitions had no objection to the consolidation of the petitions. They adopted the conferencing notes and submissions that they filed prior to the previous hearing as their final submissions. Counsel for the

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petitioner in CPC 42 of 2022 also applied to have his written submissions considered as the final submissions in the matter. This judgment is therefore in respect of the three petitions.

It is important to note that in 2023, the Computer Misuse Act, Act No 2 of 2011 or *"the principal Act"* was revised and consolidated by the Law Reform Commission. The current edition of this law is the Computer Misuse Act, Chapter 26 of the Laws of Uganda, 2023. The Revised Edition was enacted as at 31st December 2023.

When CPC 42 of 2022 was called on for hearing on 16th September 2025, counsel for the petitioner ("the ULS") sought leave to amend the petition and to file a new set of submissions to reflect the current numbering of the impugned provisions of the Act and it was granted. These were also applied to CPC 34 and 37 of 2022. Counsel for the ULS filed submissions that reflected the current numbering in the Computer Misuse Act to replace those that had been filed previously. It is therefore to that Act that I shall refer in this judgment, so that it speaks to the current provisions of the Computer Misuse Act, Cap 96 of the Laws of Uganda.

Constitutional Petition 34 of 2022

In Constitutional Petition No 34 of 2022, the petitioners raised 11 grounds, which in the terms of the current provisions of the Computer Misuse Act, Cap 96, were as follows:

a) ...

b) Section 11 (1) of the Computer Misuse Act is inconsistent with and in contravention of Articles 2, 29 (1) (a) and (b), 40 (2), 41 (1) and 43 (2) (c) of the 1995 Constitution of the Republic of Uganda, in so far as it

vaguely criminalises and unjustifiably impedes the enjoyment of the rights to freedom of expression, practicing one's profession and carrying on any lawful occupation, trade, business and access to information by prohibiting any access or interception of any program or another person's data or information; voice or video recording of another person, sharing of any information about or that relates to another person, without specifying or defining the nature of the said information;

c) Section 23 of the Computer Misuse Act is inconsistent with and in contravention of Articles 2, 29 (1) (a), 29 (1) (b), 40 (2), 41 and 43 (2) (c) of the Constitution of the Republic of Uganda, as it broadly prohibits and criminalises the unauthorised sending, sharing or transmission of any information about a child, thus imposing impermissible limitations on the right to freedom of expression, practicing one's profession and carrying on any lawful occupation, trade or business and access to information;

d) Section 26 of the Computer Misuse Act is in contravention of and inconsistent with Article 2, 29 (1), 41 (1) and 43 (2) (c) of the Constitution of the Republic of Uganda in as far as it vaguely criminalises and unjustifiably impedes free flow of ideas, freedom of expression and access to information by prohibiting, writing, or sharing any information through a computer which is likely to ridicule, degrade, or demean a person, create divisions among persons, a tribe, an ethnicity, a religion or gender, or promote hostility against a person, group of persons, tribe, an ethnicity, a religion or gender;

e) Section 27 of the Computer Misuse Act is inconsistent with and in contravention of Articles 2, 29 (1), 40 (2), 41 (1) and 43 (2) (c) of the Constitution of the Republic of Uganda in as far as it vaguely criminalises and unjustifiably impedes the enjoyment of the right to

freedom of expression, practicing one's profession and carrying on any lawful occupation, trade, business and access to information by prohibiting sending or sharing unsolicited information;

f) Section 28 of the Computer Misuse Act is inconsistent with and in contravention of Articles 2, 29 (1), 40 (2), 41 (1) and 43 (2) (c) of the Constitution of the Republic of Uganda, for it vaguely criminalises and imposes unjustifiable limitations on the enjoyment of the right to freedom of expression, practicing one's profession and carrying on any occupation, trade or business, and access to information by criminalising sending or sharing or transmitting malicious information;

g) Section 29 (1), (2) and (3) of the Computer Misuse Act is in contravention of and inconsistent with Articles 2, 29 (1), 40 (2), 41 (1) and 45 of the Constitution of the Republic of Uganda as it imposes impermissible limitations on the right to anonymity and pseudonimity by broadly criminalising anonymous communication;

h) Section 29 (4) (a), (b) and (c) of the Computer Misuse Act is in contravention of and inconsistent with Articles 28 (3) (a) and 43 (2) (c) of the Constitution of the Republic of Uganda in so far as it offends the non derogable right to fair hearing by placing the burden of proof on the accused person to prove their innocence;

i) Sections 11, 23 and 26 of the Computer Misuse Act are in contravention of and inconsistent with Articles 2, 28 (12), 44, 79 (1) and (3) of the Constitution of the Republic of Uganda as they offend the right to fair hearing by creating offences which are vague, ambiguous, imprecise and inconsistent with the principle of legality;

j) The act of Parliament passing the Computer Misuse (Amendment) Bill, 2022, into law on 8th September 2022 was inconsistent with and in

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contravention of the Preamble; Directive Principles I (i), II (i) and X; Articles 1, 2, 8A, 38, 41 (1), 79 (1) and (3) of the Constitution of the Republic of Uganda;

k) The act of Parliament introducing and/or inserting a new clause on *"Misuse of social media"* and the eventual inclusion of the said provision in the Computer Misuse (Amendment) Act, 2022 without substantially and adequately consulting the general public, was inconsistent with and in contravention of the Preamble and Directive Principles I (i), II (i) and X; Articles 1, 2, 8A, 38, 41 (1), 79 (1) and (3) of the Constitution of the Republic of Uganda.

The petition was supported by the affidavits of Tumuhimbise Norman, the 2nd petitioner, and Mukose Arnold, the 3rd petitioner, both sworn on the 28th October 2022.

The petitioners then sought declarations in the same terms as the grounds of the petition and an order that this court permanently restrains the respondent from enforcing the impugned provisions of the Computer Misuse Act, with each party bearing their own costs.

Constitutional Petition No. 37 of 2022

In Constitutional Petition No. 37 of 2022, the petitioners complained that the amendment of section 30 of the principal Act after the closure of the public hearing denied the public of the right to participate, comment and share their thoughts during the legislative process, in contravention of Articles 1, 2, 8A, 38, 45, 79 and 94 of the Constitution.

Further, that Parliament passed the Computer Misuse (Amendment) Act, 2022 without ascertaining the quorum of the House before voting on each clause of the entire Bill by the Committee of the Whole House. They contended

that this was in breach of rule 24 (3), (4) and (5) of the Rules of Procedure of the Parliament of Uganda, SI No 30 of 2021, which was further inconsistent with and in contravention of Articles 1, 2, 8A, 38, 45, 79 and 94 of the Constitution.

The Petitioners also complained about the amendments brought about by sections 1, 2 and 3 of the Computer Misuse (Amendment) Act, 2022, in terms that were more or less similar to those stated by the petitioners in CPC No 34 of 2022, which I need not repeat here. They then sought declarations, which have been attuned to the Computer Misuse Act, Cap 96, as follows:

a) The insertion of section 29, Cap 96, and the repeal of section 30 (4) of the Computer Misuse Act, 2011 without adequate and effective public participation and/or consultation was in contravention of Articles 2, 8A, 28, 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda, and therefore the two impugned provisions are null and void.

b) The Parliament of Uganda passed the Computer Misuse (Amendment) Act, 2022 without the requisite quorum mandated by rule 24 of the Rules of Procedure of the Parliament of the Republic of Uganda, SI 30 of 2021, in contravention of Articles 2, 8A, 28, 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda.

c) Section 11 (1) of the Computer Misuse Act, Cap 96, which criminalises unauthorised access or interception of any program or other person's data or information, voice or video recording of another person; or sharing of any information about or that relates to another person, in an overly broad, vague and ambiguous manner and without providing sufficient exceptions, contravenes Articles 2, 8A, 27 (2), 28, 29, 32, 40 (2), 42, 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda 1995, and is therefore null and void.

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d) Section 23 of the Computer Misuse Act, Cap 96, in criminalising sending, sharing and transmission of information about children in a manner that is overly broad and vague creates offences that are incompatible with the principle of criminal liability in contravention of Articles 2, 8A, 28, 29, 43, 44 (c), 45 and 79 of the Constitution of the Republic of Uganda, and is therefore null and void.

e) Section 26 of the Computer Misuse Act, Cap 96, in criminalising writing, sending or sharing of any information that is likely to ridicule, degrade, demean, create divisions or promote hostility against a person, group of persons, tribe, ethnicity, religion, gender in an overly broad, vague and ambiguous manner is inconsistent with and in contravention of Articles 2, 8A, 27 (2), 28, 29, 38, 40 (2), 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda, and therefore null and void.

f) Section 27 of the Computer Misuse Act, Cap 96, in criminalising sending or sharing unsolicited information with another person unless the information is in the public interest creates an overly broad, vague, and ambiguous provision that is incompatible with the principle of criminal liability in contravention of Articles 2, 8A, 28, 29, 43, 44 (c), 45 and 79 of the Constitution of the Republic of Uganda, and is therefore null and void.

g) Section 28 of the Computer Misuse Act, Cap 96, in criminalising sending, sharing or transmission of malicious information about or that relates to another person through a computer establishes an overly broad, vague and ambiguous provisions that is incompatible with the principle of criminal liability, in contravention of Articles 2, 8A, 28, 29, 43, 44 (c), 45 and 79 of the Constitution of the Republic of Uganda, and is therefore null and void.

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h) Section 29 Computer Misuse Act, Cap 96, in criminalising the publication, distribution or sharing of information prohibited under the laws of Uganda under a disguised or false identity compromises the freedom of expression and the right to privacy of social media users in contravention of Articles 2, 8A, 27 (2), 28, 29, 38, 40 (2), 43, 44 (c) and 79 of the Constitution of the Republic of Uganda, and is therefore null and void.

They then prayed for an order that the impugned provisions of the Computer Misuse Act, Cap 96, that are found to be null and void be struck out for being inconsistent with and in contravention of the Constitution of the Republic of Uganda, and that each party bears their own costs for the petition.

The petition was supported by the affidavits of Hon Winnie Kiiza (10th petitioner), Ssempala Robert (Executive Director of the 1st petitioner), Sarah Bireete (Executive Director of the 4th petitioner), Ashnah Kalemera (Programme Manager of the 3rd petitioner), Wandera Andrew (Advocate and cyber law specialist), Muhindo Morgan (13th petitioner) and Brian Chanwat Geoffrey (Executive Director of the 7th petitioner), all deposed on 15th November 2022. Robert Ssempala deposed an affidavit in rejoinder on 18th January 2023. He also deposed a supplementary affidavit on 18th September 2024.

Constitutional Petition No. 42 of 2022

The grounds in CPC 42 of 2022 were similar to those stated in CPC 37 of 2022 and I did not deem it necessary to repeat them here, save that the petitioner also challenged the provisions of section 162 of the Penal Code Act. In paragraphs 3 and 4 of the Background to complaint about criminal defamation in the Amended Petition, the petitioner states thus:

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3. *Articles 1, 2, 3 of the Constitution are to the effect that the Constitution is the supreme legal instrument in the country and all other laws, even those that predate the constitution, must fit within the framework established by the Constitution and where any law contravenes the Constitution, that law is void to the extent of the inconsistency.*

4. *Furthermore, Uganda has since signed and ratified variouis international human rights treaties, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights.*

In paragraph xiv (c) of the Amended Petition the petitioner then states that:

c) *Section 162 of the Penal Code Act which criminalises libel contravenes the Constitution to the extent that the same amounts to an unjustified restriction on the right to freedom of expression contrary to Article 29 (expression) and 43 (limitations on fundamental rights and freedoms) of the Constitution.*

The petition was supported by the affidavit of Bernard Oundo, then President of the Uganda Law Society, and a supplementary affidavit that he deposed on 25th June 2024. The petitioner prayed for declarations and orders as follows:

Parliament of Uganda passed the Computer Misuse (Amendment) Act without the requisite quorum mandated by the Rules of Procedure of Parliament in contravention of Articles 8A, 43), and 79 of the Constitution.

a) Section 11 of the Computer Misuse Act regarding unauthorised sharing, access or interception of personal data and programs, voice or video recordings and sharing of personal information contravenes Article 8A, 28, 29, 40 (2) 42, 43, 79 (1) and 92 of the Constitution.

b) Section 23 of the Computer Misuse Act on unauthorised sharing of information about children contravenes Articles 28, 29, 43 and 45 of the Constitution.

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c) Section 26 of the Computer Misuse Act relating to hate, ridiculing, divisive or hostile speech contravenes Articles 28, 29, 42, 43, 79 (1) and 92 of the Constitution.

d) Section 27 of the Computer Misuse Act on unsolicited information contravenes Article 28, 29, 42, 43, 44 (c), 45, 79 (1) and 92 of the Constitution.

e) Section 28 of the Computer Misuse Act on malicious information contravenes Articles 28, 29, 42, 43, 44 (c), 45, 79 (1) and 92 of the Constitution.

f) Section 29 of the Computer Misuse Act on misuse of social media contravenes Articles 1, 28, 43, 44 (c) 45 and 79 (1) of the Constitution.

g) Parliament of Uganda passed section 29 of the Computer Misuse Act on misuse of social media without genuine, adequate or effective public participation and/or consultation in contravention of Articles 1, 28, 43, 44 (c) 45 and 79 (1) of the Constitution.

h) Parliament of Uganda amended section 30 of the repealed Computer Misuse Act on jurisdiction without public participation and/or consultation in contravention of Articles 1, 8A, 28, 43, 44 (c), 45, and 79 (1) of the Constitution.

i) Sections 11, 26, 27, 28 and 29 of the Computer Misuse Act create strict liability offences without the element of mens rea – criminal intention, which amounts to a presumption of a guilty mind and is a disproportionate measure or restriction on Article 29 and Article 21 (1) of the Constitution.

j) The effect of sections 26, 27, 28 and 29 of the Act will be a significant depression of political speech, economic vitality (for speech related occupations) social interactions, broadmindedness, pluralism and

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diversity of opinion contrary to Articles 29, 43 and 45 of the Constitution.

k) Section 162 of the Penal Code Act on the offence of libel contravenes Articles 29 and 43 of the Constitution.

