Chapter 10

Other Gender-Based Violence

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Other GBV: "This category should be used only if any of the above types do not apply. In the context of this bench book, this category includes: exploitation; trafficking in women; forced prostitution; violence perpetrated or condoned by the state, wherever it occurs; sexual slavery; sexual harassment (including sextortion – demands for sex in exchange for job promotion or advancement or higher school marks or grades); trafficking for the purpose of sexual exploitation; forced exposure to pornography; forced pregnancy; forced sterilisation; forced abortion; virginity tests and incest."

10.1 Sexual Exploitation of Children

Kenya 

George Hezron Mwakio v Republic [2010] HC

Principle or Rule Established by the Court's Decision

Trafficking a child for the purposes of sexual exploitation can be widely interpreted and may include the purpose of enabling the trafficker continuing to exploit the child himself.

Judge: Maureen Akinyi Odero | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	High Court, Mombasa (Kenya)	Criminal Appeal 169 of 2008; judgement delivered on 26 June 2010	Other GBV (Child trafficking for sexual exploitation)

Case Summary

In addition to the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA, the appellant in this case had also been charged with the offence of child trafficking for sexual exploitation contrary to Section 18(1) of the SOA.

On 27 October 2007, the complainant was on her way home when she met the appellant at about 6 p.m. He started professing his love for her but she declined his advances, telling him that she was a student. He pulled her to

his house and later took her to a sisal plantation, where he raped her. He then forced her across the border to Tanzania but she was rescued by police and returned to Kenya. The appellant was arrested and handed over to the Kenyan authorities. He was tried, found guilty of the charges convicted and sentenced to 30 years in prison. He appealed against his conviction and sentence.

The High Court upheld the convictions. The evidence revealed that the appellant had engaged in sexual intercourse with the complainant, a child under 18 years of age. Medical evidence corroborated the complaint's evidence. Further, the Court found that the evidence that the appellant had abducted the complainant and crossed the border to Tanzania with her for purposes of sexual exploitation was undisputed. The appellant was actually pulling the complainant when the police met them. He had attempted to lie to the police that the complainant was his wife, which she vehemently denied. The evidence presented before the trial court was therefore cogent, consistent and reliable.

The harsh sentence of 30 years was justifiable in the circumstances. In particular, the offence was aggravated because the appellant was a repeat offender, having previously been convicted of a charge of attempted rape. The Court was of the view that he was a danger to women and dismissed the appeal in its entirety.

Points to Note

- There was no evidence that the purpose of going to Tanzania was to enable others to sexually exploit the child. However, the offence of child sexual exploitation specifically envisaged that an offender may themselves seek to exploit the child.
- The harsh sentence of 30 years was justifiable in the circumstances, with the offence aggravated particularly because the appellant was a repeat offender, having previously been convicted of a charge of attempted rape.
- The Court took into account the danger to women when reaching its decision.

Sheikh Ali Samoja v Republic [2016] HC

Principle or Rule Established by the Court's Decision

To prove the charge of organising travel to facilitate a sexual offence against a child, it must be shown beyond a reasonable doubt that the underlying motive or intention of the dispatcher of the child was to facilitate a sexual offence. In the absence of such an intention, the fact that a sexual offence ultimately occurred cannot justify charging the dispatcher of the child.

Justice: Justice Maureen Akinyi Odero | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction overturned	High Court, Nakuru (Kenya)	Criminal Appeal No. 170 of 2015 delivered on 1 July 2016	Other GBV (Child trafficking for sexual exploitation, Defilement)

Case Summary

The appellant had been convicted of the offence of child sex tourism. He had been accused of organising the travel of a child 15 years of age from Nakuru to Nairobi, from where the child was to be taken to Lebanon by one Sayid Murtadha. While in Nairobi, Murtadha defiled her.

The appellant had been the child's teacher and the imam of the mosque that the child and her parents attended in Nakuru. He approached the child's parents and told them that their daughter was one of a group of students selected to travel to Lebanon for greater opportunities, and that there was a sponsor in Nairobi who would finance her travel. The parents were agreeable, and the appellant gave the girl KSh 500 to travel to one Sheikh Murtadha, who he said would process her travel documents. He wrote down his name and phone number and the name of Murtadha and his phone number and gave them to the girl.

She travelled to Nairobi and met Murtadha, who took her to his house in Westlands, where she stayed for a week. One evening, Murtadha came to her room and told her he could not stay in a house with a beautiful woman. He then proceeded to tear her clothes and defiled her.

When she told the appellant on phone what Murtadha had done, the appellant told her to stop being rude as he had given her to the Sheikh to *kamliwaza* or "comfort" him.

She stayed at the Murtadha house waiting the processing of her documents but Murtadha's wife chased her away.

She went back to Nakuru and reported to the appellant that the sheikh had defiled her. The appellant retorted that, "*What is done is done.*"

Later, the complainant attempted suicide when she realised that what had happened to her in Nairobi had been revealed to others. She was rushed to hospital and survived.

Murtadha was never arrested, as he fled to the Middle East. However, the appellant was arrested, charged and convicted of organising travel to facilitate a sexual offence against a child. He appealed against his conviction.

The issue before the appellate court was whether the appellant had organised the travel of the complainant to Nairobi, into the hands of "Sheikh

Murtadha", for the purpose of availing her for sexual tourism or child prostitution.

The appellate court found that the *actus reas* of the offence – namely, organising the travel of the complainant to the home of Murtadha, who had defiled her, was present. It also found as a fact that the complainant had been defiled.

The Court expressed doubts regarding the *mens rea* or the criminal intent on the part of the appellant. It found that the appellant's intention was to enable the complainant to travel to Lebanon for greater financial opportunities and not to provide a girl for the person who defiled her. The judge therefore found the appellant blameless.

According to the Court, the fact that the child was defiled after the appellant took her to Murtadha, who was meant to facilitate her economic empowerment, was unfortunate. However, it could not be attributed to the appellant. In the opinion of the Court, the appellant was a family man who knew the complainant's family well and he would not have openly taken the child to Murtadha had he intended to traffic her.

Point to Note

In quashing the conviction in this case, the Court failed to take into account the fact that traffickers rarely inform the family of the person being trafficked that they are being trafficked. Traffickers will usually make the family and the victim believe they are being taken for better economic opportunities.

10.2 Abortion

Rwanda 

RE v N.J. [2015] HC

Principle or Rule Established by the Court's Decision

A child who has been defiled has the right to abort as long as she was impregnated as a result of that defilement.

Judges: Kaliwabo Charles, Mukakalisa Ruth and Kabagambe Fabienne | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Decision overturned	High Court (Rwanda)	Case No. RPA0787/15/HC/ KIG of 30 October 2015	Other GBV (Denial of right of abortion)

Case Summary

Article 165 of the Organic Law No 01/2012 of 02/05/2012 instituting the Penal Code (OLPC) in Rwanda gives the right to abortion to a woman who was raped.

N.J. filed a case in the Intermediate Court requesting that her daughter of 13 years be entitled to the right to abortion because she was impregnated through defilement after being given alcohol. The Intermediate Court rejected the request because there had been no conviction of a person for rape. The Court also stated that it was possible for someone to be pregnant without having sexual intercourse. In addition, the Court ruled that the mother had not proven that the child had any complications that could seriously jeopardise her health as a result of continued pregnancy.

The mother lodged an appeal to the High Court, stating that any acts related to sexual intercourse in connection with her daughter must qualify as child defilement, which was the equivalent of rape, and that they did not explain how she was impregnated.

The High Court held that the fact that the Penal Code uses the term "child defilement" instead of "rape" does not mean the child was not raped. A child is considered a minor with no capacity to consent to sexual intercourse, and therefore child defilement should be considered rape. A child who has been defiled is entitled to an abortion as long as she was impregnated through that defilement.

Point to Note

A child who has been defiled has a right to procure abortion as long as she was impregnated as a result of defilement.

10.3 Workplace Discrimination and Sexual Violence

Kenya 

G.M.V. v Bank of Africa Kenya Limited [2013] HC

Principle or Rule Established by the Court's Decision

Discriminatory treatment of a woman because of pregnancy is contrary both to principles of employment law and to a woman's constitutional rights, including the rights to equality, dignity and a family.

Justice: Rika | IC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Termination of employment unlawful	Industrial Court, Nairobi (Kenya)	Cause 1227 of 2011; delivered on 31 July 2013	Other GBV (Sexual harassment and unlawful termination)

Case Summary

The complainant had been employed by the respondent, the Bank of Africa Kenya Limited, since November 2006. On 4 March 2011, the respondent terminated her contract of employment.

During the time that she worked for the respondent the complainant fell pregnant twice. She took maternity leave for her first baby between January and May 2009. The second pregnancy was not trouble-free and the complainant was on sick leave associated with her pregnancy from 22 February 2011 to 1 March 2011. When she resumed her duties on 2 March 2011, the managing director of the respondent informed her that her contract had been terminated because employing her was expensive given that she was pregnant again and that she would need to take maternity leave. The managing director also informed her that she would need to find the means to meet her mortgage obligations immediately, otherwise her terminal benefits would be applied towards satisfying her mortgage.

