

Uganda Supreme Court orders Constitutional Court to hear a petition on maternal health rights violations

Centre for Health, Human Rights and Development and Three Others v. Attorney General [2015], Constitutional Appeal No. 01 of 2013 (Supreme Court of Uganda at Kampala)
[Decision online.](#)

COURT HOLDING

The petition raised competent questions for the Constitutional Court to determine under Article 137(4) of the Constitution. Therefore, the Constitutional Court should have heard, interpreted and determined the issues raised by the petitioners as they implicated constitutional rights.

The Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the pretext that this encroached on the discretionary powers of another organ of the state.

The doctrine of political question is of limited application in Uganda. The Constitutional Court had erred in dismissing the petitioners' claim without hearing the merits, on the ground that it raised a political question.

Summary of Facts

This was an appeal of a ruling from the Constitutional Court rendered in Constitutional Petition No. 16 of 2011 in which the appellants had challenged the Government of Uganda for failing to provide basic maternal health services. The petitioners claimed that the failure to provide basic maternal healthcare infringed constitutionally guaranteed rights under Articles 22, 24, 33, 34 and 44, as well as the right of access to health services under Objectives XIV(b), XV, XX, and Article 8A of the Constitution of the Republic of Uganda 1995 (the Constitution).

The Constitutional Court dismissed the application without hearing its merits on the ground that the petition did not disclose competent questions that needed interpretation, and that the petition concerned a political question that it could not adjudicate upon.

The appellants therefore filed the appeal on three grounds. The first was that the Constitutional Court did not correctly apply the doctrine of political question. Second, the Constitutional Court erred in law in holding that the petition did not raise competent questions requiring constitutional interpretation. Third, the Constitutional Court erred in law when it decided that the petition called it to review and implement health policies.

Arguments of parties

The appellants argued that Article 137(1) of the Constitution vests the Constitutional Court with powers to interpret the Constitution, so that it had powers to review any executive act that violated or threatened any rights guaranteed by the Constitution. The appellants cited *Ismail Serugo v. Kampala City Council & Another*, (Constitutional Appeal No. 2 of 1998) to support the argument that the Constitutional Court was obliged to entertain the petition. They further argued that no article of the Constitution was immune from interpretation. They cited *Uganda Association of Women Lawyers & Five others v. Attorney General*, (Constitutional Petition No. 2 of 2003) to advance the position that the Constitutional Court should always remain accessible to any person seeking interpretation of the Constitution.

In response, the respondent argued that the Constitutional Court decision could not hear the petition because it involved a political question, and would be contrary to the principle of separation of powers. The respondent cited Article 90(1) of the Constitution as read with Rules 133 and 161 of Parliamentary Rules of Procedure, to argue that these mandate the Parliament of Uganda to have oversight over the implementation of government policies and programs such as health programs. The respondent also argued that courts cannot adjudicate on matters that implicate allocation of resources as this would be contrary to Article 112 of the Constitution and Section 7(2) of the Budget Act, 2001.

The appellants argued that the doctrine of political question, first articulated by the Supreme Court of the United States (US Supreme Court) in *Marbury v Madison*, (5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)) was not the proper authority to guide interpretation and application of the Uganda Constitution. Rather, the Court should be guided by Article 132(4) of the Constitution. Further, the appellants contended that the Constitution requires all government agencies and organs to respect, uphold and promote the rights enshrined in the Constitution, so that no act or omission of Government was immune from constitutional scrutiny.

The appellants argued that even if the doctrine of political question had application in Uganda, it could not apply in cases where constitutional rights of an individual or constitutionality of the law were at stake. They cited the decisions of the US Supreme Court in *Zivotosfsky v. Clinton Sec of State* 32 S. Ct 1421 (2012), and the decision of the Supreme Court of Canada in *Bertrand v. AG of Quebec* [1992] 2 LRC 408 where executive decisions were reviewed because they involved constitutional rights. The appellants also referenced other court decisions that rejected the argument of immunity of executive decision concerning health matters, such as *Minister of Health and Others v. Treatment Action Campaign*, 2002 (5) SA 721 (Constitutional Court of South Africa), and *Paschim Banga Khet Mazdoor Sanity v. State of West Bengal*, (1996) 4 S.C.C 37 (Supreme Court of India).

Issues

According to the Court, the application raised three issues for determination:

- Whether the petition raised competent grounds requiring interpretation under Article 137 of the Constitution
- Whether the Constitutional Court properly interpreted and applied the political question doctrine, and
- Whether the Constitutional Court properly exercised its jurisdiction in refusing to determine the matter on the grounds that it would interfere with the discretionary mandate of another arm of government.

Court's Analysis

The Court disagreed with the reasoning and conclusion of the Constitutional Court that the petition had not raised specific issues under the Constitution for its determination. The Court agreed with the appellants that their petition had specified the acts and omissions and the particular provisions of the Constitution that were implicated. The Court found that the petition had raised competent questions for the Constitutional Court to have determined in accordance with Article 137(4) of the Constitution. The Court therefore held that Constitutional Court had erred in holding that the petition did not raise competent questions for it to determine.

The Court then considered the first and third grounds of appeal together. The Constitutional Court had held that the issue it was called upon to determine concerned the discretion of the executive to formulate and determine policy, and that it was therefore a political question which the Constitutional Court could not adjudicate upon. The Court reviewed the *Marbury case* and observed that the doctrine was an interpretive tool fashioned by courts, rather than provided for by the Constitution or legislation. The Court further observed that this tool was created to address particular political challenges in the American system of government and was in any case not applied consistently by the American courts.