The petitioner then prayed that an order of a permanent injunction issues stopping/restraining the respondent and all government agencies, authorities and officials from enforcing the impugned provisions of the Act, and that each party bears its own costs.

The Attorney General, respondent in all three petitions, opposed them in answers filed therein, in which it was contended that the petitions were misconceived and without merit. That the impugned provisions of the Computer Misuse Act, 2011 brought about by the Computer Misuse (Amendment) Act, 2022, (now incorporated into the Computer Misuse Act, Cap 96) do not contravene the impugned provisions of the Constitution, and therefore, the petitions should be dismissed with costs.

The respondent further contended that section 11 (1) Computer Misuse Act, Cap 96, is clear as it justifiably criminalises the unauthorised access to information about or that relates to another person and prescribes a penalty for the offence; it is neither broad, vague nor ambiguous, but is a demonstrably justifiable limitation. It is thus not inconsistent with and in contravention of Articles 2, 29 (1) (a) and (b), 40 (2), 41 (1) and 43 (2) (c) of the Constitution.

Further, that section 23 of the Computer Misuse Act, justifiably prohibits and criminalises the unauthorised sharing of information about children through a computer without the consent of the parents, guardians, or persons authorised by law, and it is not vague and ambiguous as alleged. It is

therefore not inconsistent with and in contravention of Articles 2, 29 (1) (a), (b), 40 (2), 41 (1) and 43 (2) of the Constitution.

It was further contended that section 26 of the Computer Misuse Act, illustrates the purpose of the Act, which is to prohibit hate speech and it is not broad, vague and ambiguous. It is therefore not inconsistent with or in contravention of Articles 2, 29 (1) (a), 40 (2), 41 (1) and 43 (2) (c) of the Constitution.

That in addition section 27 Computer Misuse Act also illustrates the purpose of the Act, which is to prohibit the sharing of unsolicited information unless it is in the public interest. It is not broad, vague and ambiguous but is a demonstrably justifiable limitation in a free and democratic society, in accordance with Article 43 (2) (c) of the Constitution. It is therefore not inconsistent with or in contravention of Articles 2, 29 (1) (a), 40 (2), 41 (1) and 43 (2) (c) of the Constitution.

Further, that section 28 Computer Misuse Act, which prohibits the sharing of malicious information relating to another person is not broad, vague and ambiguous as alleged. Instead, it is a demonstrably justifiable limitation in a free and democratic society and is not in contravention of, or inconsistent with Articles 2, 29 (1) (a), 40 (2), 41 (1) and 43 (2) (c) of the Constitution.

The respondent further contended that section 29 of the Computer Misuse Act, which criminalises the misuse of social media through sharing information prohibited by law under a disguised or false identity is not broad, vague and ambiguous and is permissible in a free and democratic society. It is neither in contravention of nor inconsistent with Articles 2, 29 (1) (a), 40 (2), 41 (1) and 43 (2) (c) of the Constitution.

That in addition, section 29 (4) (a), (b) and (c) of the Computer Misuse Act, does not derogate the cardinal principles of the presumption of innocence but is meant to prevent misuse of social media by account holders. It is neither inconsistent with nor in contravention of Articles 2, 29 (1) (a), 40 (2), 41 (1) and 43 (2) (c) of the Constitution. The respondent then asserted that the impugned provisions of the Computer Misuse Act, are clear, unambiguous, precise and consistent with the constitutional principle of legality and not inconsistent with the cited provisions of the Constitution.

Further, that the process of conceptualising, consulting, debating and passing the Computer Misuse (Amendment) Act, 2022 which brought the said provisions about was not inconsistent with and/or in contravention of Articles 1, 2, 8A, 38, 41 (1) and 79 (1) and (3) and Paragraphs I(i), II (i) and X of the Directive Principles of State Policy in the Constitution. And finally, that the petitioners did not adduce evidence to show that the Computer Misuse (Amendment) Bill, 2022 was passed by the Committee of the Whole House without quorum.

All of the answers to the petitions were supported by the affidavits of Mr Adolf Mwesigye Kasaija, an Advocate and the Clerk to Parliament at the time, sworn on 8th and 28th November 2022, and 9th January 2023, respectively.

Submissions of Counsel

I considered the submissions filed by each of the parties before the resolution of each of the questions identified for interpretation by the court.

Questions as to interpretation of the Constitution

Counsel for the Petitioners in CPC 34 of 2022 identified 10 questions as to interpretation of the Constitution. However, the first question was an

amalgamation of all the others for it was framed citing sections 1, 2, and 3 of the Computer Misuse (Amendment) Act as it related to Articles 2, 29 (1) (a) and (b), 40 (2), 41 (1), 43 (2) (c), 28 (12), 44, and 79 (1) and (3) of the Constitution. Thereafter, counsel split up the question to address the various sections that were inserted into the Computer Misuse Act, 2011 by the impugned amendment.

I observed that this would present a challenge in the analysis because the provisions of sections 1, 2, and 3 of the Computer Misuse (Amendment) Act, 2022 are also the subject of the rest of the questions, though in those questions, counsel did not address some of the provisions of the Constitution as they related to the specific provisions inserted into the parent Act by the amendment. I thought it more appropriate to address each of the provisions inserted by amendment as it related to all of the impugned provisions of the Constitution referred to for each of them. I also deemed it pertinent to adjust the impugned provisions of the Computer Misuse Act, 2011, to the numbering in the 2023 Edition of the Act, and the questions were as follows:

1. Whether section 26 of the Computer Misuse Act, in criminalising writing, sending or sharing of any information that is likely to ridicule, degrade, demean, create divisions or promote hostility against a person, group of persons, tribe, ethnicity, religion or gender in an overly broad, vague and ambiguous manner is in contravention of and inconsistent with Articles 2, 29 (1), 41 (1) and 43 (2) (c) of the Constitution, and thus void.

2. Whether section 27 of the Computer Misuse Act, in criminalising sending or sharing of unsolicited information with another person unless the information is in the public interest creates a provision that is overly broad, vague and ambiguous, and inconsistent with and in

contravention of Articles 2, 29 (1), 40 (2), 41 (1) and 43 (2) (c) of the Constitution, and thus void.

3. Whether section 28 of the Computer Misuse Act, in criminalising the sending, sharing or transmission of malicious information about or that relates to another person established an overly broad, vague and ambiguous provision that is incompatible with the principle of criminal liability and in contravention of and inconsistent with Articles 2, 29 (1), 40 (2), 41 (1) and 43 (2) (c) of the Constitution, and thus void.

4. Whether section 29 (4) (a), (b) and (c) of the Computer Misuse Act, in criminalising social media publication, distribution or sharing of information prohibited under the laws of Uganda under a disguised or false identity compromises the freedom of expression and the right to privacy of social media users is in contravention of and is thus inconsistent with Articles 28 (2) (a) and 43 (2) (c) of the Constitution of the Republic of Uganda.

5. Whether section 11 (1) of the Computer Misuse Act, in criminalising unauthorised access or interception of any program or another person's data or information; voice or video recording of another person, in an overly broad, vague and ambiguous manner and without providing sufficient exceptions, contravenes Articles 2, 8A, 27 (2), 28, 29, 32, 40 (2), 42, 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda, and therefore null and void.

6. Whether section 23 of the Computer Misuse Act, in criminalising sending, sharing and transmission of information about children in a manner that is overly broad and vague creates offences that are incompatible with the principles of criminal liability in contravention of Articles 2, 8A, 28, 29, 43, 44 (c), 45 and 79 of the Constitution of the Republic of Uganda, and is therefore null and void.

7. Whether there is a limitation to the rights in the impugned provisions of the Computer Misuse Act, and whether the limitation is justifiable.

8. Whether the act of Parliament in introducing and/or inserting a new clause on *"Misuse of social media"* and its eventual inclusion in the Computer Misuse (Amendment) Act, 2022, without substantially and adequately consulting the general public was inconsistent with and in contravention of the Preamble, and Directive Principles I (i), II (i) and X; and Articles 1, 2, 8A, 38, 41 (1), 79 (1) and (3) of the Constitution of the Republic of Uganda.

9. Whether section 162 of the Penal Code Act on the offence of libel contravenes Articles 29 (freedom of expression) and 43 (limitations on fundamental rights and freedoms) of the Constitution.

10. What remedies, if any, are available to the Petitioners?

In CPC 37 of 2022, the petitioners complained about the absence of quorum in Parliament at the time of passing the Computer Misuse (Amendment) Act, 2022, as the second ground in their petition. The petitioners in CPC 42 of 2022 stated it as the first and second grounds in their petition. In their submissions counsel for the petitioners therein still addressed it as the 2nd issue in the following terms:

> *Whether Parliament passed the Computer Misuse (Amendment Act, 2022, without the requisite quorum, in contravention of Articles 2, 8A, 28, 43, 44 (c), 45, 79 and 92 of the Constitution of the Republic of Uganda.*

In CPC 42 of 2022, counsel for the petitioners addressed it as the first question/issue in the following terms:

a) *Whether the procedure adopted by the Parliament of Uganda in enacting "the Amendment Act" contravened the Constitution.*

Counsel for the petitioners in CPC 37 and 42 then addressed the rest of the questions that were similar to those in CPC 34 of 2022, and finally whether the petitioners are entitled to any of the remedies claimed.

The 2nd ground in CPC 37, which was the first ground in CPC 42 of 2022, the passing of the Amendment, without first ascertaining the presence of the requisite quorum before voting on each clause and before passing the entire Bill by the Committee of the Whole House, goes to the root of the powers of Parliament to enact laws. It is therefore my opinion that this complaint must be addressed first, for if resolved in the positive, it may dispose of the whole of, or a significant part of the petition. I therefore hereby do so.

Whether Parliament passed the Computer Misuse (Amendment) Act, 2022, without ascertaining the presence of the requisite quorum in the House; and if so, whether it was in contravention of rule 24 (1) and (3) of the Rules of Procedure of Parliament and provisions of the Constitution of the Republic of Uganda.

Submissions of Counsel

Counsel for the petitioners in CPC 37 of 2022 submitted that a legislative body with quorum possesses all the powers of the whole legislative body, save those which are excluded or limited by the instrument creating it or defining its powers. Further, that the general rule of all parliamentary bodies is that when the quorum is present, the act of a majority of the quorum is the act of the whole body unless the instrument creating the parliamentary body has prescribed certain limitations. He referred to **United States v. Ballin, 144 U.S. 1 (1892)** and **Wakiso Miraa Growers & Dealers Association Ltd v. Attorney General, Constitutional Petition No. 001 of 2017**, to support his submissions.

He went on to submit that quorum has historically been used as one of the tools for securing the balance between the need to prevent a minority in the legislature from imposing its will on the majority, while the speed of the legislature in the execution of its mandate is not held back on account of the absence of some of its members. He referred to **Wakiso Mira Growers & Dealers Association** (supra) to support his submission. He added that quorum requirements prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members as not to command due and proper respect. He relied on Arthur Cushing's *Rules of Proceeding and Debate in Deliberative Assemblies* (5th Edition, 1899).

He further submitted that the power to make the Rules of Procedure of Parliament is vested in Parliament itself, by virtue of Article 88(1) of the Constitution. That the Rules of Procedure of Parliament provide for what constitutes quorum and once that is realised, the stage is set for Parliament to vote on a Bill. And that at the stage of voting, the Bill must receive the sufficient number of votes, as is prescribed by Article 89 (1) of the Constitution, the majority of the quorum. He added that in **Wakiso Mira Growers & Dealers Association** (supra) it was held that if there is no quorum in Parliament at the time of voting, it automatically leads to the Bill being passed without the majority contrary to Article 89 (1) of the Constitution.

Counsel then went on to emphasise the provisions of Articles 88 and 89 of the Constitution which provide for the "Quorum of and Voting in Parliament." He submitted that Parliament exercised its power in Article 88 (and 94) of the Constitution and enacted rule 24 of the Rules of Procedure of Parliament, SI 30 of 2021. It provides that the quorum prescribed by rule 24 (1) shall only be required at the time of voting. And at any time a vote is to be taken, the Speaker *shall ascertain* whether the members present in the House form a

quorum for the vote to be taken. If he or she finds that they are less, she/he suspends the proceedings for 15 minutes and the bell shall ring.

He emphasised that immediately before a vote is taken on any question by the House, the Speaker is under the obligation to ascertain that there is present in the House at least one third of all Members of Parliament entitled to vote. That it was only after ascertaining and being satisfied that the requirements as to quorum have been complied with that the Speaker (Chairperson) could proceed to have a vote taken on the issue under consideration by the House. He again referred to **Wakiso Miraa Growers & Dealers Association** (supra).

Counsel then drew the courts' attention to the critical proceedings of Parliament, for the 8th July 2022, when the impugned Bill was deliberated upon by the Committee of the whole House; and when the House passed it into law. He pointed out that it was not shown anywhere that at the time Hon Kimosho Dan moved the motion for the Committee of the whole House to adopt the Report of the Committee on the clauses of the Bill, the Speaker ascertained that the Members present in the House formed the requisite quorum for the vote to be taken. Further, that there was no evidence to show the actual number of Members present at the time the vote was taken. He explained that it was manifest from review of the Hansard for the 8th September 2022 that the Speaker did not ascertain whether the Members present in the House formed the quorum for the vote to be taken.