The claimant, feeling discriminated against on account of her pregnancy, filed a claim, seeking, *inter alia*, general damages for discrimination on account of pregnancy. The respondent denied terminating her employment or discriminating against the claimant on the grounds of pregnancy, claiming that her termination was justifiable on the grounds of her poor performance.

The Industrial Court held that a woman claiming to have been discriminated against by her employer on account of pregnancy is required only to establish a *prima facie* case demonstrating such discrimination, upon which the burden shifts to the employer to provide clear, specific reasons evidencing a legitimate explanation for termination – namely, that discrimination did not take place. The suggestion that there had been poor performance was *"dissembling to cover up for a discriminatory purpose'*.

The Court found in favour of the claimant and declared that the termination of the claimant's services was based on her pregnancy and therefore discriminatory, unfair and unlawful. There was a violation not only of the claimant's contract of employment and her employment law rights but also of the claimant's constitutional rights to fairness and discrimination-free treatment in the workplace, to dignity and to have a family.

Damages for such a violation of constitutional rights were treated as separate to any compensation for unfair termination. The claimant was awarded a total of KSh 4,473.006 in damages.

Points to Note

- This case reaffirms the internationally recognised position that a woman claiming discrimination by her employer on account of pregnancy is required only to establish a *prima facie* case demonstrating such discrimination, upon which the burden shifts to the employer to provide clear, specific reasons evidencing a legitimate explanation for termination – namely, that discrimination did not take place.
- This is an important application of the Employment Act 2007 that allows the court to infer discrimination upon the evidence unless controverted by evidence of the accused employer. This approach works to the advantage of women, who often have a difficult time proving that they were dismissed on the ground of pregnancy.

Obiter Dictum

Pregnancy is an important component of the basic right of all persons to have a family under Article 45, and, to the extent that the family is the natural and fundamental unit of society, and the necessary basis of social order, an employment decision that denigrates pregnancy is an assault on society as a whole.

Other cases/decisions referred to
Country/case
South Africa | *Constitutional Court of South Africa in the case of SA Naptosa & others v Minister of Education Western Cape & others* [2001] BCLR 338
UK | *Eastwood & another v Magnox Electric PLC; McCabe v Cornwall County Council & others* [2004] UKHL
USA | *Reeves v Sanderson Plumbing Products Inc.* [12 June 2000] 530 US. 138, 141

N.M.L. v Peter Petrausch [2013] IC

Principle or Rule Established by the Court's Decision

- Sexual harassment, including of domestic workers, is a form of GBV.
- Damages for sexual harassment are separate from any compensation for unfair termination.

Justice: J. Rika | IC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Respondent guilty. Damages awarded.	Industrial Court, Mombasa (Kenya)	Cause No 441 of 2013 delivered on 19 June 2015	Other GBV (Sexual harassment and unlawful termination)

Case Summary

NML, the claimant, a Kenyan, had been employed by Peter Petrausch, the respondent, a German national, as a domestic worker in his house in Mombasa. She worked for him from 3 September 2012 to 10 May 2013, when he terminated her contract. At the time of termination, her monthly salary was KSh 10,000. She worked from 7 a.m. to 7 p.m. every day, including public holidays, except for Christmas Day and Boxing Day in 2012. During the time the claimant worked for him, the respondent routinely sexually harassed her. He physically assaulted and insulted her. When the claimant protested, the respondent sacked her and did not pay her terminal benefits.

The claimant sought damages for sexual harassment and unfair and unlawful termination. In response, the respondent denied ever employing the claimant and claimed she was a total stranger. During the trial, however, he admitted employing her but denied all the other allegations. He also admitted to having placed an iPad in the bathroom when the claimant was bathing but claimed the iPad did not have a camera. He asked the Court to reject the claimant's claim and award him the costs of the suit.

The Court rejected his defence and accepted the claimant's evidence of sexual harassment as truthful. The Court further held that the respondent had violated the claimant's rights as a domestic worker. He had objectified her, invaded her body and privacy, injured her inherent dignity and assaulted her modesty through his demands. The court noted that the claimant was all the more vulnerable because of her gender, race and social standing. The respondent took away multiple rights to which she was entitled and which were guaranteed under domestic and international law.

Moreover, the termination of the claimant was unfair, and the respondent did not discharge the burden that fell on him to show that he had procedurally terminated her. The Court therefore found that she had made out her case for an award for damages for unfair termination as well as for sexual harassment.

Points to Note

- The judge observed that the conduct of the respondent constituted GBV, which is the most prevalent human rights violation in the world.

- The Court observed that domestic workers must no longer be undervalued or devalued or remain invisible, and that they too deserve the whole gamut of human rights.

Obiter Dictum

The conduct of the respondent amounted to racial bigotry.

Other cases/decisions referred to
Country/case
India | *Vishaka & others v the State of Rajasthan & others* [1997] [JJ] [7] [SC 384] Supreme Court of India

P.O. v Board of Trustees, AF & 2 others [2010] IC

Principle or Rule Established by the Court's Decision

- National and international law abhors GBV in the workplace, which is prevalent and which consequently has had an adverse impact on the Decent Work agenda.
- GBV reflects and reinforces inequalities between men and women and must be stopped.

Justice: James Rika IC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Damages for unfair termination and sexual harassment	Employment and Labour Relations Court, Nairobi (Kenya)	Cause 927 of 2010; judgement delivered on 28 February 2014	Other GBV (Sexual harassment and unlawful termination)

Case Summary

This was an extreme case of GBV at the workplace, where the claimant was not only sexually harassed and physically violated in the course of her employment but also unfairly and unlawfully terminated.

The claimant was employed by a charitable organisation working with women farmers in Kenya. Her agreed salary was KSh 120,000 per month and her contract was to run for two years with effect from January 2010.

The second respondent was the organisation's executive chairman/manager. In May 2010, the claimant and the second respondent left for Swaziland through South Africa to attend a conference. They stopped in Cape Town

where the second respondent said he wanted them to look at certain seedlings that could be sold in Kenya. While there, the second respondent started to make sexual innuendos to the claimant, saying he found her attractive. She did not respond. The following day he hired a car and drove with her on a journey that lasted from 8 a.m. to 6 p.m. On the way, he angrily told her that he had spent a lot of money on her yet she had rebuffed his proposals for a romantic lunch. He hit her with his clenched fists.

At the end of the journey, he told her he had booked her a room. He had in fact booked only one room for the two of them. She spent the night on the floor and left the bed for him. The following day, she reported the violence to her brother and told him what was happening. The brother sent her an electronic ticket and she travelled back to Kenya while the second respondent went to the conference.

On return from the conference, the second respondent started sending threatening email messages to the claimant. He then sent her an email message terminating her contract, citing her "misconduct" while in South Africa

The claimant brought a claim for terminal benefits for unfair and wrongful termination of her contract of employment and also general damages for sexual harassment. In response, the second respondent denied that he had been sexually or physically violent to her. It was further argued that the allegations by the claimant, if they occurred, did so within a "purely social and private context: and had no relationship with the contract of employment.

In court, the claimant produced emails sent to her by the second respondent, which disclosed not only sexual harassment but also threats. One read:

> *… From the outset, I thought you special… I told you I wanted a beautiful girl, with a sense of adventure, who wanted to travel. You are beautiful. It seems you did not really want to travel. I told you I wanted a sexy girl who would be able to make emotional investment and want to jump to bed with me… you had the opportunity to lead me and make it all work… yet we tried three times, and all ends in disaster – Malaysia, Whistling Thorns and Republic of South Africa… 3 times is enough times… I wanted someone who wanted to get up and about and do things…*

Another read:

> *… Now I suggest you be very careful, and do what is necessary to bring this matter to a safe and speedy conclusion. You have nothing to gain. You may think you have little to lose, but you can lose more than you think.*

A third read*:*

> *After 7 days, it will be assumed that there is the probability of fraudulent conversion or other form of criminal misappropriation of funds. Action in this context will be robust…*

The Court ruled in the claimant's favour, on the basis of her evidence. The Court awarded her monetary compensation for injury to her feelings, humiliation, insult to human dignity and nullification of equality of opportunity or treatment in employment. In awarding the claimant a total of KSh 3,240,000 payable within 30 days, the Court observed that the claimant had been subjected to inhuman treatment, violently beaten in a foreign land, forced to spend the night on the floor and physically and psychologically assaulted by her employer. Her employment was thereafter derailed when her contract was unlawfully terminated, simply for rebuffing unwanted sexual advances.

Point to Note

The Court found that the facts presented a very depressing case of GBV in the work place. Citing international conventions, the judge indicated that the law abhors this vice that is growing in the world of work, and that consequently has adversely affected the Decent Work agenda. GBV reflects and reinforces inequalities between men and women and must be stopped.

