**Kyamanywa v Uganda**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 7 April 2000

**Case Number:** 16/99

**Before:** Oder, Tsekooko, Karokora, Kanyeihiamba and

Mukasa-Kikonyogo JJSC

**Sourced by:** B Tusasirwe

**Summarised by:** H K Mutai

**Summarised by:** H K Mutai

*[1] Constitutional law – Constitutionality – Corporal punishment – Appellant sentenced to receive six*

*strokes of the cane – Appeal against constitutionality of corporal*

*punishment – Whether the Supreme Court had the jurisdiction to determine the issue – Section 274A –*

*Penal Code – Articles 24, 132(3) and 137 – Constitution.*

*[2] Criminal law – Jurisdiction – Sentence – Appeal against sentence – Appeal against sentence must be*

*on a matter of law – Section 6(3) – Judicature Statute 1996 – Section 108(1) – Trial on Indictment*

*Decree.*

**Editor’s Summary**

The Appellant and his co-accused were convicted of the offence of robbery contrary to sections 272 and

273(2) of the Penal Code and sentenced to death. The two accused appealed separately to the Court of Appeal where their convictions were reduced to simple robbery contrary to sections 272 and 273(1)(*b*) of the Penal Code. The Court of Appeal then sentenced the Appellant to six years’ imprisonment, six strokes of the cane and three years of police supervision after serving his term of imprisonment. He appealed to the Supreme Court against the sentence of six strokes of the cane on the ground that the sentence of corporal punishment was in conflict with the Constitution and thus illegal. Counsel for the Respondent raised a preliminary objection to the appeal on the ground that the Appellant had no right of appeal to the Supreme Court on the ground laid out since the appeal did not comply with the provisions of section 6(3) of the Judicature Statute. The Court heard arguments on the objection but postponed its ruling on the preliminary objection and instead invited the parties to proceed with their substantive submissions. Counsel for the Appellant submitted that caning constituted a form of torture and was a cruel, inhuman and degrading punishment contrary to article 24 of the Constitution. Counsel for the Respondent argued firstly that only the Constitutional Court could declare corporal punishment unconstitutional and, as it had not done so, it was a legal form of punishment under section 274A of the Penal Code. Secondly, he submitted that corporal punishment was legal because it was sheltered by the savings provision of article 273 of the Constitution, since the Penal Code had been in existence at the time the Constitution came into force in 1995.

**Held** – (1) Section 6(3) had been complied with in that (i) the sentence was not one fixed by law, as the provisions of section 108(1) of the Trial on Indictment Decree and section 274A of the Penal Code, apart from providing for a maximum, did not specify or fix the number of strokes to which a person would be sentenced, and (ii) the appeal was not against the severity of the sentence but against its legality. The preliminary objection would accordingly be overruled. (2) (Kanyeihamba JSC dissenting) Article 137 of the Constitution endowed the Constitutional Court with original jurisdiction over matters of constitutional interpretation. In order to decide on the constitutionality of corporal punishment, the Supreme Court would be required to construe the meaning of article 24 in relation to section 274A, an exercise that was clearly an act of interpretation. Section 132(3) of the Constitution gave the Supreme Court appellate powers in constitutional matters and it could not therefore entertain the appeal in the same manner as a court with original jurisdiction. Moreover, since it was likely that it would be necessary to adduce evidence to prove that corporal punishment was a form of torture, cruel, inhuman and degrading, the matter was better handled by the Constitutional Court as a court of first instance. Accordingly, a substantial question of law having arisen, the provisions of article 137 of the Constitution would be applied and the issue referred to the Constitutional Court where the issues could be properly and fully canvassed and a determination made on the question of whether corporal punishment contravened the Constitution.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Major-General Tinyefuza v Attorney-General* (SC) constitutional appeal number 1 of 1997 (UR)