He went on to emphasise that the operative word in rule 24 (3) of the Rules of Procedure of Parliament is ***"ascertain,"*** as it was held in **Paul K. Ssemwogerere & Another v. Attorney General, Constitutional Petition No 3 of 1999; [2001] UGCC 2.** He explained that the decision in that case is authority for the proposition that the Speaker of Parliament or presiding

officer cannot resort to merely looking around or guesswork to ascertain quorum. That there had to be *"physical counting."* And because the Constitution requires a definite figure, it cannot be ascertained by mere estimation. He submitted that the decision in **Wakiso Miraa Growers & Dealers Association** (supra) was consistent with the earlier decision on that point.

Counsel explained that the role of the court is simply to assess whether, from the evidence adduced, the method allegedly used by the Speaker was reasonably able to ascertain the presence of the numbers prescribed for the quorum to be realised. And that whatever method the Speaker choses to use, it must with certainty, reflect the number of Members of Parliament who are present in the House at the material time and how many of them were entitled and/or not entitled to vote. That it should further reflect the ratio of those Members present who are entitled to vote vis-à-vis the number of all Members of Parliament entitled to vote and does not fall below one third of all Members entitled to vote. And that at the end of the day this is determined by evidence in each particular case as to whether the method used produces the desired result that the numbers needed for Parliament to have quorum have been realised; and it must be reflected in the Hansard. He again referred to the decision in **Wakiso Miraa Growers & Dealers Association** (supra) to support his submission.

Counsel went on to point out that the copy of the Hansard before this court does not prove that the Speaker ascertained the presence of quorum at the relevant times. Neither did it show the number of Members of Parliament present, which makes it impossible for this court to rely on the Hansard to make its own inference that the numbers involved in the vote met the minimum prescribed to constitute the quorum. That the expression *"Question*

put and agreed to" and *"Report Adopted"* found in the Hansard did not meet the constitutional standard set in Articles 89 (1) of the Construction.

Counsel then referred to the decision in the **Ssemwogeere case** (supra) that the record should show the number of members who supported the motion, the number who opposed it and the number of those who abstained. That the total number present and voting should be able to show that there was quorum.

Counsel further referred to the decisions in **Professor Oloka-Onyango & 9 Others v. Attorney General, Constitutional Petition No. 08 of 2014**, where it was held that the act of the Rt. Hon Speaker not entertaining the objection that there was no quorum was an illegality under Rule 23 of the Rules of Procedure of Parliament at the time. Further that this tainted the process of enactment, and rendered the Act a nullity and unconstitutional. He also referred to the decision in **Male H. Mabirizi Kiwanuka & Others v. Attorney General, Constitutional Petition No. 2 of 2018**, where it was held that an Act of Parliament passed without strict compliance with the Rules of Procedure of Parliament is a nullity.

He then reproduced the proceedings as evidenced in the Hansard at the points when the Report of the Committee of the whole House was adopted and when the Bill was passed. He concluded that the method adopted by the Speaker at those two points was incapable of enabling proof of who and how many Members of Parliament voted and how they voted. It did not constitute ascertaining that quorum was constituted prior to voting on the passing of the impugned law.

In their conferencing notes, counsel for the petitioner in CPC 42 of 2022 largely relied on the decision in **Wakiso Miraa Growers & Dealers**

Association (supra) to support the submission that the Speaker did not ascertain that there was quorum before the Computer Misuse (Amendment) Bill was passed into law. Counsel specifically extracted the text at pages 25-26 of the opinion of Mutangula Kibeedi, JCC, as he then was, where he held that if there is no quorum at the time of voting, it automatically leads to the Bill being passed without the majority of the quorum contrary to Article 89 of the Constitution. Further that this contravenes the Constitution and renders the resultant Act null and void.

It is important to note that in CPC 37 of 2 022, counsel for the Attorney General did not respond to these submissions. This was very clear in the Conferencing Notes filed on 8th March 2025, and adopted as the final arguments in the matter, where instead of addressing the 9 issues set down and addressed by counsel for the petitioner in CPC 37 of 2022, only 8 issues were addressed.

In CPC 42 of 2022, the respondent submitted that according to paragraphs 7-12 of the affidavit of the Hon Adolf Mwesigye, the Clerk to Parliament, in support of the Answer to the Petition, the procedure adopted in enacting the Amendment was carried out in accordance with the law. He added that while the petitioner challenged the quorum, it did not disclose how many Members of Parliament were either present or absent at the readings to come to a conclusion that the quorum was insufficient at those times. Further, that there was no evidence on the record showing proof of absence of the requisite quorum, meaning that the petitioner made a general argument that there was no quorum. That the burden of proof still lies on the petitioner to prove this fact.

Analysis and Determination

In the 2nd ground of CPC 37 of 2022, the Petitioners complained that the Computer Misuse (Amendment) Act, 2022, was passed without the requisite quorum in Parliament provided for by rule 24 of Parliament's Rules of Procedure and in contravention of Articles 2, 8A, 28, 43, 44 (c), 45, 79 and 92 of the Constitution.

The petitioner in CPC 42 of 2022 asserted that the procedure adopted by Parliament in enacting the Computer Misuse (Amendment) Act contravened provisions of the Constitution, in that the Speaker did not take steps to establish whether there was quorum at the time of passing the Bill, contrary to rules 24 (1) and (3) of the Rules of Procedure of Parliament and Articles 88 and 94 of the Constitution. The respondent contends that there was no evidence adduced by the petitioners to prove this fact.

However, in CPC 37 of 2022, the respondent did not offer any submissions on this ground of the petition. It is my view that this omission was premised on the general manner in which the Attorney General responded to the 2nd ground or complaint in paragraph 18 (b) of the petition, relating to the absence of quorum on the passing of the entire Bill by the Committee of the whole House.

The Evidence

The only evidence to support the petitioners' grievance with regard to quorum in CPC 37 of 2022 was the averment in paragraph 4 of the affidavit of Hon Winnie Kiiza, former Leader of the Opposition in Parliament, as follows:

> *4. The Parliament passed the Computer Misuse (Amendment) Act, 2022, without quorum and without bothering to ascertain before passing each of the provisions thereof.*

The Attorney General's response to this allegation, in paragraphs 8 and 9 of the Answer, was as follows:

> *8. The Respondent denies paragraph 18 (b) of the Petition and shall put the Petitioners to strict proof of the contents therein.*
>
> *9. In further reply to paragraph 18 (b) of the Petition, the Respondent contends that the Petitioner has not adduced any evidence to show that the Bill by the Committee of the whole House was passed without quorum.*

Further to that, in the affidavit in support of the answer deposed by the Clerk to Parliament, in paragraphs 9-12 he stated thus:

> *9. That I know that on 8th September 2022, the Committee on Information, Communication, Technology and National Guidance presented its report to Parliament for its consideration and debate. A copy of the Report of the Sectoral Committee on Information, Communication Technology and National Guidance on the Computer Misuse (Amendment) Bill is hereto attached and marked "A".*
>
> *10. That I know that on 8th September 2022, Parliament passed the Computer Misuse (Amendment) Bill of 2022.*
>
> *11. That I know that the President assented to the Bill on 14th October 2022 and it became the Computer Misuse (Amendment) Act of 2022.*
>
> *12. <u>That I know that the process of conceptualizing, consulting, debating and passing of the Computer Misuse (Amendment) Bill was done in accordance with the law.</u>*
>
> *{Emphasis added}*

Although it was not indicated in any of the paragraphs reproduced above, attached to the affidavit in support of the Answer, immediately following the Report of the Sectoral Committee on Information, Communication Technology and National Guidance (**Annexure A**) was a copy of the Hansard for the Second Session – First Meeting of Thursday 8th September 2022.

It was clear to me that this copy of the Hansard was meant to support the averment in paragraph 12 of the affidavit of Mr Adolf Mwesigye. There is also

no doubt that the Report and copy of the Hansard were produced by the correct person to do so, the Clerk to Parliament. The Clerk is the custodian of all records and other documents belonging or presented to the House, pursuant to rule 227 (1) (b) of the Rules of Procedure of Parliament. And by virtue of rule 228 (1) thereof, the Clerk shall be responsible for ensuring that all parliamentary proceedings are reported word for word and that an official report of the proceedings made (Hansard) is published as soon as possible after each sitting.

In the absence of the respondent's submissions on this ground in CPC 37 of 2022, all that this court could go by to come to a conclusion as to whether Parliament complied with rule 24 of its Rules of Procedure were the statements in the Answer and the affidavit of the Clerk to Parliament.

In CPC 42 of 2022, Bernard Oundo, the President of the Uganda Law Society, in paragraphs 24 and 25 of his affidavit in support of the petition, stated thus:

> *24. That it is apparent that the procedure adopted by Parliament in passing the Computer Misuse (Amendment) Act was fundamentally flawed and in contravention of the Constitution.*
>
> *25. That the procedure adopted by the Hon Speaker of Parliament in passing the Computer Misuse (Amendment) Act 2022, fell short of the standard set out by the Constitution since no step was taken to establish that the necessary quorum of legislators was present in Parliament at the time of passing contrary to Articles 8A, 88 and 94 of the Constitution on the one hand and rules 24 (1) and (3) of the Rules of Procedure of Parliament, 2021 which provide that the quorum for a vote is one third of the members of Parliament and the Speaker is required to ascertain that a quorum is present before a vote can be taken.*

It is my view that much as the affidavits of Hon Winnie Kiiza and Mr Bernard Oundo did not give the details of the number of legislators that were present and/or who voted the Bill into law, a contentious fact was alleged or

established by each of them. The answer to that contention could only come from the averments in the answers to the petitions and the record of the proceedings of Parliament, which was produced by the respondent in CPC 37 of 2022.

I am fortified in coming to that decision by the provisions of section 102 of the Evidence Act which provides as follows:

> **102. On whom burden of proof lies.**
>
> **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

Hon Kiiza and Mr Oundo's assertions reproduced above were both in the negative. With regard to the proof of the petitioners' assertions that there was no quorum, the burden was on the petitioners to prove that fact. Once the petitioners produced sufficient evidence to give rise to the prima facie presumption in their favour, then the burden shifted to the respondent to prove that the Speaker followed the procedure, and that there was quorum.

The law as to proving negative facts as stated in Sakar on Evidence, 12th Edition (page 870), also cited in **Paul K. Ssemwogerere & Another** (supra) is that where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the *onus probandi* by reason of the form of allegation or the inconvenience of proving a negative. But in such cases, a lesser amount of proof than is usually required may avail. Such evidence as renders the existence of a negative probable may discharge the burden to the other party. And when a negative fact has to be proved, a plaintiff can be expected to do nothing more than to substantiate his allegation prima facie.

In this case, not only did the petitioner assert that there was no quorum, but the respondent filed an affidavit in support of the Answer in CPC 37 of 2022 in order to dispel the assertion. It was on that basis that I resolved this question/issue.

Quorum in Parliament

Black's Law Dictionary (9th Edition by West) defines *"quorum"* as *"the minimum number of members (usually the majority of all members) who must be present for a deliberative assembly to legally transact business."* According to *Robert's Rules of Order Newly Revised*,[1] the requirement for a *quorum* is protection against totally unrepresentative action in the name of a body by an unduly small number of persons. In contrast, a *plenum* is a meeting of the full, or rarely nearly full, body. A body or a meeting or vote of it, is *quorate* if a quorum is present, or casts valid votes.

Robert goes on to explain that each assembly determines the number of members that constitute a quorum in its governing documents, such as its constitution, charger, bylaws or standing orders. The quorum may also be set by law. He further points out that the quorum set in an organisation's bylaws should approximate the largest number that can be depended upon to attend any meeting, except in very bad weather or other extremely unfavourable conditions.

Article 88 of the Constitution provides that the quorum of Parliament shall be prescribed by the Rules of Procedure made under Article 94 thereof. And Article 94 (1) of the Constitution provides that Parliament may make rules to

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[1] General Henry M. Robert, Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, 2000, Perseus Books

regulate its own procedure, including the procedure of its Committees. Parliament thus made one rule with regard to the general quorum of the House in rule 24 of the Rules of Procedure of Parliament, as follows:

> **24. Quorum of Parliament**
>
> **(1) The quorum of Parliament shall be one third of all Members of Parliament entitled to vote.**
>
> **(2) The quorum prescribed under sub rule (1) shall only be required at a time when Parliament is voting on any question.**
>
> **(3) At any time when a vote is to be taken, the Speaker shall ascertain whether the Members present in the House form a quorum for the vote to be taken, and if he or she finds that the number is less, the Speaker shall suspend the proceedings of the House for an interval of fifteen minutes, and the bell shall be rung.**
>
> **(4) If on the resumption of proceedings after the expiry of fifteen minutes, the number of Members present is still less than the required quorum for voting, the Speaker shall proceed with other Business or suspend the sitting or adjourn the House without question put and in case of a Committee, the Chairperson shall adjourn the Committee.**
>
> **(5) If it appears to the Chairperson in a Committee of the Whole House that there is less than the required quorum for the Committee to take a decision, the House shall be resumed thereupon and the Speaker shall act in accordance with the procedure set out in sub rules (3) and (4).**
>
> **(6) For the avoidance of doubt, a Member virtually present in the House shall form part of the quorum of the House.**
>
> *{My emphasis}*

The principles that are stated before the provision above being those that are internationally accepted about quorum, it will be assumed that the Parliament of Uganda determined that a quorum of *"one third of members entitled to vote"* was a reasonable number in the circumstances of the Legislature of this country, given the number of its members.