Other cases/decisions referred to	
Country/organisation	*Decision/reference*
International Labour Organization	Working Paper 3/ 2011 titled 'Gender-based violence in the world of work: Overview and annotated bibliography' by Adrienne Cruz and Sabine Klinger
UDHR (1948)	Article 1
India	*Vishaka & Ors v the State of Rajasthan & others* [1997] JJ [7] [SC 384], India Supreme Court

10.4 Denial of Maintenance

Kenya 

R.P.M. v P.K.M. [2015] HC

Principle or Rule Established by the Court's Decision

- There is a presumptive duty that the spouse with the higher earning capacity should pay alimony to the other spouse.
- The spouse who is seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he or she has made an effort or is making an effort to secure a livelihood for herself or himself.
- Even assuming that a party is earning, or will subsequently earn money, that does not exclude him/her from the benefit of the payment of maintenance.
- Courts have wide discretion in determining the maintenance to be paid to a spouse during the divorce proceedings as well as after the granting of the divorce.

Justice: L. Kimaru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Maintenance payment of KSh 30 million plus house	High Court, Nairobi (Kenya)	Cause No. 154 of 2008; delivered on 10 March 2015	Other GBV (Denial of spousal maintenance)

Case Summary

The petitioner, who was unemployed, and the respondent, a retired soldier, had been married since 1 March 1993. They had been living separately for more than five years, and eventually the petitioner filed for divorce in 2008, alleging adultery and cruelty. The respondent denied the allegations and sought to have the married dissolved on the grounds of desertion and adultery.

The Court did not determine the grounds for divorce as averred but relied on the duration of the separation of the parties and their acrimonious conduct during the litigation as clear evidence that the marriage had irretrievably broken down. The principal issue on which it had to rule was that of any financial settlement.

One of the requests made in the petition for divorce was that the respondent pay the amount of US$6,000 (or its equivalent in KSh) monthly or, alternatively, that the respondent pay into a trust account the sum of US$1 million for the upkeep and maintenance of the petitioner and the children.

As the Court recognised, this case was "unique" among spousal maintenance cases because:

> *… the Respondent took the position that under no circumstances was he going to pay maintenance to the Petitioner. In that regard, by hook or crook, he used all legal means to frustrate the Petitioner from being paid any maintenance. He also stubbornly refused to disclose to the court his net worth and the properties he owns… the Respondent is a person who is used to having his way and would go to any lengths to frustrate anyone who would be an impediment to his wishes. Unlike other such cases where the issue that the court is left to grapple with after divorce is division of matrimonial property, in this case the Respondent has frustrated any inquiry being made by the court to determine the extent of the properties that he own.*

The issues that the Court was called on to consider included (among other things):

i. Whether there is an obligation by the party against whom the court rules to pay maintenance to a party in whose favour the court finds.

ii. Whether the respondent should be compelled to pay maintenance to the petition and solely meet the needs of the children by himself in view of Article 45(3) of the Constitution, which prescribes that:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

iii. Whether the respondent should be compelled to pay maintenance to the petitioner in light of Article 53(1)(e), which provides a child with a right to parental care provided equally by both parents, whether or not they are married.

iv. The factors that the court should take into account when making an order for maintenance.

v. The quantum maintenance, the duration of time that maintenance should be paid and the suitable mode of payment of maintenance.

The High Court ruled that:

i. As to the obligation to pay maintenance, there is a presumptive duty on the spouse with a higher earning capacity to pay alimony. However, the spouse seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he or she has made an effort, or is making an effort, to secure a livelihood for her or himself.

ii. Article 45(3) of the Constitution ascribes equal *rights* in marriage and on divorce. However, it is often the case that their economic and other circumstances are markedly dissimilar, so the parties are not equal in their *responsibilities* in the marriage. Men are, in most cases, more likely to exercise greater control in the marriage as compared with women. The respondent admitted that he provided on an almost exclusive basis for the petitioner and their children during the subsistence of the marriage. This established that they shouldered unequal responsibilities. In accordance with the decision in *WMM v BML* [2012] eKLR:

No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.

iii. In light of the comments made in relation to Article 45(3), to find that Article 53(1)(e) always required both parents to contribute equally to a child's upbringing would ignore the fact that the

respondent was and still is the higher earning party, and is likely to remain so in the foreseeable future. The constitutional requirement of equal treatment takes cognisance of the respective earning capacities of the parties to the marriage during the subsistence of the marriage.

iv. Guided by Section 77 of the Marriage Act (which provides that a court may order a person to pay maintenance to a spouse or former spouse), the Court found that it had wide discretion to determine the amount of maintenance to be paid to a spouse, both during divorce proceedings and after granting the decree of divorce.

In exercising its discretion, the court ought to be guided by the objectives that should be achieved by maintenance orders. These include identification of the economic advantages (or losses) to the spouses that may have subsisted during the marriage or led to its breakdown; apportioning the expenses of maintaining the issues of the marriage; provision of relief to cover the negative consequences for the spouses that may arise from the breakdown of the marriage; and making of sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.

Parties who approach the court for maintenance cannot expect the court to afford them the lifestyle to which they were accustomed during the marriage. However, the court is guided by the principle that the resulting standard of living should be kept as close as practicably possible to that enjoyed during the marriage.

The court was guided by an examination of the circumstances of the case, including the present and future assets, income and earning potential of the parties, taking into account their ages and professional qualifications; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.

v. In all of the circumstances, the High Court ordered that the respondent pay the petitioner the sum of KSh 30 million, as well as provide her with a house in one of the upmarket areas in Nairobi that would accord with the standard of living that the petitioner was used to during the subsistence of the marriage. In the event of a default in payment, the respondent would be required to pay a sum of KSh 60 million to the petitioner.

Points to Note

- While parties have equal rights in a marriage and on dissolution of the marriage, this does not mean the parties must bear equal financial responsibilities. The court must look at where the responsibilities lay during the marriage and make such order as it considers appropriate in light of the objectives of the statutory provisions relating to matrimonial finances articulated above.
- Spousal support cannot therefore be withheld on the basis that to pay such support infringes fundamental rights to equality.
- From a VAWG perspective, the decision safeguards the position of a spouse who may have been in an unequal position in contributing financially to the marriage, at least while the spouse becomes self-sufficient.

Obiter dictum

In this case, it was clear that the respondent had frustrated an inquiry into the extent of the property he owned; however, the Court was of the view that it was clear that he had a substantial income that he did not wish to disclose to the Court.

P.K.M. v R.P. *M.* [2015] CA

Principle or Rule Established by the Court's Decision

The court must take into account all relevant circumstances in determining an appropriate grant of maintenance and whether it should be paid by way of lump sum or in instalments. The court must therefore conduct a proper inquiry into the financial circumstances of each party.

Judges: H. Okwengu, D. Musinga and S. Gatembu-Kairu | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Case remitted to the High Court	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 166 of 2015; delivered on 30 June 2017	Other GBV (Denial of spousal maintenance)

Case Summary

This was an appeal on the decision of the High Court in *RPM v PKM* [2015] eKLR (Divorce Cause No. 154 of 2008). The appellant, a retired soldier, and the respondent, who was unemployed, got married on 1 March 1993.

They had been living separately for more than five years, and eventually the respondent filed for divorce in 2008. The High Court had ordered that the appellant pay to the respondent the sum of KSh 30 million as well as providing her with a house in one of the upmarket areas in Nairobi, to accord with the standard of living she was used to during the subsistence of the marriage, or, in default, to pay to her the sum of KSh 60 million. The question before the appellate court was whether it ought to interfere with the exercise of the discretion of the High Court in making the orders of maintenance that it did.

The Court of Appeal noted that orders of maintenance are made by the High Court in the exercise of its discretion, provided under Section 77 of the Marriage Act (as well as Section 25(2) of the repealed Matrimonial Causes Act). Whether a spouse is deserving of spousal support is a matter dependent on the circumstances of each case, based on the evidence presented to the court. The Court of Appeal will intervene when that discretion is not exercised judiciously.

The Court of Appeal found that the High Court had properly summarised the legal principles that should inform the exercise of the discretion when it held that, in seeking to ascertain maintenance, the court should have regard to existing and potential means of the parties, their respective earning capacities, financial needs and obligations, the duration of the marriage, the conduct of the parties prior to divorce and their conduct that led to the breakdown of the marriage. The trial court had also borne in mind that both parties had equal rights under Article 45(3) of the Constitution.

In order to properly and judiciously exercise its discretion when considering whether to grant relief by way of maintenance and the quantum thereof, the court must carefully and proactively examine the financial circumstances of both parties. These proceedings are inquisitorial in nature, and the courts should not engage in pure speculation.

Rule 44 of the Matrimonial Causes Rules required both spouses to file an affidavit of means with the Court, to assist the Court to make an informed decision. Neither party did so. The Court had only a schedule of expenses provided by the respondent and the evidence given in oral testimony.

