**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

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*[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.*

**JUDGMENT**

**ODER, TSEKOOKO, KAROKORA AND MUKASA-KIKONYOGO JJSC:** The Appellant, Simon Kyamanywa, and another person were tried and convicted by the High Court on the first count of an indictment of two counts of robbery contrary to sections 272 and 273(2) of the Penal Code. The particulars of the count on which they were convicted were that the Appellant, Simon Kyamanywa, and his co-accused, Sunday Joseph, on or about 26 May 1994, at Kijuujubwa Village, in Masindi District, robbed September Mathias of one NIA Radio Cassette, model CRC 3 OOT KY II and one torch and at or immediately before or immediately after the said robbery, threatened to use a deadly weapon, to wit a gun, on the said September Mathias. The Appellant and his co-accused were sentenced to death. The co-accused separately appealed to the Court of Appeal which substituted a conviction for simple robbery for the one of capital robbery. The Appellant’s appeal to the Court of Appeal against his conviction also succeeded. His conviction for robbery contrary to sections 272 and 273(2) of the Penal Code was quashed and the sentence of death set aside. The Court of Appeal substituted a conviction of robbery contrary to sections 272 and 273(1)(*b*) for the one of robbery for which he had been convicted by the High Court. The Court of Appeal sentenced the Appellant to a term of imprisonment of six years and six strokes of the cane. The Court of Appeal also ordered that he should undergo police supervision for three years after serving the term of imprisonment. The co-accused, Sunday Joseph, made a separate appeal to this Court (criminal appeal number 5 of 1998). On 8 September 1999 that appeal was withdrawn with the leave of this Court. The Appellant has now appealed to this Court against the sentence of six strokes of the cane. The only ground of appeal is set out in the memorandum of appeal as follows:

“1) The decision of the Court of Appeal that the Appellant be sentenced to receive 6 strokes of the cane is in conflict with the provisions of the 1995 Constitution and is therefore, illegal. It is proposed to ask

Court for an order that:

( a) The appeal be allowed.

( b) Sentence be set aside”.