Counsel for the petitioners strenuously argued that when the Computer Misuse (Amendment) Bill was passed on 8th September 2022, the requisite quorum of one third of all Members entitled to vote on it was not in the House. They explained that there was no evidence to prove that the requisite quorum was present because the Speaker/Chairperson of the Committee of the Whole House did not ascertain that it was.

I observed that the default mode of making decisions in Parliament is by voting, according to Article 89 of the Constitution as follows:

> **(1) Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting in a manner prescribed by rules of procedure made by Parliament under article 94 of this Constitution.**
>
> **(2) The person presiding in Parliament shall have neither an original nor a casting vote and if on any question before Parliament the votes are equally divided, the motion shall be lost.**

This is re-echoed in rule 93 of the Rules of Procedure which, in part, provides as follows:

> **93. Questions to be decided by majority**
>
> **(1) Except as otherwise prescribed by the Constitution or any law consistent with the Constitution, all questions proposed for decision of Parliament shall be determined by a majority of votes of the Members present and voting.**
>
> **...**
>
> **(4) The person presiding in Parliament or Committee shall have neither an original nor a casting vote and if upon any question before the House, the votes are equally divided, the Motion shall be lost.**

Rule 96 (1) provides that subject to rule 95 of the Rules of Procedure of Parliament every Member present in the House at the time of voting shall cast

a vote. Rule 95 then provides for the exceptions referred to in rule 96 (1) as follows:

> **95. Ex-officio Members of Parliament**
>
> **A Vice-President, Prime Minister or a Minister who by virtue of article 78 of the Constitution, is an ex officio Member of Parliament, shall not vote in the House.**

It must be emphasised that rule 24 (2) provides that the quorum of one third provided for in sub-rule (1) of rule 24 shall only be required at a time when Parliament is voting on any question. It appears to me that it is for that reason that Rule 24 (3) places an obligation on the Speaker to ascertain that the requisite quorum is present in the House before a decision is taken on any matter before it. Further, that this provision replaced rule 17 (2) and (3) of the Rules that were the subject of the complaint and decision in **Paul K Ssemwogerere & Another** (supra), which required the Speaker to ascertain quorum at the commencement of the proceedings and after being moved by a Member concerned that it was not constituted.

The import of rule 17 of the Rules of Procedure of Parliament, 1996 was discussed by this court in **Paul K. Ssemwogerere & Zachary Olum v. Attorney General** (supra). In that case, the petitioners complained that the decision that the Speaker of Parliament took to ascertain quorum by examining attendance registers or the record of that day's attendance when the impugned Act was enacted, instead of taking a physical count of Members of Parliament there and then sitting and voting, was inconsistent with rules 17 and 150 of the Rules of Procedure of Parliament, made under Article 94 (1) of the Constitution. And that in the result, it led to contravention of Articles 79, 88 and 89 of the Constitution. Further, that the Referendum and Other Provisions Act, No. 2 of 1999, the law that was challenged by the petitioners

in that case, was void because it did not obtain the constitutional majority at the stages of its final deliberation and of its passing.

I observed that rule 17 that was challenged in **Paul K Ssemwogerere & Another** (supra) was clearly quite different from the impugned rule 24 of Rules of Procedure of the 11th Parliament, SI No. 30 of 2021, because it provided as follows:

> **17 (1) The quorum of Parliament shall be one third of all Members of Parliament.**
>
> **(2) If at the time of sitting a Member takes notice or objection that the Members present in the House are less than one third of the number of all the members of Parliament, the Speaker shall on ascertaining it to be true, suspend the proceedings of the House for an interval of fifteen minutes during which a bell shall be rung.**
>
> **3) If on the resumption of Proceedings after expiry of fifteen minutes, the number of Members present is still less than one third of all members of Parliament the Speaker shall suspend the sitting or adjourn the House without question put.**
>
> **(4) If at any time it appears to the Chairperson of a Committee of the whole House or if objection is taken by a Member that there are present still less than one third of members of the House, the House shall be resumed and the Speaker shall thereupon act in accordance with the procedure set out in sub rules (2) and (3) of this rule.**
>
> *{My emphasis}*

It is pertinent to note that unlike the requirements of rule 24 (2) and (3) challenged in this petition, which provide that the requisite quorum of one third shall only be required at the time of taking a vote, rule 17 (2) of the Rules of Procedure of Parliament, 1996, required the designated quorum of one third to be present right from the time of the commencement of the meeting.

In addition, it appears that under the same rule, the Speaker was under no obligation to ascertain that there was quorum unless a member present in the House noticed and raised an objection to that effect. On raising the objection or drawing it to the attention of the House, the Speaker would on ascertaining this to be true suspend the proceedings for 15 minutes, in the first instance, during which a bell would be rung. It is obvious that this was meant to ensure that the requisite quorum, if present on the precincts of Parliament, is summoned to assemble in the House.

The Chairperson of the Committee of the whole House was also under an obligation to ascertain the presence of the requisite quorum at any time, if it appeared to him or her or if objection was taken by a Member, that there are present still less than one third of members of Parliament.

In order to establish what was meant by the word *"ascertain"* in rule 17 of the 1996 Rules, In **Paul K Ssemwogerere & Another** (supra) Twinomujuni, JCC, with whom the rest of the court agreed, had recourse to Webster's New World Dictionary, where the word *"ascertain"* was defined as: *"to find out with certainty"* or *"to make certain and definite.* At page 20 of his opinion, he then found and held that:

> *"In my judgment this cannot be done by simply looking around. It must be achieved by physical counting. If the Speaker looked around as he stated, then his findings were not certain or definite and that explains why he had to resort to Registers which according to his own admission are much more uncertain, became many people who sign them are not necessarily always in the House. Some may be in the lobby and others in the precincts of the House, which places, according to Hon Ayume himself, are not part of the House. In my view the failure by Hon Ayume to comply with rule 17 of the Rules of Procedure of the House was a serious omission that led him to fail to comply with article 88 of the Constitution. The procedure he adopted was mere guess work. As the Constitution requires a definite figure, it cannot be ascertained by mere estimation."*

The learned jurist further found, at page 22 of his opinion, that not only should the Speaker ascertain whether there is quorum by physical counting, but in addition that:

> *"The records should be able to show the number of members who supported the decision, the number of those who opposed it, the number of those who abstained. The total number of members present and voting in the house should be able to show that at the time of voting there was a quorum. ..."*

In agreement, Mpagi Bahigeine, JCC at pages 5-6 of her opinion, held thus:

> *"It can hardly be emphasised that whether or not an alleged law/statute has been regularly enacted in conformity with the fundamental law is a judicial question to be determined by the court. The court must enforce a constitutional provision which declares that certain steps or forms are indispensable in the passage of laws. An act will be held void where it appears that constitutional requirements were not observed. It is null and void where it is passed without a quorum at any stage.*
>
> *This brings me to Ex P1 the Hansard of the 1st July 1999. I found this to be lacking in relevant entries. This should have been the most authentic source of information as to the adoption of the Act. It is desirable that where the Constitution requires that certain steps in the passage of laws shall be taken, they should be entered in the Hansard. The Hansard should show all relevant entries that the Act was passed in the mode prescribed by the Constitution. It is hardly sufficient to say "question put and agreed to" as is reflected in Ex P1. Definiteness in the record is essential for establishing either complete rejection or failure to accord approval by a constitutional majority. I think this is the purpose of keeping the record. A lot of time would have been saved if the Hansard was clearer.*
>
> ...
>
> *The question whether a quorum was present should have been conclusively settled by a Hansard entry in regard thereto, bearing in mind that this is (a) constitutional though even in the latter case, Parliamentary records would be resorted to, to resolve such crucial issues - See Stockdale v Hansard, (1839)9 Ad. & El and generally see Erskine May's Parliamentary Practice 17th Edn - Sir Barnett Cocks."*
>
> *Emphasis added}*

The court also considered the import of rule 76 of the Rules of Procedure of Parliament which at the time provided thus:

> **76. When the question has been put by the Speaker or Chairperson, the votes shall be taken by voices of "Aye" and "No" and the result shall be declared by the Speaker or the Chairperson.**

It was the position of the Attorney General in **Paul K. Ssemwogerere & Another** (supra) that Parliament complied with the procedure above in voting on the enactment of the Referendum and other Provisions Bill, 1999 into law. However, the court had no kind words for this provision. At page 4 of his opinion Kato, JCC, had this to say about it:

> *"Apart from being inconsistent with the provisions of Article 89(2) of the Constitution, I find Rule 76 of the Rules of Procedure of Parliament of Uganda to be oppressive and insensitive to some members of 'the House. The Rule reads as follows:*
>
> *{Verbatim quote} ...*
>
> *This Provision is totally archaic and does not take into account the small voices which may be swallowed up by the strong and loud voices of very few vocal men; it does not also take into account that some members of Parliament may be impaired in their vocal systems or organs."*

Mpagi Bahigeine, JCC, at page 4 of her opinion made observations, which I thought were profound, about the effects of rule 76 then on the intentions of the Legislature when it enacted the provisions relating to the enactment of laws, as follows:

> *"It is of paramount importance to recognise that the constitutional provisions relating to the manner of enactment of Laws or rules of procedure of Parliament are remedial. They guard against recognised evils arising from loose and dangerous methods of enacting legislation or application of those Rules of Procedure of Parliament. The Constitutional provisions are therefore mandatory, so that there must be complete compliance therewith without discretion or invocation of* ***"wisdom"*** *on the part of the legislature. <u>While Rule 17 conforms to the Articles, Rule 76 manifestly confounds their strictly precise</u>*

terms. When the Hon Speaker takes a decision depending on ***"ayes*** *"or* ***"noes"*** *this should be followed by a list of those voting in the affirmative being recorded, and those voting in the negative or abstaining should similarly be recorded. The provisions of articles 88 and 89 are not merely directory, they are mandatory and non-compliance with them renders the statute invalid.*

{Emphasis added}

Twinomujuni, JCC in his opinion, was of the view that rule 76 of the Rules of Procedure of Parliament at the time contravened the requirements of Article 89 (1) of the Constitution that decisions should be determined by the majority of votes of Members present and voting. He found that, to that extent, rule 76 was null and void; but his was a lone voice. As will be shown later in this judgment the rule, in a different form, continues to operate in the proceedings of the Parliament of Uganda.

For the reasons shown above, the court in **Paul K Ssemwogerere & Another** (supra) unanimously held that the Referendum and Other Provisions Act of 1999 was passed in a manner that was inconsistent with Articles 88 and 89 of the Constitution; and that as a result it was null and void.

The decision in **Paul K Ssemwogerre & Another** was the basis of our decision in **Wakiso Miraa Growers & Dealers Association** (supra). In that case, this court found and held that due to the failure to ascertain that Parliament had quorum at the time of passing section 2 of the Narcotic Drugs and Psychotropic Substances (Control) Bill into an Act of Parliament, the resultant Act was null and void. At the time of enacting that law, the provisions about quorum flowing from Articles 88 and 94 of the Constitution were contained in rule 23 of the Rules of Procedure of 9th Parliament and as follows:

23. Quorum of Parliament

(1) The quorum of Parliament shall be one third of all Members of Parliament entitled to vote.

(2) The quorum prescribed under sub rule (1) shall only be required at a time when Parliament is voting on any question.

(3) <u>At any time when a vote is to be taken, the Speaker shall ascertain whether the Members present in the House form a quorum for the vote to be taken, and if he or she finds that the number is less, the Speaker shall suspend the proceedings of the House for an interval of fifteen minutes, and the bell shall be rung.</u>

(4) If on the resumption of proceedings after the expiry of fifteen minutes, the number of Members present is still less than the required quorum for voting, the Speaker shall proceed with other Business or suspend the sitting or adjourn the House without question put and in case of a Committee, the Chairperson shall adjourn the Committee.

(5) If it appears to the Chairperson in a Committee of the Whole House that there is less than the required quorum for the Committee to take a decision, the House shall be resumed thereupon and the Speaker shall act in accordance with the procedure set out in sub rules (3) and (4).

{Emphasis added}

Save for the absence of a provision on virtual attendance which was added to the Rules of the 10th and 11th Parliament by sub rule 6, the rule on Quorum was similar to rule 24 of the Rules, which is in contention in this petition. And in respect of ascertaining the presence of the quorum required by rule 23, the interpretation given to sub rule 3, at page 18 of the opinion of Mutangula Kibeedi, JCC (as he then was) in **Wakiso Miraa Growers** (supra) was exactly in the terms of that provision. It was buttressed by the interpretation of the word *"ascertain"* that the court emphasised in **Paul K Ssemwogerere & Another** (supra).