In the absence of clear evidence as to means, the High Court fell into error. The judge was perfectly entitled to draw an adverse inference against the appellant as he had failed in his duty of candour to furnish the Court with information as to his means and assets. However, the conclusion that the appellant had concealed his income or property was not based on any evidence.

Furthermore, the judge had failed to consider the respondent's capacity to earn before assessing the quantum of relief. The respondent had, prior to

2010, been in gainful employment as a design consultant earning US$3,500 per month. This failure adversely affected the exercise of his discretion.

The matter was remitted back to the High Court with an order that the parties file comprehensive affidavits of means so that the Court could pronounce itself on the quantum of maintenance.

Point to Note

Whether a spouse merits spousal support depends on the circumstances of each case based on the evidence presented to the court. The court must carefully and proactively examine the financial circumstances of both parties when considering whether to grant relief by way of maintenance and the quantum thereof.

Other cases/decisions referred to
Country/case
India | *Dr Pradeep Kurmar Sharma v Ratna Sharma* [2007] CM(M) 50 and [2008] CM 15892 (High Court New Dehli)
UK | *Prest v Petrodel Resources Limited and others* [2013] UKSC 34
USA| Alaska | *Sharpe v Sharpe* 366 P.3d 66

10.5 Human Trafficking

Uganda 

Uganda v Natukunda Faith [2012] HC

Principle or Rule Established by the Court's Decision

- "Practices similar to slavery" means the economic exploitation of another person on the basis of a relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights, and includes debt bondage, serfdom, forced or servile marriages and exploitation of children and adolescents.
- Pseudonyms can be used to anonymise and protect the identity of witnesses or complainants in cases of human trafficking.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court – (ICD) (Uganda)	HCT/ICD/ CO-001/2012	Other GBV (Trafficking in persons)

Case Summary

The accused person, Natukunda Faith, also known as Nsasira Karongo and Mulinde, was indicted on two counts of aggravated trafficking in persons and trafficking in persons, contrary to Sections 3(1) and 4(j) of the Prevention of Trafficking in Persons Act No. 7 of 2009 respectively.

The accused recruited victims, including two girls referred to in court only as "Peninah" and "Ritah", with false promises of good job opportunities and better lives, only for the victims to be exploited and forced to work under brutal conditions. In order to control the victims, the accused used various means of coercion such as beatings, confiscation of travel documents and rituals. Peninah and Ritah were voluntarily trafficked because of their erroneous belief that there was a better life waiting for them in China. They were told by the accused that they would be hired to work for the accused in different capacities. Peninah and Ritah were made to believe that they would take up employment in salons and at the restaurant that the accused purportedly owned in China.

Prior to their travel, each of the victims communicated with the accused on the phone. The accused told the victims that they would enter into a ritual agreement with her. She asked the two to provide their photographs, two razor blades, two mirrors, nails from their fingers and toes, hair from their armpits and pubic hair. These were taken from Peninah on arrival in China by the accused.

The accused received each one on arrival at Guangzhou Airport in China. Each victim was booked in a separate hotel. When they got to Guangzhou, the accused complained that the girls had misused the pocket money given to each of them in Uganda. The money was intended to be used to purchase SIM cards on arrival so that the victims could link up with the accused. The accused announced that they were to engage in prostitution. Having booked them in hotel rooms, the accused did not waste time. She contacted her male customers immediately and the men forced the girls into sex. Each of the victims refused to yield to the men but the men overpowered them claiming that they had pre-paid for their services.

As a result, the victims were forced to engage in prostitution without any pay to them individually. The money was either paid to the accused beforehand or packaged for the girls to carry and deliver to the accused on return from prostitution. Later, the accused sought to relocate the victims to Malaysia, where they were destined to continue to work as prostitutes, although she still disguised this relocation as another opportunity for them to work. Ritah gave the accused the "ritual" items of nails, hair from her private parts, her photos and other items just before she left China for Malaysia.

When the girls arrived at Malaysia Airport, Peninah, being frustrated, intentionally refused to talk to the immigration officers so they would

intervene. As a result, the victims were denied entry, detained for a few days and eventually deported back to China then again back to Malaysia. While at Malaysia Airport, they sought assistance from the Ugandan Embassy. While in custody at the airport, Peninah fell ill, diagnosed with HIV/AIDS and also miscarried. Fortunately, the International Organization for Migration (IOM) intervened and assisted the victims by paying for their travel back to Uganda. IOM also reunited them with their families. They subsequently reported what had happened to the police. The police arrested and charged the accused when she returned to Uganda. The accused denied participation.

Preliminary procedural matters

Two preliminary procedural matters had to be considered. First, a question arose as to whether the matter had been properly laid before the Court because the law stipulates that consent has to be obtained from the Attorney General in cases of extra-territorial jurisdiction. The Court considered whether the lack of consent affected the rights of the accused person and noted that justice should be expended without undue regard to technicalities. The Court resolved that the absence of a provision on the consequences would mean the section is merely directory and not mandatory.

Second, the prosecution also made applications pertaining to witness protection for the protection and modesty of the victims and witnesses in the case. The Court granted an application prohibiting the media from publishing any information regarding the personal circumstances of the victims, pursuant to Section 13(3) of the Prevention of Trafficking in Persons Act. The Court also permitted the use of the pseudonyms "Peninah" and "Ritah" in respect of the two victims who would be testifying at trial.

Decision of the Court

The Court held that "practices similar to slavery: means the economic exploitation of another person on the basis of an actual relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights, and shall include debt bondage, serfdom, forced or servile marriages and exploitation of children and adolescents.

Effective control or coercion

The Court held that the accused's *modus operandi* was to lure victims by promising them legitimate work in a restaurant, shop or salon that did not in fact exist. The accused took away the victims' passports, specifically for the purposes of denying the victims freedom of movement or access to any public services.

This, together with the lack of legitimate work, provided the accused with an effective means of control and coercion over the victims. The accused ensured the girls were financially indebted to her. Neither victim ever received any payments for their prostitution.

The ensuing mental and physical abuse also further subjugated the victims and the other girls there in China. Peninah testified that the accused would quarrel with them, and that the accused slapped Ritah after telling the accused that Ritah was free to do anything she likes. Peninah also testified that the accused would give her tablets to swallow that would make her unconscious. On another occasion, the accused made Ritah have sexual intercourse during her monthly period.

The Court also held that:

> *A person can be free to do a multitude of things but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will… be in sexual servitude.*

Debt bondage

The victims were also subjected to debt bondage. Under Section 2(b) of Act No. 7 of 2009, debt bondage is the status or condition arising from a pledge by the debtor of his or her personal services or labour, or those of a person under his or her control, as security for payment of a debt, when the length and nature of services is not clearly defined or the value of the services as reasonably assessed is not applied towards liquidation of the debt.

Both victims told the Court that the accused had told them that this "agreement" was meant to ensure the victims would pay back the accused person all the money she had spent on their tickets, passports and visas. The accused also threatened the victims that, if they did not keep their part of the bargain, their private parts would rot. This was all meant to ensure the victims paid back the US$7,000 that the girls allegedly owed the accused. For debt bondage to occur, "*There is a pledge by a person of sexual services as security for a debt claimed to be owed and the debt is manifestly excessive.*" In order to prove the condition of sexual servitude, however, it must be shown that the use of force or threats causes a person not to be free to cease providing sexual services or to leave the place or area where the person provides sexual services.

From the facts, it was clear that there was bonding, with the girls having to pay back the debt of US$7,000, and this was a means of keeping the girls in servitude.

Involuntary servitude

Peninah testified that the accused kept the key to the hotel room most of the time. The accused allowed her to leave the room after two weeks. Servitude means labour conditions and/or an obligation to work or to render services from which the person in question cannot escape and that he or she cannot change. Regarding "involuntary servitude", the Court cited *United States v Mussry* [1998] 726 F, 2d 1448 to assist in understanding what "coercion"

entails. This raises the question of whether the will of servitude has been subjugated. The Court found that the accused had recruited, transported and transferred the victims by deception, the victims were in a position of vulnerability and there had been the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. As a result of the above, Peninah acquired HIV/AIDS.

Points to Note

- This case was the first international case under the Prevention of Trafficking in Persons Act No. 7 of 2009. It is a novel one in Uganda so contributes to the jurisprudence in Uganda but also internationally as the crime is a global vice.
- The offence is a transnational crime, which means it is committed in more than one state or takes place in one state but is planned or controlled in another. There are challenges pertaining to the prosecution of this offence, such as funding international investigations of uncertain crimes that have to be budgeted for. The crime has grown into a global crime and, as such, is a threat to the rule of law everywhere it surfaces; it does not fall within usual criminal cases and calls for multidisciplinary action and operations.
- Trafficking constitutes a crime against humanity when the trafficking involves sexual slavery and enforced prostitution and enslavement. Enslavement includes trafficking in persons. Sexual slavery and enforced prostitution are categories of enslavement. Slavery is prohibited under customary international law, regardless of the context in which it occurs, whether international or an internal armed conflict.
- Trafficking in persons is a pernicious and brutal abuse of human rights. It is usually done in a clandestine way. Another feature of trafficking in persons is its association with international criminal organisations, which means many perpetrators are highly mobile and difficult to prosecute. The offence itself is a process in that it entails several procedures on the side of the trafficker and on the side of the trafficked person.
- The offence of human trafficking is truly about the vulnerability of women and children, who are more prone to being trafficked as they migrate for "greener" pastures and end up in servitude or bondage.
- This case is indicative of the fact that traffickers include both men and women, which in turn shows that victims may not be wary of or readily notice who a trafficker is.