The Court said that Article 137(1) of the Constitution was interpreted by a Ugandan Court in *Paul Semogerere and Two others v. the Attorney General* (Constitutional Appeal No. 1 of 2002) to mean that the Constitutional Court is mandated to determine on any claim involving constitutional rights violations. The Court therefore held that the Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the grounds that it infringed on the discretionary powers of another organ of the state.

The Court then turned to the argument that the Constitutional Court was barred from adjudicating on matters that involved allocation of resources and therefore falling within the ambit of Article 111(2) of the Constitution. The Court found that Article 111(2) vests the power to determine, formulate and implement government policies in the Cabinet, while Article 137(3)(b) grants any citizen who alleges contravention of a provision of the Constitution the right to petition the Constitutional Court for redress. It therefore did not agree with the Constitutional Court's conclusion that it could not entertain the petition because it involved a political question, nor with the respondent's assertion that by virtue of being enacted lawfully by the Legislature, laws were therefore immune from constitutional scrutiny.

The Court also reasoned that if the Constitutional Court were to allow the argument that the political question ousted its jurisdiction, then all acts and omissions of the executive would be beyond its scrutiny. This would be contrary to the spirit of the Constitution which demands that state actors respect, uphold and promote the Constitution. The Court therefore held that the Constitutional Court had erred when it abdicated its constitutional duty to hear and determine on the allegations of violations of constitutional provisions by the executive because executive acts and omissions are not protected from constitutional challenge. The Court also held that the political question doctrine was of limited application in Uganda, and that the Constitutional Court had erred in dismissing the petitioners' claim without hearing the merits, on the ground that it raised a political question.

In a separate concurring judgement, Kutereebe CJ, expressed the view that under a democratic dispensation, there is no such thing as absolute separation of powers among arms of the government. Rather, the Constitution provided a system of checks and balances, where the courts had the power to review constitutionality of executive decisions. Kutereebe CJ was of the view that the petition had created an important opportunity for the Constitutional Court to determine on the content and application of the right to life and the right to health in Uganda. He also disagreed with the reasoning that the Constitutional Court could not intervene in policy issues that involve resource allocation. He cited several examples of cases where courts intervened in executive decisions that implied resource allocation, including in *Minister of Health and others v. Treatment Action Campaign*, (supra) and the Indian court decision in *Pashim Banga Khet Mazdoor Samity and Others v. State of West Bengal and Another*, (1996) AIR SC 2426 (Supreme Court of India).

Conclusion

The appeal succeeded and the matter was remitted to the Constitutional Court for determination of the merits.

Significance

The African region has some of the highest rates of maternal mortality globally. Uganda's maternal mortality ratio is estimated at 343 deaths per 100,000 live births.¹ The causal factors may be complex, but governments have the mandate to ensure availability and accessibility of basic services so that women have appropriate care during pregnancy and childbirth. Many countries have adopted constitutions that recognise rights relating to access to maternal health services. Some constitutions such as the Uganda Constitution do not explicitly provide for the right to access maternal health care in the Bill of Rights, but recognise policy objectives relating to health care services including maternal health. However, rights relating to maternal deaths are implicated in other rights provisions of the constitution, for instance Article 22 on the right to life.

This case sets important jurisprudential precedent in signalling that preventable maternal deaths is a human rights issue. Maternal mortality and other women's health issues have usually been regarded as "natural" phenomena that families or communities should privately deal with, and should not surface into the public domain of politics and economics. Perhaps the strange and puzzling reaction of the Constitutional Court when it was presented with a concrete case of two women who died as a result of acts or omissions of the health system epitomises how socio-political systems would want to make women's or social issues invisible, unlike other issues that are considered to be the "real" issues states and governments should be dealing with.

It is time that governments are held accountable for ensuring equitable and quality provision of maternal health services. Too many women in Africa continue to lose their lives due to pregnancy and childbirth. The African Union adopted a resolution in 2008 on maternal mortality in Africa at the African Commission on Human and Peoples' Rights Meeting.² The recommendations that were made at this meeting are still pertinent. These included that African states:

- Ensure participation of women and civil society in the formulation, implementation, monitoring and evaluation of policies and frameworks aimed at addressing maternal mortality;
- Take all appropriate measures including positive discrimination in providing funds for specific programs and projects to secure maternal health;
- Provide well-staffed and equipped maternity centres in rural areas;
- Employ and retain skilled health personnel and birth attendants at rural and semi-urban areas;
- Train and retain health workers in emergency obstetric care;
- Develop community-led emergency transport systems to cushion the effect of delays in getting medical attention;

¹ World Health Organisation, *Trends in maternal mortality: 1990 to 2015: estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division*, World Health Organisation, Geneva, 2015.

² African Commission on Human and Peoples' Rights, *135: Resolution on Maternal Mortality in Africa*, (2008) (<http://www.achpr.org/sessions/44th/resolutions/135/>)

- Develop adaptive training curriculum for the education of women and girls on rights to reproductive health.

Limited resources are certainly a challenge. However, the limitation should not merely be a scapegoat for not doing anything or doing too little. It is therefore important for advocates such as CEHURD and others to continue to agitate for implementation of measures which will lead toward improved maternal health care, and toward elimination of preventable maternal deaths and ill-health in Africa.