However, the decision of this court in **Wakiso Miraa Growers & Dealers Association** (supra) distinguished between the situation that obtained at the time the decision in **Ssemwogerere's case** was handed down. With regard to the requirement for a physical count in order to arrive at definite numbers of Members present in the House and voting, at pages 18-19 of his opinion

Kibeedi, JCC (as he then was) ruled, and the rest of the court agreed with him, that:

> *"I agree with the decision in the Ssemwogerere case (ibid) that ascertaining the quorum of Parliament by the Speaker must result into certainty or definite figures in order for the Speaker to be sure that the numbers prescribed by the Constitution or the Rules of Procedure of Parliament made under the Constitution have been met, namely, one third of all the Members of Parliament (before 2005 Constitutional Amendment) or one third of the Members of Parliament entitled to vole (after the 2005 Constitutional Amendment). However, the statement that '... [ascertaining] must be achieved by physical counting' should be understood only in the context of the evidence that was before the court in that case. It should not be stretched beyond that case. I do not agree that 'physical counting' is the only mode of ascertaining the existence of quorum in Parliament. And my reasons for this position are below:*
>
> *First, the phrase 'physical counting' is not derived from the Constitution or the applicable Rules of Parliament. The word used by the Rules is 'ascertain.' To me the word 'ascertain' is much wider than 'physical counting'. In my view, 'physical counting' is simply one of the ways of ascertaining. Physical Counting is not the only way of ascertaining. As such, for the court to use the phrase 'physical counting' as if it is synonymous with the word 'ascertain' would unduly be restricting Parliament or the Speaker as to what method to use in order to establish with certainty the number of members of parliament required to form quorum."*

In the Petition now before us, none of the Members of Parliament raised any objection about the absence of quorum at the time of debate and the passing of the Computer Misuse (Amendment) Bill into law. However, it is my view that rule 24 (3) of the Rules of Procedure of Parliament does not require that this be done before the Speaker/Chairperson ascertains that the requisite quorum for the vote is present. My understanding of rule 24 (3) of the Rules of Procedure is that it was couched in a manner that shows that the ascertainment of quorum is a mandatory step that has to be taken by the Speaker/Chairperson before a vote is taken. The words of Mpagi-Bahigeine

quoted verbatim, at page 39 of this opinion, are clearly instructive on this point.

I am also of the view that within the context of the 10th and 11th Parliaments, this became absolutely necessary because of the large numbers of Members of Parliament. While on 1st July 1999 when the Referendum and Other Provisions Act was enacted Parliament had 279 Members, by December 2018, the count had grown to 459 members; by January 2021, it reached 529.[2] This growth must of necessity be reflected in the number of ex officio Members who are excluded from voting by Article 79 of the Constitution and rule 95 of the Rules of Procedure of Parliament.

I observed that the mischief that the provisions of the Constitution and the attendant Rules of Procedure intended to address is evident in the Hansard Report for 8th September 2022 when the impugned Amendment was passed into law, at page 5649 thereof. The Hansard showed what transpired at the adoption of the Report of the Committee of the Whole House and the third reading and passing of the Bill as follows:

MOTION FOR ADOPTION OF THE REPORT OF THE COMMITTEE OF THE WHOLE HOUSE

3.32

MR DAN KIMOSHO (NRM, Kazo County, Kazo): Madam Speaker, I beg to move that the House adopts the report of the Committee of the whole House.

THE SPEAKER: Honourable members, I put the question that the House adopts the report of the Committee of the whole House.

(Question put and agreed to)

Report adopted.

[2] Inter Parliamentary Union; Global Data on National Parliaments

BILLS

THIRD READING

THE COMPUTER MISUSE (AMENDMENT) BILL, 2022

3.32

MR DAN KIMOSHO (NRM, Kazo County, Kazo): Thank you, Madam Speaker, I beg to move that the Bill entitled, "The Computer Misuse (Amendment) Bill, 2022" be read the third time and do pass into law. I beg to move.

THE SPEAKER: Honourable members, I put the question that the Computer Misuse (Amendment Bill, 2022 be read the third time and do pass.

(Question put and agreed to)

A BILL FOR AN ACT ENTITLED, "THE COMPUTER MISUSE (AMENDMENT) ACT, 2022"

The Speaker: the title settles and the Bill passes. (Applause)

...

Honourable members, I want to thank all of you for passing this Bill and we wait for assent from the President. Those people who think they should play around with other people's names must answer for it.

Clearly, there is no evidence in the Hansard that there was any concern about whether the Members in the House at the time that the Report was adopted and the Bill passed into law constituted the requisite quorum of one third of Members entitled to vote.

It must again be emphasised that the default mode of making decisions in Parliament is provided for by rule 93 of the Rules of Procedure of Parliament, entitled "*Questions to be decided by majority,*" which at the risk of repetition of the provision in this opinion, provides as follows:

> **(1) Except as otherwise prescribed by the Constitution or any law consistent with the Constitution, all questions proposed for decision of Parliament shall be determined by a majority of votes of the Members present and voting.**

As intimated above, the equivalent of rule 76 that was criticised by this court in **Paul K Ssemwogerere & Another** (supra) still exists in the Rules of Procedure of Parliament because rule 96 (2) thereof provides for the various forms of voting as: voice voting; secret voting; electronic voting; division; roll call and tally; or voting by show of hands. Rule 97 then provides for the default mode of voting as follows:

> **97. Voice Voting**
>
> **(1) Except where these Rules expressly provide otherwise, where a matter is to be put to vote, voice voting shall be the default method of voting.**
>
> **(2) When a question has been put by the Speaker or the Chairperson, the votes shall be taken by voices of "Ayes" and "Noes" and the result shall be declared by the Speaker or the Chairperson.**
>
> *{Emphasis added}*

The Hansard of 8th September 2022, the day on which the Computer Misuse (Amendment) Act was passed, shows that the mode of recording the proceedings attendant to enacting legislation that was discouraged in **Paul K. Ssemwogerere & Another** (supra) is still practiced. The process of voting was summarised by the authors of the Hansard as, *"Question put and agreed to."*

There is also clearly no record that the Speaker ascertained whether there was quorum before the vote was taken on the Bill. Neither is there a record of the number of Members of Parliament that was present and entitled to vote; nor is there any evidence that any of those present abstained yet there was presented before Parliament a Minority Report by Hon Gorreth Namuga, Member of Parliament for Mawogola County South, and a member of the Committee on Information Communication Technology and National Guidance.

It is important to note that the Report was not welcome. Hon Namugga's presentation, as is shown on page 6639 of the Hansard, was almost shot down on points of procedure. It was alleged that she did not respect the Speaker and had it not been for another Member who implored the Speaker to allow her to conclude delivery of the Report, it could have simply been snuffed out.

The gist of her Minority Report which was not attached to the Majority Report of the Committee as is required by rule 205 of the Rules of Procedure of Parliament, reflected at page 5640 of the Hansard, was as follows:

> *"I conclude by saying that the entire Bill should not be left to stand as part of our laws, as the clauses are already catered for in the existing legislation; and some offend the Constitution of the Republic of Uganda.*
>
> *The fundamental rights to access of (sic) information electronically, and to express oneself over computer networks, are utterly risked by this Bill. If passed into law, it will stifle the acquisition of information.*
>
> *The penalties provided in the Bill are overly harsh and disproportionate, when compared to similar offences in other legislation. If the Bill is passed, it will be bad law and liable to constitutional petitions upon assent. I beg to submit, Madam Speaker."*

There were also some Members that joined the debate on the basis of the Minority Report at the Committee Stage. It therefore cannot be gainsaid that there were Members of Parliament against the passing of the Computer Misuse (Amendment) Bill, 2022, into law in the House when Parliament purported to enact it. Since there were some as is evident from the debate, however small their number, it ought to have been reflected in the Hansard. Instead, what is implied by the absence of detail as to how many Members of Parliament voted for, against or abstained, is that the Bill was by the unanimous vote of Parliament passed into law.

It is my view that these anomalies resolve the question as to whether or not there was quorum on the passing of the Bill into law in favour of the petitioners. I would find so because the evidence (the Hansard) that was produced for the Attorney General to prove the assertion of the Clerk in paragraph 12 of his affidavit in support of CPC 37 of 2022, does not show that the Speaker complied with the impugned provisions of the Constitution and the Rules of Procedure of Parliament. Instead, the copy of the Hansard exposed glaring omissions in the process of passing the Bill into an Act of Parliament.

I would therefore find that when Parliament passed the Computer Misuse (Amendment) Bill, 2022 into an Act of Parliament, it did not comply with the provisions of rule 24 (3) of the Rules of Procedure of Parliament made under Article 94 of the Constitution. Further, that the passing of the Bill into an Act of Parliament was inconsistent with Articles 88 and 89 of the Constitution, making the Computer Misuse (Amendment) Act, 2022, null and void. It follows that all of the impugned provisions of the Computer Misuse Act that were challenged in the three petitions are null and void and there is no need to interpret them as against the stated provisions of the Constitution.

That would conclude the determination of this petition but the Uganda Law Society, the petitioner in CPC 42 of 2022 also challenged the provisions of section 179 (now section 162) of the Penal Code Act (PCA) for being inconsistent with Articles 29 and 43 of the Constitution.

Interestingly, it appears that the respondent in his answer filed on 11th January 2023 did not respond to this complaint. Neither was the challenge to the provision reflected in the affidavit in support of the answer. However, the question must be addressed since it is clearly part of the petition and

counsel for both parties addressed it in their submissions. I will therefore proceed to do so.

Whether section 162 of the Penal Code Act, which creates the offence of criminal libel, is inconsistent with and/or in contravention of Articles 29 and 43 of the Constitution, and Uganda's international treaty obligations.

In his affidavit in support of the petition, Mr Oundo did not dwell on the niceties of this complaint. Simply put, he stated that section 179 (now 162) of the Penal Code Act (PCA) criminalises defamatory speech and so contravenes Articles 29 and 43 of the Constitution; it is therefore inconsistent with the freedom of speech and other media in a free and democratic society. The Attorney General did not respond to this complaint. His answer can therefore only be deduced from the blanket denial of all the claims in the petition.

Submissions of Counsel

Counsel for the petitioner submitted that section 162 PCA is unconstitutional to the extent that it imposes a custodial sentence and a harsh penalty for the purpose of protecting a person's reputation. He went on to point out that the general punishment for misdemeanours under section 22 PCA is imprisonment for a period that does not exceed 2 years. He contended that the impugned provision does not represent a sufficient legislative objective to warrant the limitation on the freedom of speech and expression that is guaranteed by Article 29 (1) (a) of the Constitution. Further, that neither is it rationally connected to the legislative objective nor is it proportional in the manner that it set out to achieve it.

He referred to **Jacqueline Okuta & Jackson Njeri v Attorney General & Others [2017] KEHC 8382 (KLR),** in which the Constitutional Human

Rights Division of the High Court of Kenya declared Kenya's criminal libel law unconstitutional. He explained that Kenya's provision on criminal libel was identical to the impugned provision in Uganda and it too specified a punishment of up to 2 years' imprisonment. He reproduced the relevant part of the decision *in extenso* and invited this court to follow it and declare section 162 PCA unconstitutional.

Counsel went on to submit that section 162 PCA is inconsistent with and contravenes Uganda's International Treaty obligations. That as a result, it also contravenes Article 45 of the Constitution. He, among others, cited the decision of this court in **Dr Busingye Kabumba & Another v Attorney General [2022] UGCC 8,** where it was held that under Principle XXVIII(i) (b) of the National Objectives and Directive Principles of State Policy in the Constitution, the international obligations to which Uganda is beholden are justiciable before both the country's domestic courts and the relevant international courts. He further referred to the decision of this court on the same point in **Gwogyolonga & 3 Others v Attorney General [2023] UGCC 96.** He then asserted that section 162 PCA is unconstitutional for the reason that it is in contravention of and inconsistent with Uganda's treaty obligations.

Counsel further asserted that section 162 PCA is inconsistent with Articles 8 and 9 of the African Charter on Human and Peoples' Rights. He referred to the decision of the African Court in **Lohe Issa Konate v Burkina Faso [2014] ACHPR 42 (5th December 2014)**, where it was held that similar provisions on defamation in Burkina Faso (sections 109 and 108 of the Information Code and section 178 of the Penal Code) contravened Article 9 of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. That in addition, violations of laws on freedom of

speech and the press cannot be sanctioned by custodial sentences without going contrary to the said provisions.

Counsel concluded that the dictum of the African Court is applicable in equal force to section 162 PCA which criminalises libel in Uganda. He prayed that this court issues a permanent injunction restraining the respondent and all Government Agencies, authorities and officials from enforcing the provision.

In their reply, counsel for the Attorney General submitted that it is not in doubt that Uganda is obliged to respect and adhere to international treaties and obligations. They asserted that the respondent has at all times, in respect of human rights, fulfilled all its treaty obligations.

Counsel went on to submit that all the provisions of the international conventions and treaties that the petitioner claims have been violated are enshrined in Ugandan laws especially the Constitution. Finally, that the right to freedom of expression is not absolute and can be limited in cases where it is acceptable and demonstrably justifiable in a free and democratic society. That therefore, section 162 PCA is not inconsistent with Uganda's international treaty obligations. Counsel then prayed that this part of the petition be dismissed with costs.

Analysis

The right to freedom of expression and the press is the cornerstone of any democracy. This was acknowledged by the Supreme Court in **Charles Onyango Obbo & Another v Attorney General (Constitutional Appeal 2 of 2002) [2004] UGSC 44**, where it was observed that:

> *"In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the*

hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. In ***R. vs. Zundel*** *(supra) at p. 205, the following excerpt from an earlier judgment in* ***Edmonton Journal vs. Alberta (A.G.)*** *(1989) 2 SCR 1326, was cited with approval -*

> *'It is difficult to imagine a guaranteed right more important to democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasised.'"*

The press in Uganda has always sought the realisation of that right by challenging the persistent efforts to have them arrested for expressing opinions or publishing news on controversial subjects, as it was in **Charles Onyango Obbo** (supra).

I observed that the complaint by the Uganda Law Society (ULS) in respect of section 162 PCA arose from the challenge to provisions of the Computer Misuse Act, especially section 28, which prohibited the publication of malicious information. In relation to that provision the ULS further sought a declaration that section 162 PCA contravenes Articles 29 and 43 of the Constitution. Further, that it contravenes provisions of the African Charter on Human and Peoples Rights and as a result, it contravenes Article 45 of the Constitution.