- Although servitude is prohibited by, *inter alia*, the UDHR and the ICCPR, neither of these international instruments contains an explicit definition of servitude. In its judgement in the case of *Siliadin v France* [26 July 2005] No. 73316/01, the European Court of Human Rights defined servitude as an obligation to provide one's services that is imposed by means of the use of coercion, and is to be linked to the concept of slavery. In this case, the convict used voodoo or witchcraft to bind her wards. This calls for sensitisation of the public and strategic outreach programmes.
- Courts have convicted individuals in similar contexts of transferring victims internationally by deception for the purposes of exploitation. Criminal Case No. 22878 of the Regional Trial Court, Ninta Judicial Region, Branch 12, Zanboanga City (UNODC No. PHL035) involved recruitment, transportation and harbouring of women.
- It is pertinent to note that coercion is explicitly codified as a fundamental legal element in human trafficking crimes. However, the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion. It is conceptually more difficult to define at what point coercion occurs. Additionally, the aspect of coercion does not have to mean literal coercion but could be an effective coercion, which corresponds with other aspects of this element, where in essence the result must have been such that the victim was either physically or mentally subverted or made inferior or physically, emotionally or financially weakened as a result of the tactics, manipulation or subversion of the defendant. The same is true of the other aspects of this element when the victim is under the control or under the abuse of power.

10.6 Incest

Tanzania 

Lawama Dedu v Republic [2016] CA

Principle or Rule Established by the Court's Decision

Whether a person who has sexual intercourse with a niece can be prosecuted for incest will depend on whether sexual intercourse between such relations is proscribed by statute.

Judges: Mjasiri, Juma and Mugasha | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed, proceedings of trial court quashed and sentence set aside	Court of Appeal/ Appellate, Iringa (Tanzania)	Criminal Appeal No. 318 of 2015; delivered on 1 August 2016	Other GBV (Incest, Defilement)

Case Summary

The appellant, Lawama Dedu, had carnal knowledge of L.K., a 14-year-old girl, who to his knowledge was his niece. On 7 February 2014, the complainant went to visit her aunt. On arrival at around 7 p.m., she met her uncle, who invited her to his residence, saying that his wife, her aunt, wanted to meet her there. They walked together and, as they were passing a patch of forest, the appellant forcefully pulled her far away from the pathway into the forest, removed her underpants and proceeded to have sexual intercourse with her. He ignored her cries for help, including calling out her aunt's name. After he had finished, he forced her to follow him into a house whose owner the complainant did not know. The cries for help had led people to gather. She was later assisted and taken to a dispensary and the appellant was arrested. The trial court convicted the appellant and the conviction was upheld in the first appeal at the High Court.

On appeal to the Court of Appeal, the issue for determination was whether sexual intercourse with a niece falls within the ambit of the offence of "incest by a male" under Section 158(1) of the Penal Code.

The Court of Appeal held that Section 158(1) creates the offence of incest by a male and Section 158(1)(a) defines incest by a male as having sex with a granddaughter, daughter, sister or mother. In light of this definition, although an adult man and his niece having sexual intercourse is an act that is contrary to common morality, it cannot sustain a charge of incest by a male. Furthermore, a consenting adult niece could not be charged with incest by a female under Section 160 of the Penal Code, which prohibits sexual activities only if the man is her grandfather, father, brother or son. The conviction had to be quashed and the sentence set aside.

Points to Note

- The decision in this case is very important because it addresses sexual offences within a family by addressing the limitation in the definition of incest by a male in the Penal Code by excluding a niece as a prohibited sexual partner.

- The Court discussed how other jurisdictions have widened this definition. For example, Kenya realised the gaps in the said provisions and changed the law in 2006 on offences related to incest by males and now provides a clear example of legislative intent to include nieces in the group of females with whom sexual intercourse is prohibited in the SOA 2006.
- The Court also noted how this definition is limited in that it is not comparable to the categories of males and females that are grouped as prohibited relations in the Law of Marriage Act. It called for harmonisation of the provisions punishing incest by males under the Penal Code with the prohibited marriage under the Law of Marriage Act.

Uganda 

Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi [2007] HC

Principle or Rule Established by the Court's Decision

A custom that is not repugnant and that is in conformity with both written and other laws can constitute a "lawful cause" to successfully challenge an impending marriage.

Judge: Remmy Kasule | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Prospective marriage declared illegal, null and void; permanent injunction issued barring the defendants from contracting a marriage	High Court (Uganda)	Judgement delivered on 5 May 2007, Civil Suit No. 52 of 2006	Other GBV (Incest, Intra-clan marriages)

Case Summary

This case dealt with the customs applicable to intra-clan marriage as practised among the Baganda. The plaintiff, Bruno Kiwuwa, sought to pre-empt the marriage of the two defendants, Ivan Serunkuma and Juliet Namazzi, whose wedding had been scheduled for 24 June 2006. The plaintiff was the second defendant's father.

The plaintiff's case was that the two defendants were Baganda by tribe and both belonged to the *Ndiga* (sheep) clan. It was asserted that a custom among

the Baganda calling for exogamy within marriage relationships meant there could be no valid contract of marriage between the two defendants. It was argued that it was possible to stop the celebration of a marriage under the Marriage Act where one could show "just cause" and that the violating of a custom constituted such just cause. Further, it was argued that the Court was required to enforce the custom by Article 37 of the Constitution, which protects the right to enjoy, practise, profess, maintain and promote any culture, cultural institution and tradition in a community. Sections 14 and 15 of the Judicature Act also require the courts to observe and enforce customs that are not repugnant to natural justice, equity and good conscience and that are not incompatible either directly or by necessary implication with any written law.

The defendants contended that the customs were inapplicable to their marriage, which was to be contracted under the Marriage Act and not the Customary Marriage (Registration) Act. It was argued that, even if it fell under the latter Act, the custom was not part of the prohibited degrees of consanguinity under Section 11(d) of the Second Schedule. Nor was the marriage among the prohibited degrees of consanguinity under Section 149 of the PCA.

The Court established that the defendants were precluded from getting married as a result of existing customary law. In arriving at this conclusion, the Court observed that customary law may exist and operate on its own or may co-exist with a different type of law. It also noted that customary law is *"accepted and binding on a given society or tribe in their social relations and may be uniform to a number of societies or tribes"* or may vary from one to the other and area to area.

The Court established the continued application of customary law to marriage by demonstrating that the enactment of the Marriage Act, the Marriage of Africans Act and the Marriage and Divorce of Mohammedans Act by the colonial administration to cater for marriage between non-African Christians, Christian Africans and Arabs and African Mohammedans, respectively, did not lead to the inapplicability of customary law in marriages but led to the creation of a dual system where native laws were recognised so long as they were not repugnant.

The Court therefore rejected the argument that the custom in question was not applicable.

The Court did not accept that the custom could be enforced against the defendants only if they were customarily contracting a marriage under the Customary Marriage (Registration) Act. The Marriage Act acknowledges

the validity of customary marriage and recognises the operation of customary marriage laws. The Court was therefore of the view that a custom in issue could constitute lawful cause to successfully challenge the marriage of both defendants under the Marriage Act.

Section 4 of the Act calls for the satisfaction of formalities preliminary to marriage and therefore applies the custom in issue to the intended marriage of the defendants. The Court considered that the issue of whether customary law or practices allowed the defendants to get married was a preliminary consideration that had to be resolved prior to contracting a marriage under written laws.

Furthermore, the Court posited that the Marriage Act provided numerous grounds for challenging an intended marriage under the Act independent of the prohibited degrees of consanguinity under Section 149 (1) of the PCA and the Customary Marriage (Registration) Act.

Lastly, the Court found that the particular custom did not violate constitutional rights under Article 31 (the right to marry), Article 32(2) (a prohibition on customs that are against the dignity, welfare or interest of women) and Article 37 (the right to belong to, practise, profess maintain and promote any culture, cultural institution and tradition within a community). The custom was therefore not repugnant to natural justice, equity and good conscience or in conflict with the Marriage Act or any other written law.

Accordingly, the Court issued the following orders, *inter alia*:

i. A declaration that the first and second defendants' intended marriage was illegal, null and void by reason of the custom that, being Baganda by tribe, both belonging to the same *Ndiga* clan, the defendants could not lawfully contract a marriage as between themselves.

ii. A declaration that it is a custom of the Baganda as a tribe that, before a marriage is contracted, it is preceded by an introduction ceremony.

iii. A permanent injunction restraining the first and second defendants from contracting a marriage between them.