When the appeal was called for hearing, Mr Charles Ogwal *Olwa*, Principal State Attorney, for the State Respondent, took a preliminary objection to the appeal, and prayed that the appeal should be struck out. Mr Joseph *Zagyenda* appearing for the Appellant opposed the objection. The learned counsel then made their arguments on the objection. We postponed our ruling on the same and asked both the parties to proceed with their respective submissions on the merit of the appeal. We indicated that we would give our ruling on the objection in our judgment. We now proceed to do so. In essence the objection is that the appeal is incompetent because the Appellant has no right of appeal to this Court on the ground set out in his memorandum of appeal. The appeal is not properly before this Court. Section 6(3) of the Judicature Statute 1996, provides: “In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law not including the severity of sentence”. In the instant case, the Appellant is appealing against a sentence of corporal punishment imposed on him by the Court of Appeal. Sentence of corporal punishment is provided for by section 274A of the Penal Code which states: “Without prejudice to anything contained in any written law, any person who is sentenced to a term of imprisonment under the provisions of section 273 or section 274 of this Code, shall, in addition thereto, be sentenced to corporal punishment”. Corporal punishment is not defined by the Penal Code Act. The *Shorter Oxford Dictionary* 1973 Volume I defines it as: “Punishment inflicted on the body, now confined to flogging”. The *Concise Oxford Dictionary* defines it as: “Punishment inflicted on the body especially by beating”. The provisions of section 108(1) of the Trial on Indictment Decree appear to be consistent with this definition. The section indicates what weapon or instrument should be used in inflicting corporal punishment and how it should be meted out. It states: “108 (1) Only one sentence of corporal punishment shall be imposed at one time. Such corporal punishment shall be inflicted with a rod or cane to be approved by the minister. The sentence shall specify the number of strokes which shall not exceed twenty-four”. Section 274A of the Penal Code by virtue of which the Court of Appeal sentenced the Appellant to six strokes of the cane does not specify or fix the number of strokes of the cane to which a person must be sentenced on conviction under sections 273 and 274. It does not say, for instance, that: “any person who is sentenced to a term of imprisonment under the provisions of section 273 or section 274 of this Code, shall, in addition thereto, be sentenced to X strokes of the cane of corporal punishment”. The above words are our addition for purposes of explaining the point. If the section provided for the number of strokes of the cane which a court must impose, then the sentence would be fixed. As it is, the number of strokes of the cane applicable is left to the discretion of the trial court. Section 108(1) of the Trial on Indictment Decree sets out the maximum within which that discretion may be exercised. The limit is 24 strokes. In the circumstances the sentence of corporal punishment by strokes of the cane to which the Appellant was sentenced by the Court of Appeal is one which is not fixed by law for purposes of section 6(3) of the Judicature Statute. For that reason, this appeal is competent. The appeal is competent for another reason. The Appellant is not appealing against severity of sentence. He is appealing against the legality (or constitutionality) of the sentence. He contends that the sentence of corporal punishment to Page 430 of [2000] 2 EA 426 (SCU) which he was sentenced by the Court of Appeal is illegal because it is in conflict with article 24 of the Constitution. It is contended that the punishment is a form of torture, is cruel, inhuman and degrading. This is a matter of law not including severity of sentence. It is a condition required by section 6(3) of the Judicature Statute for a person to appeal to the Supreme Court against sentence. For the above reasons, we see no merit in the Respondent’s preliminary objection to this appeal. It is therefore overruled. In his submission on the merit of the appeal, Mr Joseph *Zagyenda*, the Appellant’s learned counsel, contended that the punishment of six strokes of the cane imposed on the Appellant, is in conflict with article 24 of the Constitution. Caning is a form of torture, cruel, inhuman and degrading punishment. We should therefore declare it to be unconstitutional, and set aside the Appellant’s sentence to corporal punishment of six strokes of the cane. For the Respondent, Mr Charles Ogwal *Olwa*, Principal State Attorney, opposed the appeal. He submitted in his reply that because the Constitutional Court has not yet declared corporal punishment unconstitutional, corporal punishment is legal under section 274A of the Penal Code Act. Only the Constitutional Court under article 137(3) of the Constitution can declare corporal punishment unconstitutional. Secondly, corporal punishment created by section 274A of the Penal Code Act is legal because it was saved by article 273 of the Constitution when the Constitution came into force in 1995, the Penal Code Act having been in existence before. He prayed for dismissal of the appeal. Article 24 of the Constitution which the Appellant contends the corporal punishment is in conflict with provides: “No person shall be subjected to any form of torture, cruel, inhuman, or degrading treatment or punishment”. This appeal requires us to decide whether, and declare that, corporal punishment is inconsistent with article 24 of the Constitution. The constitutionality of corporal punishment is therefore being challenged by the Appellant. We have to decide whether corporal punishment is constitutional or not. In order to make that decision, it is necessary, in our view, to construe the meaning of that article in relation to section 274A of the Code Act. In our view that clearly involves interpretation of the Constitution. The jurisdiction for interpretation of the Constitution in the first instance is the preserve of the Constitutional Court under Article 137(1) of the Constitution which says: “137 (1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court”. This means that it is the Constitutional Court which has the original jurisdiction on matters of interpretation of the Constitution. It also has the original jurisdiction in cases where a person seeks a declaration that an Act of Parliament is inconsistent with a provision of the Constitution. This is provided for in article 137(3) which states: “(3) A person who alleges that: An Act of Parliament, ... Page 431 of [2000] 2 EA 426 (SCU) is inconsistent with or in contravention of a provision of this Constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate”. In the instant case the Appellant is, in essence, seeking a declaration that the corporal punishment to which he has been sentenced is inconsistent with or contravenes the provisions of article 24 of the Constitution. The sentence of corporal punishment is provided for by an Act of Parliament. If corporal punishment were to be declared to be inconsistent with the provisions of article 24 of the Constitution the result would be that to that extent section 274A of the Penal Code would be inconsistent with the provisions of article 24. Insofar as this appeal seeks for an interpretation of the Constitution and for a declaration under article

137(3)(*a*) of the constitution that corporal punishment is unconstitutional, it follows that it is the

Constitutional Court which has the original jurisdiction on these matters as the court of first instance to consider and determine the issues raised by this appeal.

This Court cannot determine at this stage the issues raised in the appeal for the following reasons.