In paragraphs 40-44 of his affidavit in support of the petition, Mr Bernard Oundo stated that he perused section 162 of the Penal Code which proscribes the offence of criminal libel. He asserted that the provision is an affront to Articles 29 and 43 of the Constitution, to the extent that it places an excessive limitation to the right to free speech and expression, by criminalising speech yet there are other proportional remedies including civil defamation laws.

He went on to state that the Penal Code Act was enacted before the promulgation of the Constitution of the Republic of Uganda in 1995. Further, that from 8th October 1995 all laws in Uganda were required to either fit within the constitutional framework or fall by the wayside. That as a result, where any law contravenes or purports to exceed the existing constitutional order, it is void. That the principle applies to section 179 of the Penal Code, now section 162 thereof. The Attorney General's response to this particular complaint in his answer was a general one. It was stated in paragraph 1 in respect of all provisions challenged in the petition that, *"the respondent makes no admission to any of the averments in the petition and the petitioner would be put to strict proof thereof."* Nothing was said about it in the affidavit in reply either.

It is pertinent to note, that though none of the parties pointed it out in their submissions, this court considered the question whether criminal defamation that is proscribed by the PCA is consistent with Articles 29 and 43 of the Constitution in **Joachim Buwembo & 3 Others v Attorney General, Constitutional Reference No. 1 of 2008** (Unreported).

The facts in that case were that the 4 applicants who were journalists, employed by the Monitor Newspaper, published articles in the Sunday issues of 19th and 26th August 2007 captioned: *"IGG in Salary Scandal"* and *"God's Warrior Faith Mwondha Stumbles,"* respectively. When their case came up for hearing before the Magistrates' Court they objected to the trial and raised issues about the law under which they were charged, section 179 of the Penal Code Act. The Magistrates Court framed one question for interpretation by the Constitutional Court, viz:

> *"Whether section 179 of the Penal Code Act is not inconsistent with Article 29(1)(a) of the Constitution of the Republic of Uganda."*

However, this court with the consent of the parties framed a second question:

> *Whether or not Sections 179 of the Penal Code Act is a restriction permitted under Article 43 of the Constitution as being demonstrably justifiable in a free and democratic society.*

The court (consisting of Mpagi-Bahigeine, Engwau, Byamugisha (RIP), Kavuma & Nshimye, JJA/JJCC) considered the limitations upon rights guaranteed by the Constitution under Article 43 thereof, and the interpretation that was given to it by the Supreme Court in **Charles Onyango Obbo & Another** (supra). The court further considered the provisions of Article 45 of the Constitution which opens up the Bill of Right in Chapter 4 of the Constitution to the consideration of rights not specifically set out therein; decisions of the courts in other jurisdictions where it was held that criminal libel was justifiable in a free and democratic society; provisions of Article 17 of the International Covenant on Civil and Political Rights which provides that everyone has a right to the protection of law against attacks on his or her honour and reputation; and Article 12 of the Universal Declaration of Human Rights which, among others, also provides for the protection of the rights of persons from attacks upon their honour and reputation. The court then concluded thus:

> *"It becomes clear that although freedom of expression is for enhancing public knowledge and development, statements which defame members of the public do not enhance public knowledge and development. On the contrary, they stifle and retard it.*
>
> ...
>
> *Most certainly therefore defamatory libel is far from the core values of freedom of expression, press and other media. It would trivialize and demean the magnificence of the rights guaranteed by the Constitution if individual members of the public are exposed to hatred, ridicule and contempt without any protection. In fact, the press would be doing a disservice to the public by publishing defamatory libels.*

The applicants in this case cannot say that they are being tried under an unconstitutional law. The applicants' complaint and defence should not, therefore, be that section 179 of the Penal Code Act is bad law. The freedom of expression in Uganda should be enjoyed within the restrictions imposed by section 179 of the Penal Code Act. Holding that section 179 is unconstitutional would mean that the right of freedom of expression is unlimited and thus this would contravene Article 43 of the Constitution. It serves the purpose achieved by the Canadian Criminal Code.

In summary, Section 179 of the Penal Code Act (Cap 120) is not inconsistent with Article 29(1)(a) of the Constitution. Sections 180 to 186 of the Penal Code Act are, therefore, not redundant. Section 179 of the Penal Code Act is a restriction permitted under Article 43 of the Constitution as being demonstrably justifiable in a free and democratic society."

There is therefore no doubt that the ULS brought this complaint about section 179 PCA, now section 162 thereof, without considering the decision in **Joachim Buwembo** (supra), and it is still contended that it contravenes Articles 29 and 43 of the Constitution, but for different reasons. The main thrust of the current challenge is that section 162 PCA is inconsistent with Uganda's International Treaty obligations and thereby contravenes Article 45 of the Constitution. In that regard, Article 287 of the Constitution is also brought to the fore.

Since this court already came to the decision that section 179 Penal Code, now 162 thereof, is not inconsistent with Articles 29 and 43 of the Constitution, what remains to be considered by this court in this petition is whether the provision contravenes Uganda's International Treaty obligations, and therefore Article 45 of the Constitution, as it is contended for the petitioner.

Article 8A of the Constitution of the Republic of Uganda provides for the National interest in the following terms:

8A National interest

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

Objective 1 of the Directive Principles of State Policy sets the tone for the purpose of the principles thus:

I. Implementation of objectives

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

This court has therefore consistently held that the National Objectives and Directive Principles of State Policy are justiciable. (**See Centre for Health, Human Rights & Development & Others v Attorney General & Another [2022] UGCC 14**, among others.

The principles provide for the foreign policy objectives of Uganda in objective XXVIII as follows:

(i) The foreign policy of Uganda shall be based on the principles of—

(a) promotion of the national interest of Uganda;
(b) respect for international law and treaty obligations;
(c) peaceful coexistence and non-alignment;
(d) settlement of international disputes by peaceful means;
(e) opposition to all forms of domination, racism and other forms of oppression and exploitation.

(ii) Uganda shall actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity.

(iii) The State shall promote regional and pan-African cultural, economic and political cooperation and integration.

{My Emphasis}

Pursuant to clause 1 (b) above, Article 287 preserved the instruments that Uganda entered into before the coming into force of the Constitution in the following terms:

> **287. International agreements, treaties and conventions**
>
> **Where—**
>
> **(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or**
>
> **(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it.**

In this case, the petitioner contends that provisions of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (ACHPR) apply to the interpretation of the impugned provision of the Penal Code Act. Further that this is so on the basis of the provisions of the Constitution and the principles stated above.

Uganda did not sign UDHR, which came into force in 1948, because it was still a colony of Britain; but the latter did sign it. However, the principles in UDHR were incorporated into and are the foundation of Chapter 4 of the Constitution of the Republic of Uganda.

Uganda ratified ICCPR on 21st June 1995. It was therefore adopted under Article 287 because the Constitution was promulgated on 8 October 1995.

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Uganda officially ratified the African Charter on Human and Peoples' Rights on 10th May 1986, shortly before it entered into force on 21st October, 1986. Chapter 4 of the 1995 Constitution aligns with many provisions of the African Charter.

However, before I consider this question any further, it is pertinent to establish the position of this court on the application of international human rights instruments and treaties.

In **Madrama v. Attorney General (Constitutional Appeal No 1 of 2016); [2019] UGSC 1**, the appellant challenged the decision of this court on the interpretation of Article 21 (1) of the Constitution (freedom from discrimination). In the petition before this court, it was held that the abridgment of the right to pension, which is provided for by Article 245 of the Constitution, did not amount to an infringement of the right to freedom from discrimination, because age is not one of the factors listed in Article 21 (2) of the Constitution. On appeal the Supreme Court considered the import of Article 45 of the Constitution and Katureebe, JSC (as he then was) with whom the rest of the court agreed held that:

> *"Article 45 is a forward looking provision designed to give the Constitution a durable character and the elasticity to wither through the dynamics and ever changing needs of society. The mantle falls upon the Courts to determine which rights are covered under Article 45. This exercise must be done judiciously by examining among others International Human Rights Instruments and human rights Constitutional developments in other Jurisdictions."*
>
> *{Emphasis added}*

I understood this to mean that since the rights that are set out in Chapter 4 of the Constitution are impacted upon by the dynamics and changing needs of society, interpretation must of necessity change with the ethos and constitutional developments of the times. I would therefore find that the

tenets of UDHR, ICCPR and the ACHPR can be applied by this court in construing the rights listed in Chapter 4 of the Constitution, and others not listed therein, under Article 45 thereof. Consequently, UDHR, ICCPR and the ACHPR also apply to the interpretation of laws vis-à-vis the provisions of the Constitution that are impugned under Article 137 thereof.

My understanding of the challenge set up by the ULS here is that there are basically three issues that lie for determination by this court. I am of the view that they are best framed in the terms of the relevant provisions of the international instruments/treaties that were listed and referred to by the petitioner as follows:

(i) Whether section 162 PCA contravenes the provisions of Article 19 of the Universal Declaration of Human Rights;
(ii) Whether section 162 PCA contravenes the provisions of Article 19 of the International Covenant on Civil and Political Rights; and
(iii) Whether section 162 PCA contravenes Article 9 of the African Charter on Human and Peoples' Rights.

Issue 1: Whether section 162 PCA contravenes Article 19 of UDHR.

Article 19 UDHR provides as follows:

> **Article 19**
>
> **Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.**

The equivalent provision of the Constitution of the Republic of Uganda is Article 29 (1) (a) which is couched in the following terms:

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29. Protection of freedom of conscience, expression, movement, religion, assembly and association.

(1) Every person shall have the right to—

(a) freedom of speech and expression which shall include freedom of the press and other media;

Section 162 of the Penal Code Act provides for the misdemeanour called *"libel"* in the following terms:

162. Definition of libel

Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel.

Section 22 PCA provides for the punishment as follows:

22. General punishment for misdemeanours

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years.

I observed that in its interpretation of section then 179 of the PCA (now section 162) in **Joachim Buwembo** (supra) the court did not consider the positive implications of the tenets of Article 19 UDHR, before it went on to find that it limits the rights that are guaranteed by Article 29 (1) (a) of the Constitution. In that regard, the court found and held thus:

"Similarly, it is noteworthy that a number of international conventions to which Uganda is a party contain explicit limitations of freedom of expression in order to protect the reputation of individuals. For example, Article 17 of (the) International Covenant on Civil and Political Rights (1966) provides that everyone has a right to the protection of law against attacks on his or her honour and reputation, Likewise, Article 12 of the Universal Declaration of Human Rights (1948) provides that 'No person shall be subjected to arbitrary

interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interference or attacks.' We thus need hardly emphasize the fact that the reputation of an individual is of such great importance that it even attracts international recognition and protection.

Though the court relied on the tenets of UDHR that limit the right to freedom of expression, UDHR is not a legally binding treaty. However, its principles are considered a foundation for international human rights law and have been incorporated into subsequent legally binding treaties, such as the ICCPR and the ACHPR, as well as national laws.

Further to that, while the UDHR itself is not a binding legal document, its principles have become part of customary international law, meaning that at least some of its provisions are binding on states. It then becomes necessary to establish whether section 162 PCA contravenes provisions of ICCPR and the African Charter on Human and Peoples Rights.

Issue 2: Whether section 162 PCA contravenes Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Article 19 of the International Covenant on Civil and Political Rights provides for the right to freedom of expression and the press in very broad terms as follows:

Article 19

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order *(ordre public)*, or of public health or morals.

The import of paragraph (1) of Article 19 ICCPR, was laid down by the United Nations Human Rights Committee in its General Comment No. 34[3] as follows:

> *"Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1. Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion."*

The extent of the protection accorded by paragraph (2) of Article 19 was also explained in General Comment No 34 as follows:

> *Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on*

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[3] 102nd Session, Geneva, 11-29 July 2011

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public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.[4]

Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

{Emphasis added}

The effect of the explanation above is that all of the forms of expression stated in section 162 PCA *(whether it be by print, writing, painting, effigy or gestures, spoken words or other sounds)* are protected by Article 19 ICCPR.

What is of concern to the petitioner here is contained in paragraph 3 of Article 19 in that, section 162 PCA limits the right to freedom of expression by creating a misdemeanour called libel for any person who *"unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person."* The perceived intention of the provision is to respect the rights or reputations of other persons; and it is for that reason that this Court held that the provision was not inconsistent with Article 29 (1) and 43 of the Constitution in the case of **Joachim Buwembo** (supra).

However, since Uganda is a party to ICCPR, the test for the restrictions laid down in Article 19 (3) is strict, with narrowly drawn conditions. In General

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[4] Article 20 of ICCPR provides that any propaganda for war shall be prohibited by law; and so shall advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence.

Comment 34, the Committee on Human Rights pointed out that paragraph 3 of Article 19 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. And for that reason, two areas of restriction on the right were permitted by the Instrument, relating either to respect of the rights or reputations of others, or the protection of national security, public order, and public health or morals.

The Committee cautioned that when a party to the Covenant imposes restrictions on the exercise of freedom of expression, these may not put the right itself in jeopardy; the relation between right and restriction and between norm and exception must not be reversed. This was clarified by drawing attention to Article 5 (1) of ICCPR which provides that:

> **Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.**

Specific conditions for restrictions are therefore laid down in paragraph 3 of Article 19. Therefore, restrictions: (i) must be provided by law; (ii) may only be imposed for the grounds set out in subparagraphs (a) and (b) of paragraph (3); and (iii) must conform to the tests of necessity and proportionality.