Point to Note

This case illustrates that adjudication is reflective of the customs of the general populace as provided for in Article 126(1): it provides that judicial power is derived from the people and shall be exercised in conformity with law and with the values, norms and aspirations of the people.

10.7 Denial of Access to Medical Health Care

Uganda 

CEHURD & 3 others v The Attorney General [2011] CC

Principle or Rule Established by the Court's Decision

A declaration about whether the conduct of public business is acceptable is a "political" issue to be determined by the legislature or the executive branch of government and not by the court.

Judges: A.E.N Mpagi-Bahigeine, C.K Byamugisha, S.B.K Kavuma, A. S Nshimye and Remmy Kasule | JCC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Petition struck out	Constitutional Court (Uganda)	Constitutional Petition No. 16 of 2011 (Articles 137(3), (4) and Article 45 of the Constitution and Rule 3, SI No. 91 of 2005	Other GBV (Denial of maternal health rights)

Case Summary

The petitioners filed a constitutional petition on the grounds that the government had violated the rights of women through acts and omissions with regard to maternal health services. The petitioners asserted that the government had failed to provide basic maternal health services and to adequately budget for maternal health. The petition also suggested that the unethical behaviour of health workers had led to the preventable deaths of expectant mothers during childbirth. The petitioners claimed that the aforementioned actions or omissions violated the rights to life and health; women's rights; and the right to be free from torture, cruel, inhuman and degrading treatment or punishment.

Pursuant to Article 137 of the Constitution, the petitioners then sought declarations that the acts/omissions of the respondent's agents violated the stated constitutional rights. They also sought an order that the families of the expectant mothers who had died during childbirth receive compensation for the violation of their rights.

At the start of the hearing, counsel for the respondent raised a preliminary objection based on the legal doctrine known as the "political question" doctrine. The petitioners had sought an interpretation of whether government spending on health care was sufficient to be constitutionally

acceptable. Counsel for the respondent contended that this required the Court to make a judicial decision involving and affecting political questions. In so doing, the Court would in effect be interfering with political discretion, which by law is a preserve of the executive and the legislature. She stated that, for the Court to determine the issues in the petition, it would have to call for a review of all the policies of the entire health sector and the sub-sector of maternal health care services and make findings on them, while implementation of these policies is the sole preserve of the executive and the legislature.

In reply, counsel for the petitioner argued that the preliminary objection was misconceived because the petitioner's prayer to court was to determine whether the acts and omissions are in contravention of the Constitution and not the determination of a political question. He pointed out that the government budget allocation to the health sector had for the previous 10 years been 9.6% of the national budget, lower than the required 15%. He argued that the different conventions to which Uganda is a party spell out the obligations to the parties, which the government must respect.

The Constitutional Court found the Supreme Court of Uganda had adopted the political question doctrine in *Attorney General v Major General David Tinyefuza* in which Kanyeihamba JSC (as he then was) went to great length in explaining the extent to which courts should go in interpreting and concerning themselves with matters that are, under the Constitution and by law, assigned to the jurisdiction and powers of Parliament and the executive.

The Court cited *Coleman v Miller* 307 U.S. 433,454-455 where it was held that, in determining whether a question fell within the doctrine of political question, dominant considerations included the appropriateness under the system of government of attributing finality to the action of the political departments and the lack of satisfactory criteria for judicial determination of such matters. Ultimately, the question is whether the separation of powers is respected in circumstances where a court is being asked to pass judgement on the actions of politicians.

The acts and omissions complained of in the current present petition effectively required the Court to review and implement health policies. A declaration about whether the conduct of public business is acceptable is a "political" issue to be determined by the legislature or the executive branch of government and not by the court. The acts and omissions complained of therefore fell within the doctrine of political question. The justices therefore upheld the respondent's preliminary objection and the petition was struck out accordingly as not raising competent questions for determination.

The Constitutional Court appreciated the concerns of the petitioners that motivated them to lodge this petition with regard to what they perceived to be the unsatisfactory provision of basic health maternal commodities and services towards expectant mothers However, the Court found that the solution to the problem was not through a constitutional petition framed in this way. There were other legal alternatives that the Constitution and other laws provide for resolution of such matters. For example, the petitioners could apply for redress under Article 50 of the Constitution. Article 50 focuses on redress for alleged constitutional infringements, rather than requiring the court to make declaratory judgement about political decision-making.

Points to Note

- The decision in this case was overturned on appeal but it is of relevance because it provides the background to the decision of the Supreme Court, which is set out separately below.
- The Court held that, in seeking adjudication on cases involving the level of protection afforded by the state to women and girls as a result of the exercise of political discretion, petitioners should avoid making applications for a declaratory judgement. Such a judgement will require the court to make public declarations about how a political question has been determined, for example about how public spending is allocated. This is an impermissible infringement of the separation of powers. A claim for damages arising out of alleged constitutional breaches may be more appropriate.
- This case stands out because it reiterates the political question doctrine in its relevance to the separation of powers. Such a case indicates how problematic it is to hold the state accountable where it has not fulfilled its commitment to protect the rights of its citizens, women and girls; the political question could be used to evade questioning the implementation of policies.

CEHURD & 3 others v The Attorney General [2016] SC

Principle or Rule Established by the Court's Decision

The "political question" doctrine only extends to shield both the executive arm of government as well as Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution.

Judges: B. M Katureebe, Kisaakye Esther, Jotham Tumwesigye, Odoki, Tsekooko, Okello and Kitumba | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal successful, case remitted to the Constitutional Court	Supreme Court (Uganda)	H.C Crim. Case 1155/2016 (s.129 PCA)	Other GBV (Denial of access to maternal health)

Case Summary

This appeal was brought against the ruling of the Constitutional Court in Constitutional Petition No. 16 of 2011, in which the appellants petitioned the Court to determine whether the Government of Uganda had violated the rights of women to maternal health services by failing to provide basic maternal health services. The Constitutional Court dismissed the petition without hearing its merits because the declarations sought infringed the "political question: doctrine.

The appellants filed an appeal on three grounds – namely, that the Constitutional Court:

i. Incorrectly applied the doctrine of political question.
ii. Erred in law in holding that the petition did not raise competent questions requiring constitutional interpretation.
iii. Erred in law when it decided that the petition called for it to review and implement health policies.

The Supreme Court considered Article 137(1) of the Constitution, which provides that *"any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court"*. It found that Article 137(1) been interpreted by a Ugandan Court in *Paul Semwogerere & 2 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. Therefore, the Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution simply on the grounds that it infringed the discretionary powers of another organ of the state.

The political question doctrine had limited application in Uganda's current constitutional order and only extends to shield the executive arm of the government and Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution.

The appellants' petition fell outside of the political question doctrine. It had referred to specific acts and omissions of the government and prayed for a determination as to whether there had been a proper exercise of mandate in light of specific provisions of the constitution. Contrary to its decision, the Constitutional Court had been competent to make an adjudication

as to whether redress could be granted, pursuant to Article 137(4) of the Constitution.

The Supreme Court reasoned that the Constitutional Court should have heard the parties and made a determination based on the merits of the petitioners' claims and not struck out the petition summarily without hearing them. It ordered that the Constitutional Court proceed and hear Constitutional Petition No. 16 of 2011 on its merits.

Point to Note

This case stands out because it illustrates the manner in which the political question doctrine may operate. It also limits the application of the political question doctrine in the manner by which it excludes the Constitutional Court from inquiring into matters involving the provisions of the Constitution of Uganda. This shows a willingness on the part of the judiciary to hear constitutional matters that would previously be construed as interfering with the separation of powers. This opens up the space within which accountability for rights abuses and public interest litigation for women's rights may flourish and serves to empower adjudications in cases involving issues of VAWG.

Kenya 

J.O.O. (also known as J.M.) v The Attorney General & 6 others [2018] HC

Principle or Rule Established by the Court's Decision

A failure to provide adequate and appropriate maternity care is a violation of a woman's rights to maternal health care and dignity and to not to be subjected to cruel, inhuman and degrading treatment.

Judge: Ali-Aroni | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Declaration of violation of rights to maternal health care, to dignity and to not be subjected to cruel, inhuman and degrading treatment	High Court, Bungoma (Kenya)	Constitutional Petition No. 5 of 2014; judgement delivered on 22 March 2018;	Other GBV (Denial of access to medical care)

Case Summary

The petitioner was a woman from a low-income background seeking free maternal care at Bungoma County Referral Hospital, a public health care facility that ought to provide free maternal health care following a

presidential directive. On admission, she was asked to purchase cotton wool and the drug used to induce labour. There were insufficient beds available in the labour ward and she was forced to share a bed with another patient.