First, in constitutional matters this Court is an appellate court. Article 132(3) provides:

“(3) Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court on questions of law”. As the appellate court in constitutional matters this Court cannot entertain and determine this appeal as a court with original jurisdiction or a court of first instance. The issues raised by this appeal are being raised for the first time in this Court. It has not come to this Court on appeal. The Appellant has not been aggrieved by a decision of the Constitutional Court on the question raised by his appeal, which is a condition precedent before this Court can entertain and determine the question. Secondly, it is the Constitutional Court as the court of first instance on the issue, and not this Court, which should first deal with the matter, because it may be necessary to adduce evidence before the Constitutional Court to prove that corporal punishment is a form of torture, cruel, inhuman and degrading treatment or punishment. On the basis of such evidence (if any) and submissions by counsel, the Constitutional Court would then make the necessary decision and declaration on the issue raised in this appeal.

In view of what we have said above in this judgment, a question as to the interpretation of the

Constitution has arisen in the procedures of hearing this appeal in this Court. The provisions of clause (5)

of article 137 of the Constitution are, therefore relevant. The clause says:

“5. Where any question as to the interpretation of this Constitution arises in any proceedings in a court of

law other than a Field Court Martial, the Court

( *a*) m ay, if it is of the opinion that the question involves a substantial question of law; and

( *b*) S hall, if any party to the proceedings requests it to do so,

refer the question to the Constitutional Court for decision in accordance with clause (1) of this article”.

In the instant case, none of the parties to the appeal has requested the Court for a reference to the Constitutional Court of the question of interpretation of the Constitution which has arisen. Accordingly, clause (5)(*b*) of article 137 is inapplicable to this case. The Court, therefore, is not obliged to comply with clause 5(*b*). Under clause 5(*a*), the court concerned has discretion to refer a question arising before it if it is of the opinion that the question involves a substantial question of law. The provisions of this clause notwithstanding, another question now arises whether this Court should exercise its discretion under clause 5(*a*) of article 137 of the Constitution in the instant case in view of its position and jurisdiction in the hierarchy of courts in the judicial system as established by the 1995 Constitution? Clause 5(a) appears to empower any court before which a question as to the interpretation of the Constitution arises in any proceedings before it to refer the question to the Constitutional Court at its own discretion. Only the Field Court Martial is exempted. This Court is not exempted. If it was the intention of the makers of the Constitution to do so, they would have no doubt done so as they did the Field Court Martial. In the circumstances our view is that the expression “any proceedings in a court of law other than a Field Court Martial” is wide enough to include the proceedings in this appeal in which the question under discussion has arisen and this Court before which the question has arisen. We also think that the question of interpretation of the Constitution which has arisen in this appeal is a substantial question of law. It is therefore necessary for the Constitutional Court to decide on the question in relation to section 274A of the Penal Code. That is to say, it should answer the question whether corporal punishment is in conflict with or contravenes provisions of the Constitution. There appears to be no good reason for this Court to negatively exercise its discretion by not referring the question to the Constitutional Court. It would be an arbitrary decision to do so, given the fact that a substantial question of law involving interpretation of the Constitution has arisen. On the