For purposes of the first restriction or limitation permitted by Article 19 (3) ICCPR, the Committee on Human Rights explained that for a norm to pass the test of *"a law"* as is provided for thereunder, such norm must:

a) be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly;
b) be made accessible to the public; and

c) not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.

I therefore analysed the impugned provision according to the criteria above.

As to whether the offence created by section 162 PCA is formulated with sufficient precision to enable an individual regulate his or her conduct accordingly, in order to facilitate a better understanding of it within its context I deemed it appropriate to set down the terms of section 162 PCA again, and it is couched in the following terms:

> **Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel.**
>
> *{Emphasis added}*

There is no doubt that the framers of this provision meant that the publication of the statement *must be with the intention to defame* the person about whom it is published. Further, that in order to clarify what was meant by section 162, section 163 PCA was included and it provides thus:

> **163. Definition of defamatory matter**
>
> **(1) Defamatory matter is matter likely to injure the reputation of any person by exposing that person to hatred, contempt or ridicule, or likely to damage any person in his or her profession or trade by an injury to his or her reputation.**
>
> *{Emphasis added}*

Sections 162 and 163 PCA must be read together in order to ascertain the meaning of the former. However, it is my opinion that the definition of *"defamatory matter"* in section 163 PCA does not bring clarity to the meaning

of that term in section 162 PCA. I say so because Black's Law Dictionary (9th Edition by West) defines *"defamation"* as follows:

> *"1. The act of harming the reputation of another by making a false statement to a third person. ... 2. A false written or oral statement that damages another's reputation."*

Black's Dictionary adds that: *"If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault."*

The legal test in civil defamation cases essentially takes three strands: i) the words in a statement are defamatory; ii) that they referred to the plaintiff; and (iii) they were published by the defendant. The question whether the words complained of are defamatory is one of law while that whether they referred to the plaintiff is a question of fact. (**Simms v Stretch [1936]2 All ER 1237**). An inquiry is also made by the court to establish who the right thinking members of a community are, which infers that while a statement may be perceived as defamatory by some sections of society, it may fall on deaf ears for others in the same society.

The definition in Black's Law Dictionary seems to me to attach to the tort of defamation or libel for which a court may award damages to the person wronged or offended. It also appears to adequately serve that purpose because what has to be proved must only be proved on the balance of probabilities.

On the other hand, the definition of *"defamatory matter"* in section 163 PCA seems to me to be indeterminate. What amounts to defamatory matter will most likely be subjective, depending on who perceives that a statement is *"likely to injure the reputation of any person by exposing that person to hatred, ridicule or contempt"* or *"likely to damage any person in his or her profession*

or trade by an injury to his or her reputation." It has thus been held in some jurisdictions that construing defamatory matters as that which is *"likely to injure reputation by exposing one to hatred, ridicule and contempt"* is a narrow construction of the term *"defamation."*

For instance, the court in **Dr. Sarah Thornton v Telegraph Media Group Limited [2010] EWHC 1414 (QB)** referred to the opinion of Scrutton LJ in **Tournier v National Provincial Union Bank of England Ltd [1924] 1 KB 461** at 477**, [1923] All ER Rep 550** at 557, where he opined that he did not think that this *"ancient formula"* was sufficient in all cases, because words might damage the reputation of a man as a business man which no one would connect with hatred, ridicule or contempt. The court then reproduced an excerpt from the opinion of Atkin LJ, in the same case, where he expressed a similar opinion as follows:

> *"I do not think that it is a sufficient direction to a jury on what is meant by 'defamatory' to say, without more, that it means: Were the words calculated to expose the plaintiff to hatred, ridicule or contempt, in the mind of a reasonable man? The formula is well known to lawyers, but it is obvious that suggestions might be made very injurious to a man's character in business which would not, in the ordinary sense, excite either hate, ridicule, or contempt - for example, an imputation of a clever fraud which, however much to be condemned morally and legally, might yet not excite what a member of a jury might understand as hatred, or contempt."*

I am therefore of the view that the definition of *"defamatory matter"* in section 163 PCA does not bode well with the standard of proof for offences that are proscribed by the Penal Code Act, which is *"beyond reasonable doubt."* It leaves the definition of the misdemeanour called *"libel"* uncertain, vague, indefinite, unspecified, and, I am afraid, ambiguous.

I am fortified in coming to that conclusion by the decision of the Supreme Court of Zimbabwe in **Chimakure & Others v Attorney-General 2013 (2) ZLR 466 (S)** in respect of this point, where it observed and held that:

> *"The applicants attacked the quality of the law. There is no question of breach of the rule of adequate accessibility. The law is published in a form accessible to those affected. The contention was that the provision is not a rule of law because the essential elements of the crime do not define the scope of the prohibited acts in a language which is sufficiently clear and adequately precise. A compliant law must, in accordance with the principle of legality, enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience. This is the requirement of foreseeability of law."*

Having come to the same conclusion, I see no need to explore the import of the rest of the criteria provided by the Human Rights Committee in General Comment 34. They appear to have been satisfied by section 162 PCA because it is the law and thus accessible to citizens. In addition, persons charged under the provision have access to independent courts at trial, including the right to appeal against the decision at first instance to a higher court.

I would therefore find that section 162 PCA falls short of the requirement that the law *must* be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. I would therefore also find that, to that extent, it contravenes Article 19 (3) (a) of ICCPR.

(iii) Whether section 162 PCA contravenes Article 9 of the African Charter on Human and Peoples' Rights.

The Declaration of Principles of Freedom of Expression and Access to Information in Africa (hereinafter sometimes referred to as *"the Declaration"*) was adopted by the African Commission on Human and Peoples' Rights (the African Commission) at its 65th Ordinary Session held from 21st October to

10th November 2019 in Banjul, The Gambia. It is stated in the introduction thereto that:

> *"The Declaration establishes or affirms the principles for anchoring the rights to freedom of expression and access to information in conformance with Article 9 of the African Charter which guarantees individuals the right to receive information as well as the right to express and disseminate information. The Declaration therefore forms part of the soft-law corpus of Article 9 norms developed by the African Commission, including the Model Law on Access to Information for Africa as well as the Guidelines on Access to Information and Elections in Africa, adopted by the Commission, respectively, in 2013 and 2017."*

Article 9 of the ACHPR provides as follows:

> **ARTICLE 9**
>
> **1. Every individual shall have the right to receive information.**
>
> **2. Every individual shall have the right to express and disseminate his opinions within the law.**

The right to freedom of expression can thus be limited by the law but the criteria for the limitation are not stated under this provision as they are in Article 19 (3) of ICCPR. However, Article 27 of ACHPR provides as follows:

> **Article 27**
>
> **1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.**
>
> **2. <u>The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.</u>**
>
> *{Emphasis added}*

It appears to me that because the limitations to the right to freedom of expression were not laid down in the ACHPR, Principle 9 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa, 2019 laid them down in great detail, partly, as follows:

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Principle 9. Justifiable limitations

1. States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation:

a) is prescribed by law;

b) serves a legitimate aim;

c) and is a necessary and proportionate means to achieve the stated aim in a democratic society.

2. States shall ensure that any law limiting the rights to freedom of expression and access to information:

a) is clear, precise, accessible and foreseeable;

b) is overseen by an independent body in a manner that is not arbitrary or discriminatory; and

c) effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.

3. A limitation shall serve a legitimate aim where the objective of the limitation is:

a) to preserve respect for the rights or reputations of others; or

b) to protect national security, public order or public health.

4. ...

It then becomes clear that the criteria for the limitation of the right to freedom of expression under the ACHPR is based on the principles in clause 1 of Principle 9 of the Declaration. The rest of the clauses therein are explanations of the contents of clause 1. I will therefore next explore whether section 162 PCA satisfies the recommended criteria in order to establish whether it is consistent with Article 9 ACHPR.

Paragraph 1 of principle 9 of the Declaration provides that states may only limit the exercise of the right to freedom of expression and access to information on the basis of three criteria: (a) prescription by law; (b) serving a legitimate aim; and (c) necessity and proportionality to achieve the stated aim in a democratic society.

Prescription by law, in my view, must be given the same meaning as it was given by the UN Human Rights Committee in General Comment 34. I already found that given that meaning, section 162 PCA fell short of the requirement that the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. It is therefore still my view that the definition of the misdemeanour called *"libel" is* uncertain, vague, indefinite, unspecified, and ambiguous. It therefore falls short of the requirements of Principle 9 (2) (a) of the Declaration.

As to whether section 162 PCA serves a legitimate aim, there is no doubt that the prohibition of libel serves the aim of preserving respect for the rights or reputations of others from statements that are *"likely to injure their reputation by exposing them to hatred, contempt or ridicule,"* or damage them in their profession or trade by injury to their reputations.

Libel laws are usually enforced to protect the reputations of persons in public office or public figures, and that is their main purpose. It is therefore a legitimate aim, but there is no doubt about the intent or objective of the Computer Misuse (Amendment) Bill falling in that category for it was a private Members' Bill introduced by a Member of Parliament. It will be recalled that the main reason why the ULS attacked section 162 PCA (libel) in this petition about the Amendment of the Computer Misuse Act is that it purported to introduce a provision to the same effect (section 28 thereof) which proscribes the publication of *"malicious information."*

It is pertinent to note that with regard to protecting reputations, Principle 21 of the Declaration provides as follows:

Principle 21. Protecting reputations

1. **States shall ensure that laws relating to defamation conform with the following standards:**

a) **No one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.**

b) **Public figures shall be required to tolerate a greater degree of criticism.**

c) **Sanctions shall never be so severe as to inhibit the right to freedom of expression.**

2. **Privacy and secrecy laws shall not inhibit the dissemination of information of public interest.**

Section 162 PCA, and its attendant definition in section 163 thereof, should therefore be analysed through this lens, among others, in order to establish whether they do not further violate Article 9 of the ACHPR.

Black's Law Dictionary (supra) defines a *"public figure"* as *"A person who has achieved fame or notoriety or who has voluntarily become involved in a public controversy."* It goes on to identify two categories of public figures thus: i) *"All-purpose public figures"* are persons who achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts. This includes those who occupy positions with great persuasive power and influence, whether or not they actively seek attention. ii) *"Limited-purpose public figures"* on the other hand, are persons who having become involved in a particular public issue achieve fame or notoriety only in relation to that particular issue. The level to which each of these categories requires protection under defamation laws is based on the category in which they fall.

It must be emphasised that Principle 21 (b) of the Declaration provides that public figures shall be required to tolerate a greater degree of criticism. This position was affirmed by the Supreme Court in **Charles Onyango Obbo & Another v. Attorney General** (supra).

I will thus proceed to determine whether section 162 PCA satisfies the requirement in principle 9 (1) (c), that is, whether it is a necessary and proportionate means to achieve the stated aim in a democratic society.

The test employed to make a determination as to whether the limitation is justifiable is stated in clause (4) of Principle 9 of the Declaration which provides as follows:

> **4. To be necessary and proportionate, the limitation shall:**
>
> **a) originate from a pressing and substantial need that is relevant and sufficient;**
>
> **b) have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and**
>
> **c) be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorised.**
>
> *{My emphasis}*

I deemed it necessary to explore clauses (b) and (c) above in as far as they relate to the criminalisation of defamation by section 162 PCA. It is generally agreed among human rights activists that criminalising defamation has a negative effect on the right to freedom of expression. In **Basildon Peta v The Minister of Law, Constitutional Affairs and Human Rights & Attorney General, CC 11/2018,** citing the PEN International Report *"Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa"* the Constitutional Court of Lesotho observed that:

> *"Criminalising defamation has a chilling effect on journalistic freedom of expression. Fear of potential criminal sanction and reputational incursion may result in media practitioners doing what is known as self-censoring. The corollary of this self-censoring is to stop the flow of information, leaving the public less informed about the goings-on in Government."*

Section 162 PCA definitely has the same effect on the rights guaranteed by Article 29 (1) of the Constitution of Uganda. It also does not pass the test because there exist civil defamation laws in Uganda whose sanctions are less restrictive than imprisonment. For the same reasons, the impugned provision falls short of the requirement in clause 4 (c) of Principle 9 of the Declaration.

Finally, Principle 22 of the Declaration restricts criminal measures in respect of defamation when it places obligation upon parties to ACHPR as follows:

Principle 22. Criminal measures

1. **States shall review all criminal restrictions of content to ensure that they are justifiable and compatible with international human rights law and standards.**
2. **States shall repeal laws that criminalise sedition, insult and publication of false news.**
3. **States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate.**
4. **The imposition of custodial sentences for the offences of defamation and libel are a violation of the right to freedom of expression.**
5. **Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.**

{My emphasis}

It is pertinent to point out that consistent with clause 2 above, following the decision of the Supreme Court in **Charles Onyango Obbo & Another v. Attorney General** (supra), Parliament repealed section 50 of the Penal Code when it passed the Law Revision (Miscellaneous Amendments) Act, 2023. The provision proscribed the publication of false news.

With regard to the provision of what is now section 162 PCA, the decision of this court on libel in section 179 PCA in **Joachim Buwembo** (supra) was handed down on 4th June 2009, 10 years before the African Commission issued the Declaration of Principles on Freedom of Expression in November 2019. As the principles stand now, clause 3 above is imperative. The law must therefore be amended to repeal section 162 PCA to make way for civil sanctions for defamation, only. There is also no compromise about following the imperative in clause 3 because it is further stated in clause 4, in no uncertain terms, that criminalising defamation violates the right to freedom of expression.