The nurses on duty instructed the expectant mothers, including the petitioner, that, at the onset of labour pains, they would have to walk to the delivery room. When the inducement drug was administered to the petitioner, the nurses failed to monitor and check on her. On the onset of her labour pains, the nurses did not respond to her calls for help. She then walked to the delivery room and found that the three available beds were occupied by other women in the process of delivery. Left with no choice, she attempted to walk back to the labour ward but lost consciousness along the way and delivered her baby on a concrete floor. She woke up to shouting and abuse from two nurses, who asked her why she had delivered on the floor and therefore soiled it in the process. Without any assistance, she was ordered to carry the placenta and walk to the delivery room to have it removed.

The complainant further alleged that complaint mechanisms were neither displayed nor brought to her attention.

The main issues for determination were:

i. Whether or not there was a violation of the petitioner's rights under the Constitution of Kenya and international instruments with regard to the right to dignity, information and health care, in particular maternal health care.
ii. Whether there was failure by the national and county governments to establish necessary policy guidelines and other measures to implement and monitor health care services and to allocate maximum available resources, and if so whether such failure resulted in the infringement of the petitioner's rights.

The judge found the hospital had violated the petitioner's rights to maternal health care, contrary to Article 43(1) of the Constitution, Article 12(1) of the ICESCR and Article 16 of the ACHPR. This was by reason of its failure to provide basic equipment, facilities and medication, including requiring women to purchase basic provisions in a public facility that is required to provide maternal health care in accordance with a presidential directive.

The judge also found that the degrading treatment shown to the petitioner was a violation of her right to dignity under Article 28 of the Constitution, and the right not to be subjected to cruel, inhuman and degrading treatment under Article 29(j) of the Constitution, as well as under the ACHPR.

Although the petitioner alleged that complaint mechanisms were neither displayed nor brought to her attention, the Court found there was no violation to the petitioner's right to information. From the facts

on record, the petitioner did not, during her admission and discharge from hospital, anticipate complaining against anyone. Furthermore, the petitioner had not testified to the fact that necessary information was not disclosed to her.

The Court found that the national and county governments had not devoted adequate resources to health care services, and had failed to put in place effective measures to implement, monitor and provide minimum acceptable standards of health care, thus violating the petitioner's rights under the Constitution and relevant international instruments.

The Court declared that:

i. The petitioner's right to dignity and to not be subjected to cruel, inhuman and degrading treatment had been violated.
ii. The neglect suffered by the petitioner was a result of the national and county government's failure to ensure available quality health care services.
iii. The national government and county government of Bungoma had failed to develop and/or implement policy guidelines on health care, thus denying the petitioner her right to basic health care.
iv. The national government and county government of Bungoma had failed to implement and/or monitor standards of free maternal health care and services, resulting in the mistreatment of the petitioner and violation of her right to dignity and to treatment that is devoid of cruelty, inhumanity and degradation.

The Court ordered that a formal apology be made to the petitioner by the third respondent (the Bungoma county cabinet secretary for health), the fifth respondent (Bungoma County Referral Hospital) and the three nurses named as having violated the rights of the petitioner.

The Court also ordered that the second respondent (the county government of Bungoma) and the fourth respondent (the cabinet secretary of the Ministry of Health) in equal shares pay an award of damages in the sum of KSh 2.5 million, as well as the costs of the suit.

Points to Note

- This case affirmed the socio-economic right to health and specifically reproductive medical health care services. Further, the state has a duty to provide free maternity services in accordance with constitutional and international law standards.
- The judgement affirms the right of all Kenyans, especially the poor and marginalised (the majority of whom are women), to be treated with dignity while accessing free (maternal) medical care.

- This is an important precedent as it sets down that nurses, as health care providers, owe a duty of care to their patients to treat them with dignity.
- This right is anchored in the Constitution and international instruments, and is a moral obligation on health care professionals (*"Theirs is a calling to serve humanity in vulnerable circumstances"*, at Paragraph 62).
- This case should be treated as an instance of GBV as the petitioner suffered violence that could have been meted out to her only by virtue of her being a woman. Indeed, maternal care differs from general/basic health care as it involves specialised care for women who are pregnant.
- In addition to the Constitution of Kenya 2010, the Court notably grounded its findings of human rights violations in various international instruments, including the ICESCR and the ACHPR.
- While the Court did not specifically define what amounts to "minimum acceptable standards of health care", providers are required to provide proper treatment, equipment, facilities and medication in conformity with standards set out in international conventions, national laws and policy directives.

Obiter Dictum

In awarding damages, the Court was cognisant of the fact that no amount of monetary compensation can adequately redress the injuries suffered by the petitioner; the award is merely an acknowledgement of the infringement of rights and an attempt to make reparation.

Other cases/decisions referred to	
Country	*Decision*
South Africa | *Treatment Action Campaign & others v Minister of Health & others*	The Constitutional Court of South Africa held that the refusal by the government of South Africa to provide anti-retroviral drugs to HIV-positive pregnant women was a violation of the right to health under the Constitution. This was a landmark decision protecting the right to maternal, child and reproductive health and the justiciability of economic, social and cultural rights.
South Africa | *Srs Makwanyane & another* [1995] CCT3/94 ZACC 3	*The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Constitution.*
Kenya | *Republic v Minister for Home Affairs and 2 others Ex-parte Leonard Sitanize* [2005] eKLR	*Human dignity is of Fundamental importance to any Society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights.*

M.A.O. & another v The Attorney General & others [2015] HC

Principle or Rule Established by the Court's Decision

Violation of human rights declared. Compensation awarded.

Judge: Mumbi Ngugi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Violation of human rights declared; compensation awarded	Constitution and Human Rights Division, Nairobi High Court (Kenya)	17 September 2015, Case No. 562 of 2012	Other GBV (Denial of access to medical care)

Case Summary

This petition sought redress for the treatment of the two petitioners at Pumwani Maternity Hospital in Nairobi. Both petitioners were mothers who had given birth at Pumwani and subsequently been detained there. On 1 June 2013, the government issued a directive under which it removed all charges in respect of maternity services in public hospitals in Kenya. Prior to this, patients were required to meet the cost of delivery in public hospitals. As a result, the practice of detention of indigent patients for inability to pay hospital charges was widespread.

The first petitioner was a mother of six, who worked as casual labourer, washing clothes and cleaning houses. Her net income was KSh 100 per day. The second petition was a mother of five, who worked as a hairdresser. Her income was not fixed and ranged between zero and KSh 500 per day. Because of the irregular nature of her income, she was often unable to meet the cost of necessities for herself or her children.

In September 2010, the first petitioner gave birth at Pumwani Hospital. She was subsequently detained there for a period of 24 days, during which time she suffered trauma. The first petitioner claimed the nurses had treated her rudely, and that she and other detained patients were forced to share beds. During the time of detention, she noted that some of the detained mothers would elect to sleep on the floor and leave the beds for their babies, and she therefore slept on the floor on various occasions. The first petitioner was eventually released from the hospital when the mayor of Nairobi at the time visited Pumwani and the first petitioner's friends reached out to him about her predicament. As a result, the mayor wrote a cheque towards her medical bill.

The second petitioner was first admitted to and detained at Pumwani Hospital in 1991 when she was 15 years old. She was unable to deliver her baby vaginally and therefore had a caesarean section. She regained

consciousness 10 days after the operation, upon which the hospital staff removed her stitches and sought to discharge her. Being only a young girl, she had no money to pay the bill, so the hospital detained her. She slept on the floor for a period of seven days. During that time, the hospital had many patients and the detained patients were always fed last. As such, the second petitioner sometimes missed out on food.

The second petitioner's husband raised the money to have her discharged from the hospital and took her home. She avers that her womb continued to ache and that she felt something pricking her there. Her husband decided to return her to Pumwani Hospital for a check-up. At the hospital, she was rushed to theatre, where it emerged that a pair of scissors had been left in her womb during the caesarean section.

In November 2010, the second petitioner once again experienced Pumwani Hospital. At the time, she was an expectant mother and was receiving antenatal care at a Nairobi City Council clinic. On 9 November 2010, she was on her way to an antenatal appointment with her sister when she started bleeding. A taxi driver drove them to Pumwani Hospital. On arrival, the staff at the hospital instructed her sister and the taxi driver to place her on the floor. The nurses at the hospital later informed her that the hospital beds were fully occupied, and that she would have to wait for other patients to give birth before she could find a bed. She was told to wait on the bench in the reception area. All this time, she was still bleeding.

According to the second petitioner, as she was waiting in the reception area, a female doctor came by and the second petitioner heard the doctor tell the nurses nearby that her case was serious, that the baby she was about to deliver was in breech position and that she could die. The doctor ordered that the second petitioner be taken in for immediate surgery. She therefore underwent surgery on 9 November 2010 at 11 a.m. despite the fact that she had been admitted at 9 a.m. on the same morning.

After the surgery, the second petitioner was taken to a ward bed. She states that the nurses were all very rude to her. For example, when she wanted to urinate, the nurses attending to her told her that if she thought she could stand and go to the toilet on her own then she could do so by herself. Eventually, the nurses came and, when they attempted to move her, they noticed that she was bleeding heavily and therefore called a doctor. On examining her, the doctor informed her that she suspected that her bladder had ruptured. The second petitioner was taken back to theatre, where the doctors put in a catheter, which she had to use for the next ten days. After the surgery, the second petitioner noticed that her wound was infected and that the stitches were badly done.