other hand as discretion must be exercised judiciously, our view is that it is the proper course to take. Moreover, it has to be appreciated that the issue raised in this appeal is bound to have consequences in respect of other offences for which convictions entail corporal punishment. It is therefore important that issues raised in this appeal should be properly and fully convassed in the Constitutional Court which should make its views on the matter known. Many courts below will be affected by such a decision. For these reasons, we think that this Court should make such a reference in accordance with clause 5(*a*) of article 137 of the Constitution. Clause (6) of article 137 of the Constitution provides: “(6) Where any question is referred to the Constitutional Court under clause (5) of this article the Constitutional Court shall give its decision on the question and the Court in which the question arises shall dispose of the case in accordance with that decision”. If this Court referred the question to the Constitutional Court it would do so as the court in proceedings before which the question has arisen. As we have already said before in this judgment it would do so like any other court other than a Field Court Martial under clause (5) of article 137 of the Constitution. It would not be doing so in its jurisdiction as the appellate Constitutional Court consisting of all its members, which constitutionally it is, under article 131(2) of the Constitution. Similarly after the Constitutional Court has given its decision on the question referred to it, this Court would dispose of the appeal before it, not as the Constitutional Appellate Court, but as the Court from the proceedings before which the question arose. It would have to dispose of the appeal in accordance with the decision of the Constitutional Court on the question. To us, that appears to be the effect of the mandatory language of clause (6) of article 137. In case the decision of the Constitutional Court on the question is appealed (which at this stage can only be a matter for speculation), then such an appeal would come to this Court in its jurisdiction as the appellate Constitutional Court consisting of all the members of the Court. In case the decision of the Constitutional Court on the question referred to it is not appealed, then such a decision would stand as the law until it is overturned or upheld on appeal by the appellate Constitutional Court in another case in the future. In the circumstances, and in accordance with the provisions of clause 5(*a*) of article 137 of the Constitution and the Schedule to the Interpretation of the Constitution (Procedure) Rules, 1992 (Modification) Directions 1996 (Legal Notice Number 3 of 1996), the following question is hereby referred to the Constitutional Court. Form: Reference to the Constitutional Court. In The Constitutional Court of Uganda. The Interpretation of The Constitution (Procedure) Rules. The Reference of the Honourable Justices of the Supreme Court, Oder, Tsekooko, Karokora, Kanyeihamba (dissenting) and Mukasa-Kikonyogo JJ.SC, of the Supreme Court sitting at Kampala in Supreme Court criminal appeal number 16 of 1999. The Supreme Court being of the opinion that a substantial question of law as to the interpretation of the Constitution has arisen in the above proceedings. The question or issues are: “On 16 March 1999, the Court of Appeal of Uganda at Kampala (Kato, Engwau and Twinomujuni JJA) in the Court of Appeal criminal appeal number 52 of 1998, *Simon Kyamanywa v Uganda*, convicted the Appellant of robbery contrary to sections 272 and 273(1)(*b*) of the Penal Code Act and sentenced him to imprisonment for six years and to six strokes of the cane. It was also ordered that the Appellant should undergo police supervision for three years. The sentence of six strokes of the cane was imposed under section 274A of the Penal Code Act. Is the sentence of six strokes of the cane inconsistent with or does it contravene the provisions of article 24 of the Constitution?” The Supreme Court desires the Constitutional Court to determine the question or issues in order to dispose of the above appeal.

