**Lyomoki and others v Attorney-General**

**Division:** Constitutional Court of Uganda at Kampala

**Date of judgment:** 2005

**Case Number:** 8/04

**Before:** Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and

Kavuma JJA

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*[1] Constitutional law – Freedom of association – Definitions of freedom to associate – Derogations*

*from the freedoms to associate.*

*[2] Constitutional law – Principles of interpreting the Constitution.*

*[3] Trade Unions Act – Constitutionality of various provisions of the Trade Unions Act – Effect of*

*contravention provisions of Constitution*

**Editor’s Summary**

The petitioners sought declarations, under Article 137 of the Constitution and the Rules of the Constitutional Court (Petitions for declarations under Article 137 of the Constitution) (Directions L.N. number 4 of 1996) that the definition of an employee association under section 1(*cc*) of the Act, insofar as it set the minimum number of persons required to form an employees association; that the definition of a trade union in section 1(*cc*) of the Act, insofar as it prescribes 1000 people as the minimum number required to form a trade union; that section 2(1) of the Act insofar as it ordains the National Organisation of Trade Union as the only principal organisation of employees and provides for compulsory affiliation of every trade union; that Section 28 insofar as it subjects a proposed amalgamation of trade unions to the prior consent of a registrar of the Trade Unions; and that the powers of the Minister of Labour, Gender and Community Development under section 70 to amend the second schedule, all contravene the

Constitution

**Held** – When interpreting an application for constitutional interpretations:

(i) T he onus is on the petitioner to show a *prima facie* case of violation of their constitutional rights.

Thereafter the burden shifts to the respondent to justify that the limitations to the rights in the statute is justified by Article 43 of the Constitution;

(ii) The purpose and effect of an impugned legislation are relevant in the determination of constitutionality;

(iii) The Constitution ought to be looked at as a whole with no one particular provision destroying another but each supporting the other. All the provisions on an issue should be considered together so as to give effect to the purpose of the instrument;

(iv) The Constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental rights and freedoms;

(v) Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of human rights and freedoms.

(*James Rwanyarare and others v Attorney-General* Constitutional Petition number 7 of 2002 followed).

The freedom of association includes the freedom to enter into consensual arrangements to promote common interests and the freedom to disassociate or not associate at all. (*Collymore v Attorney-General*

[1970] AC 352; *TICGFA and Attorney-General v Sereeram* [1975] 27 WLR 329 applied).

The provisions of section (1)(*e*) of the Trade Unions Act impose a limitation on the freedom of association guaranteed under Articles 29(1)(*e*) and 40(3) of the Constitution as it prevents 29 or less employees employed in the same business or industry from forming an association for purposes of regulating relations with their employer or among themselves. The freedom of association guaranteed under the Constitution can be enjoyed by two or any other number of people unless there is a justifiable reason against it. To the extent that the section prescribes a minimum of 30 employees in order for the association to be formed, it is null and void. Although sections 1(*cc*) and 6(3) of the Trade Union Act requiring a minimum of 100 employees for a trade union to be formed appears to limit the freedom of association, the limitation is justifiable and the two sections do not contravene the Constitution. Section 17(1)(*e*) of the Trade Union Act requiring that for an employer to recognise a trade union, 51 percent of his employees must be registered members of the union, limits the freedom of association guaranteed by Articles 29(1)(*e*) and 40(3) of the Constitution. However, these limitations are justified to avoid a situation where an employer has to negotiate with two or more trade unions representing employees who have common interests. It is reasonable to require that employees with common interests and in the same employment organise themselves, or at least a majority of them, in one union. There is a contradiction between the provisions of section 2 of the Act and those of the Constitution. It is unconstitutional to form one organisation by legislation and to require all trade unions to affiliate to it. Hence section 2 of the Act, to the extent that it requires all trade unions to affiliate with NOTU is inconsistent and contravenes Articles 29(1)(*e*) and 40(3)(*a*) and (*b*) and is, therefore, null and void to that extent. The requirement in section 28 of the Act that trade unions obtain consent from the registrar in order to amalgamate is reasonable and does not contravene Articles 29(1)(*e*) and 40(3)(*a*) and (*b*) because it is justifiable under Article 43 of the Constitution. Section 70(1)(*c*) of the Act giving the Minister powers to amend the schedule of the class of employees not allowed to join trade unions is reasonable and does not contravene Article 20 of the Constitution. By prescribing a minimum number for employee associations and trade unions, the Act does not take away the employees’ right and freedom to associate within the context of the Constitution nor does the fixing of minimum percentages for trade unions to be recognised by employers take away those rights and freedoms. The Act merely seeks to limit and regulate the enjoyment of those rights and freedoms. It also seeks to ensure order and harmony between the employees and employers at the workplace and to minimise the proliferation of employee associations and trade unions to reduce *inter alia* the risk of possible disruption of work and hardship in the management of industrial relations between employees and their employers. (Kavuma JA dissenting) The right and freedom to associate is not absolute, it is derogable, as is the right to collective bargaining and representation. Regulating the trade union movement and the aspect of affiliation to NOTU, as a single national employee centre by all trade unions, is still necessary and justifiable. This is simple derogation permitted by the Constitution. (Kavuma JA dissenting) Sections 1(*e*), 1(*cc*), 6(3) and 17(1)(*e*) are not inconsistent with Articles 29(1)(*e*) and 40(3)(*a*) and (*b*)

of the Constitution; section 2(1) is not inconsistent with Article 29(1)(*e*) and 40(3)(*a*) and (*b*) of the

Constitution; Section 28 is not inconsistent with Article 29(1)(*e*) and 40(3)(*a*) and (*b*) of the Constitution

and section 70 is not inconsistent with Article 20 of the Constitution (Kavuma JA dissenting)

**Cases 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)

***East Africa***

*Attorney-General v Abuki* [2001] 1 LRC 63

*Attorney-General v Major General Tinyefuza*, Constitutional appeal number 1 of 1997

*Collymore v Attorney-General* [1970] AC 532 at 547

*Dr James Rwanyarare and another v Attorney-General* Constitutional Petition number 5 of 1999

*Tinyefuza v Attorney-General* Constitutional case number 1 of 1996

*Silvatori Abuki and another v Attorney-General* Constitutional case number 2 of 1997

*Zachary Olum and another v Attorney-General* Constitutional Petition number 6 of 1999

***United Kingdom***

*Attorney-General v Momoddon Jobo* [1984] AC 689

*NTN Pty Ltd and NBN Ltd v The State* 1988 LRC (Const)

*South Dakota v North Carolina* 192, US 268 (1940) LED 448.

*TICGFA and Attorney-General v Seereeram* [1975] 27 WLR 329