In **Jaqueline Okuta & Another** (supra) the Constitutional & Human Rights Division of the High Court of Kenya relied on the imperatives in Article 19 of the ACHPR when it came to the conclusion that the provisions of section 194 of the Kenya Penal Code, which criminalised defamation, were inconsistent with Article 44 of the Constitution of Kenya. After setting out the principles, relevant provisions and observations about the Declaration, the court found and held that:

> *"Turning to the regional sphere, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24th November 2010, condemns criminal defamation in the specific context of journalism and the media,*
>
> ...
>
> *Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples' Rights:*
>
> > *"to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments."*
>
> *By now, I am persuaded beyond doubt that having regard to all of the foregoing, I take the view that the harmful and undesirable consequences of criminalizing defamation, viz: the chilling possibilities of arrest, detention and two years'*

imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society like ours.

Above all, I am clear in my mind that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Consequently, I am satisfied that criminal defamation is not reasonably justifiable in a democratic society within the contemplation of article 24 of the Constitution. In my view, it is inconsistent with the freedom of expression guaranteed by 33 of that Constitution."

The court also relied on the decision in **Lohe Issa Konate v Burkina Faso** (supra) where similar provisions on defamation laws were challenged and the African Court on Human and Peoples Rights came to the following conclusions:

"163. In essence, the Court notes that, for now, defamation is an offense punishable by imprisonment in the legislation of the Respondent State, and that the latter failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary.

164. Accordingly, the Court opines that sections 109 and 110 of the Information Code and section 178 of the Penal Code of Burkina Faso on the basis of which the Applicant was sentenced to a custodial sentence is contrary to requirements of article 9 of the Charter and article 19 of the Covenant. The Applicant having also mentioned article 66 (2) (c) of the Revised ECOWAS Treaty under which States parties undertake to 'respect the rights of journalists', the Court finds that the Respondent State also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the exercise of the freedom of expression by journalists in general and especially in the Applicant's capacity as a journalist.

165. Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that

the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.

166. The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments."

The decisions above are not only highly persuasive but also instructive because Uganda is a party to the instruments relied upon.

It is further pertinent to note that though the Supreme Court of Appeal of South Africa in **S v Hoho 2009 (1) SACR 276 (SCA)** recognized that criminal sanction is indeed a more drastic remedy than the civil remedy, it was also argued that this was counterbalanced by the onerous burden of proof beyond a reasonable doubt which is a requirement in all criminal matters as against proof on the balance of probabilities in civil matters. However, subsequently, the legislature in the Republic of South Africa passed the Judicial Matters Amendment Act, 2023 in which criminal defamation was abolished making defamation strictly a civil matter.

I would therefore find that section 162 PCA contravenes Article 9 of the ACHPR. Further, that section 163 does not meet the standard of the law that is required by Article 9 (2) of ACHPR.

Finally, I would also find that section 162 of the Penal Code Act contravenes Objective XXVIII (i) (b) of the National Objectives and Directive Principles of State Policy in the Constitution, because it is inconsistent with Uganda's international obligations. It is also inconsistent with Article 8A (1) of the Constitution and thus null and void.

This petition would therefore partially succeed, and since Kitariisibwa Katunguka, Musisi, Byaruhanga Rugyema and Nambayo, JJCC also agree, the following declarations shall issue:

(i) Parliament passed the Computer Misuse (Amendment) Bill, 2022 into an Act of Parliament without complying with the provisions of rule 24 (3) of the Rules of Procedure of Parliament made under Article 94 of the Constitution.

(ii) The enactment of the Computer (Amendment) Bill into an Act of Parliament without complying with rule 24 (3) of the Rules of Procedure of Parliament was inconsistent with Articles 88 and 89 of the Constitution, and as a result, the Computer Misuse (Amendment) Act, 2022, was null and void.

(iii) The provisions of the Computer Misuse Act (2023 Edition) that were challenged in Constitutional Petitions 34, 37 and 42 of 2022 are therefore all null and void because they were enacted without following the law.

(iv) The definition of the misdemeanour called *"libel"* under section 162 of the Penal Code Act in section 163 thereof is vague and ambiguous. To that extent, it contravenes the provisions of Article 19 (3) (a) of ICCPR and thus Objective XXVIII (i) (b) of the National Objectives and Directive Principles of State Policy in the Constitution.

(v) Section 162 of the Penal Code Act contravenes Article 9 of the African Charter on Human and Peoples' Rights; and section 163 that defines the term *"defamation"* therein does not meet the standard of the law that is required by Article 9 (2) of the Charter, and is inconsistent therewith to that extent and therefore null and void.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Mulyagonja, Kitariisibwa Katunguka, Musisi, Byaruhanga-Rugyema & Nambayo, JJCC)

CONSOLIDATED CONSTITUTIONAL PETITIONS NO. 34, 37 & 42 of 2022

1. **ALTERNATIVE DIGITALK LIMITED**
2. **TUMUHIMBISE NORMAN**
3. **MUSOKE ARNOLD ANTHONY**
4. **BIKOBERE FARIDA**
5. **MUKIIBI JERIMIAH**
6. **TUMUSIIME KATO**
7. **LUWEDDE LILLIAN**
8. **TULYAHABWE ROGERS**
9. **NABUKEERA TEANGEL TEDDY**
10. **NAMIREMBE ANGELLA**
11. **ESOMU SIMON PETER**
12. **ODUR ANTHONY**

PETITIONERS

AND

1. **HUMAN RIGHTS NETWORK FOR**
2. **JOURNALISTS-UGANDA (HRNJ-U)**
3. **CHAPTER FOUR UGANDA**
4. **COLLABORATION ON INTERNATIONAL ICT POLICY FOR EASTERN AND SOUTHERN AFRICA**
5. **CENTRE FOR CONSTITUTIONAL GOVERNANCE**
6. **UNWANTED WITNESS UGANDA**
7. **CENTRE FOR PUBLIC INTEREST LAW**
8. **STRATEGIC RESPONSE INTERNATIONAL**
9. **AFRICAN CENTRE FOR MEDIA EXCELLENCE**
10. **EDITORS GUILD**
11. **HON WINNIE KIIZA**
12. **AGATHER ATUHAIRE**
13. **WANDERA ANDREW**
14. **MUHINDO MORGAN**
15. **LILIAN DRABO**

PETITIONERS

AND

UGANDA LAW SOCIETY ::: PETITIONER

VERSUS

THE ATTORNEY GENERAL ::: RESPONDENT

JUDGMENT OF KETRAH KITARIISIBWA KATUNGUKA, JCC

1. I have read in draft the judgment prepared by my Learned Sister Hon. Justice Irene Mulyagonja, JCC. I am in agreement with her analysis and finding that the petition succeeds with declarations that: -
   i. Parliament passed the Computer Misuse (Amendment) Bill, 2022 into an Act of Parliament without complying with the provisions of rule 24 (3) of the Rules of Procedure of Parliament made under Article 94 of the Constitution.
   ii. The enactment of the Computer (Amendment) Bill into an Act of Parliament without complying with rule 24 (3) of the Rules of Procedure of Parliament was inconsistent with Articles 88 and 89 of the Constitution, and as a result, the Computer Misuse (Amendment) Act, 2022, was null and void.
   iii. The provisions of the Computer Misuse Act (2023 Edition) that were challenged in Constitutional Petitions 34, 37 and 42 of 2022 are 10 therefore all null and void because they were enacted without following the law.
   iv. The definition of the misdemeanour called "libel" under section 162 of the Penal Code Act in section 163 thereof is vague and ambiguous. To that extent, it contravenes the provisions of Article 19 (3) (a) of ICCPR

and thus Objective XXVIII (i) (b) of the National Objectives and Directive Principles of State Policy in the Constitution.

v. Section 162 of the Penal Code Act contravenes Article 9 of the African Charter on Human and Peoples' Rights; and section 163 that defines the term "defamation" therein does not meet the standard of the law that is required by Article 9 (2) of the Charter, is inconsistent therewith to that extent and therefore null and void.

vi. Section 162 of the Penal Code Act Contravenes objective XXVIII (i) (b) of the National Objectives and Directive Principles of State Policy in the Constitution because it is inconsistent with the International obligations of Uganda. It is thus inconsistent with Article 8A (1) of the Constitution and null and void.

2. And orders that: -

(a) a permanent injunction issues to restrain the respondent and all government agencies, authorities and officials from enforcing the impugned provisions of sections 11, 23, 26, 27, 28 and 29 of the Computer Misuse Act, 2003 and section 162 of the Penal Code Act.

(b) The respondent shall pay 30% of the costs of the petitioner's Advocates.

Dated at Kampala this 17th day of March 2026

Ketrah Kitariisibwa Katunguka
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Mulyagonja, Kitariisibwa Katunguka, Musisi, Byaruhanga-Rugyema & Nambayo, JJCC)

CONSOLIDATED CONSTITUTIONAL PETITIONS NO. 34, 37 & 42 of 2022

1. ALTERNATIVE DIGITALK LIMITED
2. TUMUHIMBISE NORMAN
3. MUSOKE ARNOLD ANTHONY
4. BIKOBERE FARIDA
5. MUKIIBI JERIMIAH
6. TUMUSIIME KATO
7. LUWEDDE LILLIAN
8. TULYAHABWE ROGERS
9. NABUKEERA TEANGEL TEDDY
10. NAMIREMBE ANGELLA
11. ESOMU SIMON PETER
12. ODUR ANTHONY :::PETITIONER

AND

1. HUMAN RIGHTS NETWORK FOR JOURNALISTS-UGANDA (HRNJ-U)
2. CHAPTER FOUR UGANDA
3. COLLABORATION ON INTERNATIONAL ICT POLICY FOR EASTERN AND SOUTHERN AFRICA
4. CENTRE FOR CONSTITUTIONAL GOVERNANCE

5. UNWANTED WITNESS UGANDA

6. CENTRE FOR PUBLIC INTEREST LAW

7. STRATEGIC RESPONSE INTERNATIONAL

8. AFRICAN CENTRE FOR MEDIA EXCELLENCE

9. EDITORS GUILD

10. HON WINNIE KIIZA

11. AGATHER ATUHAIRE

12. WANDERA ANDREW

13. MUHINDO MORGAN

14. LILIAN DRABO::PETITIONERS

AND

UGANDA LAW SOCIETY ::PETITIONER

VERSUS

THE ATTORNEY GENERAL :::RESPONDENT

JUDGEMENT OF ESTA NAMBAYO, JCC

I have had the benefit of reading in draft the judgment of my sister, Irene Mulyagonja, JCC. I agree with her reasoning and finding that the petitions succeed and with the orders that she has proposed.

Dated and delivered at Kampala this ......17th......day of ......March...... 2026

....

Esta Nambayo
JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Mulyagonja, Kitariisibwa Katunguka, Musisi, Byaruhanga-Rugyema & Nambayo, JJCC)

CONSOLIDATED CONSTITUTIONAL PETITIONS NO. 34, 37 & 42 of 2022

1. **ALTERNATIVE DIGITALK LIMITED**
2. **TUMUHIMBISE NORMAN**
3. **MUSOKE ARNOLD ANTHONY**
4. **BIKOBERE FARIDA**
5. **MUKIIBI JERIMIAH**
6. **TUMUSIIME KATO**
7. **LUWEDDE LILLIAN**
8. **TULYAHABWE ROGERS**
9. **NABUKEERA TEANGEL TEDDY**
10. **NAMIREMBE ANGELLA**
11. **ESOMU SIMON PETER**
12. **ODUR ANTHONY**

PETITIONERS

AND

1. **HUMAN RIGHTS NETWORK FOR JOURNALISTS-UGANDA (HRNJ-U)**
2. **CHAPTER FOUR UGANDA**
3. **COLLABORATION ON INTERNATIONAL ICT POLICY FOR EASTERN AND SOUTHERN AFRICA**
4. **CENTRE FOR CONSTITUTIONAL GOVERNANCE**
5. **UNWANTED WITNESS UGANDA**
6. **CENTRE FOR PUBLIC INTEREST LAW PETITIONERS**
7. **STRATEGIC RESPONSE INTERNATIONAL**
8. **AFRICAN CENTRE FOR MEDIA EXCELLENCE**
9. **EDITORS GUILD**
10. **HON WINNIE KIIZA**
11. **AGATHER ATUHAIRE**
12. **WANDERA ANDREW**
13. **MUHINDO MORGAN**
14. **LILIAN DRABO**

AND

UGANDA LAW SOCIETY ::PETITIONER

VERSUS

THE ATTORNEY GENERAL :::RESPONDENT

JUDGMENT OF BYARUHANGA JESSE RUGYEMA, JCC.

I have had the benefit of reading in draft the judgment prepared by my learned sister, Hon. Lady Justice Irene Mulyagonja, JCC.

I agree with her detailed analysis, conclusions and the orders proposed.

I have nothing useful to add.

Dated at **Kampala this**.....17th.....**day of**.....March.....**2026**.

.....

Byaruhanga Jesse Rugyema

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Mulyagonja, Kitariisibwa Katunguka, Musisi, Byaruhanga-Rugyema & Nambayo, JJCC)

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AND

UGANDA LAW SOCIETY ::PETITIONERS

VERSUS

THE ATTORNEY GENERAL :::RESPONDENT

JUDGMENT OF MUSISI, JCC

I have had the advantage of reading the draft judgment of my learned sister, Irene Mulyagonja, JCC. I agree entirely with her reasoning and conclusions, and I concur with the orders proposed therein.

Dated and signed at Kampala this 17th day of March 2026.

John Mike Musisi

JUSTICE OF THE CONSTITUTIONAL COURT