**KANYEIHAMBA JSC (dissenting):** The facts and circumstances leading to this appeal are ably described in the majority judgment of my learned brothers and sister and I need not repeat them except in so far as they are relevant to this judgment. Suffice to say that the Appellant Simon Kyamanywa and another accused, Sunday Joseph, were charged on two counts of capital robbery contrary to sections 272 and 273(2) of the Penal Code Act. The High Court convicted and sentenced them to death. In separate appeals, the Court of Appeal allowed the appeals but convicted the two of simple robbery contrary to sections 272 and 273(1)(*b*) of the Penal Code Act and sentenced them to terms of imprisonment, corporal punishment and made some other orders which are not relevant to this appeal. The Appellant appealed against corporal punishment. There was one ground of appeal in the memorandum of appeal which read as follows: “The decision of the Court of Appeal that Appellant be sentenced to receive 6 strokes of the cane is in conflict with the provisions of the 1995 Constitution and is therefore illegal”. Appellant asked this Court for an order allowing the appeal and setting aside the sentence of corporal punishment. Counsel’s submissions and arguments are adequately summarised in the majority judgment. I will first deal with the question of whether or not this Court has jurisdiction to hear this application. Article 50 of the Constitution provides: “(1) Any person who claims that fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation. (2) Any person or organisation may bring an action against the violation of another person’s or group’s human rights. (3) Any person aggrieved by any decision of the court may appeal to the appropriate court. (4) Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter”. In *Major-General Tinyefuza v Attorney-General (SC)* constitutional appeal number 1 of 1997, (UR)*,* this Court held that under article 50 of the Constitution, any person if aggrieved by any decision of a court may appeal to the appropriate court including the Constitutional Court for a remedy. In my opinion any court and any tribunal which is properly constituted has jurisdiction to hear and determine any dispute arising from the application and enforcement of any provision of the Constitution. Where a matter arises as to whether any act, decision or behaviour is contrary to the provisions of the Constitution, anyone in a position to do so may declare such an act, decision or behaviour to be contrary to the provisions of the Constitution. It is then upon the person disagreeing with that declaration to seek the assistance of the Constitutional Court to interpret the declaration. If it were to be held that every time any matter affecting or related to the provisions of the Constitution had to go to the Constitutional Court for interpretation or construction, the Constitution would become stale and entirely unreliable. The Appellant has sought the protection of this Court and in my opinion, this Court must give him that protection or deny it to him on legal and reasoned grounds. In my view, litigants or Appellants who, come before court are entitled to have a ground or grounds of their claim or appeal, as the case may be, considered and resolved by the court if that ground or grounds would, if not dealt with, leave some matter or matters raised in the case unresolved. Failure by the court to consider and resolve such matters would, in my opinion, be a failure on the part. of that court to do its duty. As far as this appeal is concerned there is nothing prohibited by the Constitution or by the laws of Uganda. On the contrary, my own understanding of the Constitution and the laws of Uganda would suggest that this Court should grant the remedy sought. Section 6(3) of the Judicature Statute 1996, provides: “In the case of an appeal against a sentence and order other than one fixed by law the accused person may appeal to the Supreme Court against the sentence or order on a matter of law not including the severity of the sentence”. The appeal in this case is on a point of law in that it is contended in the memorandum of appeal that the sentence contravenes provisions of the Constitution. In my opinion, it is clear therefore that the Appellant properly brought the appeal to this Court. This Court has jurisdiction to entertain the appeal since it is on a point of law, namely, whether the infliction of corporal punishment is inconsistent with article 24 of the Constitution. Article 24 provides: “No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment”. The Appellant claims that in imposing corporal punishment upon him, the Court of Appeal contravened the provisions of article 24. In my view, this Court does not need to refer this case to the Court of Appeal for interpretation in accordance with the provisions of article 137. The Court can proceed under article 50 because what the Appellant seeks is the protection of his freedom from the evils envisaged in article 24 and not the interpretation of the Constitution. The provisions of the law which authorise the infliction of corporal punishment are to be found in section 274A of the Penal Code Act which was enacted before the promulgation and coming into force of the 1995 Constitution. Article 273 of the Constitution provides: “273 (1) Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution. ( 2) F or the purposes of this article, the expression ‘existing law’ means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date”. In my opinion, article 273 is addressed to the whole world in general and to executive, legislative and judicial authorities in particular, whose duties include the protection and enforcement of the Constitution. Every time a matter arises which appears or is alleged to be in conflict with the provisions of the Constitution, the persons and authorities I have alluded to above must act at once to protect and enforce the Constitution. Whoever disagrees with their act or decision may petition the Constitutional Court for the interpretation of the provisions under article 137. Every court in Uganda is vested with the jurisdiction to construe, apply and enforce the provisions of the Constitution in relation to any dispute before it. Every time there is a constitutional appeal to the Supreme Court and the court either agrees or disagrees with the findings and decisions of the Constitutional Court, the Supreme Court is construing and enforcing the Constitution. In doing so, the Supreme Court does not confine itself to submissions or arguments which were available in the Constitutional Court only, but admits documents, authorities and submissions on matters which, are sometimes extrinsic to those which were available in the Constitutional Court or were obtained from outside our own jurisdiction. Whether or not corporal punishment contravenes article 24 is a question which the Supreme Court can answer without having to remit it to the Court of Appeal. If it were to be field that every time the question of contravening the provisions of the Constitution comes up, resort must be had to the Constitutional Court, constitutional litigation in that court would be a daily routine for some officials, an occupational hazard. In my opinion, and by way of examples, an administrative registrar who is presented with a child of 14 to marry or an election agent who is presented with a parliamentary candidate aged 10 are able to construe the Constitution there and then and refuse to marry or approve the candidature of respectively these children since to do otherwise would be contrary to the provisions of the Constitution. Anyone disagreeing with the decisions of the registrar or the parliamentary agent, as the case may be, would be entitled to petition the Constitutional Court for interpretation. In my opinion therefore, this Court could have heard this appeal on merit without having to refer it back to the Constitutional Court.

For the Appellant:

*Mr T Zagyenda*

For the State:

*Mr CO Olwa*