The second petitioner stated that she was discharged five days later. At this time, her wound still looked septic and she still had the catheter. According to

the second petitioner, the catheter was ultimately removed five days too early. The second petitioner did not have adequate money to pay her entire bill on discharge, and her offer to pay the KSh 6,000 she had with her was rejected. The second petitioner states that she was never shown an itemized bill. She was due to leave the hospital on 13 November 2010 but was detained for failure to pay her medical bill. For the period of her detention, she was relegated to sleeping on the floor. When she complained about being put on the floor, the nurses stopped dressing her wound. She was also not given a blanket, although her newborn child continued to receive treatment as she had swollen limbs.

As was the case during her previous detention, she and other mothers who were detained and sleeping on the floor received food only after other paying patients had received their portions. During the period of detention, she was locked in and would not even be allowed to go outside the ward to bask in the sun because the staff feared that she along with other detained patients would run away. She was eventually released on 19 November 2010 after her relatives managed to raise the KSh 12,300 demanded by the hospital.

The petitioners asked the Court to find that these violations had occurred, and to grant declarations that:

i. Detention of the first and second petitioners was arbitrary.
ii. The act of arbitrary detention in a health care facility is a violation of the constitutional and human rights standards to which Kenya prescribes.
iii. Under its constitutional and human rights obligations, the Kenyan government must take the necessary steps to protect patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations.

The petitions also prayed for an order for general damages for physical and psychological trauma occasioned as a result of the acts or omissions of the hospital's staff and or workers.

After considering the material presented and all the arguments, the judge found the petition was competent and proper. The petitioners had pleaded their case sufficiently and in doing so had filed voluminous pleadings, which clearly set out their factual allegations with respect to their detention by the hospital and the treatment they were subjected to while so detained. The petitioners also gave evidence on oath, and were cross-examined at length on their evidence. The submission that their petition was incompetent therefore had no merit. In any event, a failure to plead with precision would not have been, of itself, sufficient to render the petition incompetent. The duty of the court is to render substantive justice, not to pay talismanic homage to rules and technicalities.

The judge found the petitioners were clearly discriminated against because of their economic status. They were denied access to health care facilities because of their inability to pay. When they were, very grudgingly, given treatment, they were detained because of their inability to pay. While at the hospital, they were denied basic provisions such as beds and bedding, and the food they were given was insufficient. To act in such a way was contrary to the Constitution and to the regional and international conventions to which Kenya was a party.

The judge also found that the detention of the petitioners for non–payment of medical bills was a violation of constitutional rights guaranteed under Articles 28 and 29 of the Constitution (to human dignity and not to be deprived of freedom by way of arbitrary detention). The judge posited that detention of a person must be for just cause; otherwise, it amounts to arbitrary detention, which is contrary to the law. There is nothing in law that allows a medical institution to detain a patient for non-payment of a medical bill, and the judge agreed with the reasoning in previous decided cases, which stated that detention of a person for failure to pay a civil debt amounts to an arbitrary deprivation of liberty and violation of the right to freedom of movement.

The judge issued the following declaratory orders:

i. *"I declare that the detention of the 1st and 2nd Petitioners by the 5th respondent was arbitrary and unlawful;*
ii. *"I declare that the act of arbitrary and unlawful detention in a health care facility is a violation of the constitutional and human rights standards under the Constitution, as well as under international conventions and treaties that Kenya subscribes to;*
iii. *"I declare that the Kenyan Government must take the necessary steps to protect all patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations;*
iv. *"I declare that the conduct of staff of the 5th Respondent against the petitioners before and during their detention constitutes an infringement of the petitioners' fundamental rights and freedoms as set out in Articles 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution;*
v. *"I direct that the 3rd, 4th and 5th Respondents will develop clear guidelines and procedures for implementing the waiver system in all public hospitals;*
vi. *"I direct that the 3rd, 4th, and 5th Respondents take the necessary administrative, legislative, and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills."*

The petitioners were also awarded damages as follows:

i. To the first petitioner, the sum of KSh 1.5 million.
ii. To the second petitioner, the sum of KSh 500,000.

Points to Note

- This case clearly indicated that woman and girls have clear constitutional rights to be treated with dignity and respect with regard to the provision of maternity care, regardless of their socio-economic status.
- The judge made reference to state obligations under international law and acknowledged the measures the state had put in place, such as a policy under which maternity services, including antenatal and postnatal care in public hospitals, will be free. If properly implemented, women will not be dependent on the doubtful mercy of those in public hospitals charged with determining whether they qualify for a waiver or not. This is a good thing.
- Courts are expected to take note that the state must, however, go further, to ensure such services are rendered in accordance with constitutional and international law standards and conform to such standards with respect to the right to health.

Obiter dictum

"The rights in the Constitution and the international instruments that were highlighted and which represent the great hope of the poor and marginalized in our society, will remain weak and ineffectual platitudes unless we can unearth, from the recesses of our hearts and minds where they are buried under layers of indifference and lack of concern for the welfare of others, even those whom we have a legal duty to serve, the remnants of values, compassion and empathy that we once had. Without these three, in circumstances such as have been presented before me, all that a Court can do is come in after the fact, after great pain and suffering has been inflicted on the minds, bodies and spirits of our mothers, sisters, daughters and wives, to offer reliefs that may not quite make up for the humiliations and degradation that we subject others to. And that, in the final analysis, degrades and dehumanizes all of us.

"It is, however, not a totally hopeless situation. As the Judge noted that the state has put in place a policy under which maternity services, including ante natal and post-natal care in public hospitals, will be free; if properly implemented, women will not be dependent on the doubtful mercy of those in public hospitals charged with determining whether they qualify for a waiver or not. This is a good thing. The state must, however, go further, to ensure that the services rendered are rendered in accordance with constitutional and international law standards and conform to such standards with respect to the right to health.

"The challenge of ensuring access to health for all, but particularly for women and, by necessary extension, children, must be at the forefront in the minds of policy makers and implementers. This is particularly so in view of the fact that health care is now a devolved function, responsibility for which lies with county governments, under Schedule Four of the Constitution."

Other cases/decisions referred to	
International Commissions/ Committees	*Decisions*
Economic, Social and Cultural Rights (ESCR) Committee	The ESCR Committee has described discrimination as follows: *Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.* The ESCR Committee has also noted that there are non-derogable rights to which a state party cannot justify non-compliance. These rights include *the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.*
ACHPR | Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights	*Some of the obligations imposed on States parties to the Banjul Charter are immediate upon ratification of the Charter. These obligations include but are not limited to... the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights.*
CEDAW Committee | General Recommendation No. 28	The Committee has found that the phrase *"without delay"* in Article 2 of CEDAW is *clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate nature.* Thus, CEDAW *does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume upon ratification of or accession to the Convention. It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State.*

10.8 Bride Price

Uganda 

Mifumi & others v The Attorney General and Kenneth Kakuru [2014] SC

Principle or Rule Established by the Court's Decision

The custom and practice of demand for refund of bride price after the break down of a customary marriage is unconstitutional as it violates Articles 31(1)(b) of the Constitution, and it should be prohibited.

Judges: B. M Katureebe, Kisaakye, Tumwesigye, Odoki, Tsekooko, Okello and Kitumba | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal partially succeeded	Supreme Court (Uganda)	Constitutional Appeal No. 2 of 2014	Other GBV

Case Summary

A petition was filed with the Constitutional Court for a declaration that (among other things):

i. The demand for and payment of bride price fetters the free consent of persons intending to marry or leave a marriage, as guaranteed by Article 31(3) of the Constitution.
ii. The demand for a refund of bride price as a pre-requisite for the dissolution of marriage is also unconstitutional in that the practice undermines the dignity of women, as guaranteed by Article 33(6) of the Constitution. Also, demanding refunds of bride price may lead to domestic violence.

The Constitutional Court held that:

i. The Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to so choose the bride price option as the way they wish to get married. Justice Leticia Kikonyogo found that the groom's family was not the only one giving gifts; the bride's family often gave gifts as well.
ii. Although the demand for a refund of bride price demeans and undermines the dignity of a woman and is in violation of Article 33(6) of the Constitution, no declaration was necessary to this end. Redress could be provided by an application for compensation under Article 50 of the Constitution. There was no evidence. There was no evidence to support any assertion that, as a matter of course, demands for refunds of bride price led to domestic violence. It may play a part in some cases of domestic violence, but this fact alone provided no justification for a blanket prohibition of the practice of bride price.

By a majority of four to one, the petition for declarations was therefore dismissed. Dissatisfied with the decision, the appellants lodged an appeal to the Supreme Court to contest the decision of the justices of the Constitutional Court. The Supreme Court was asked to determine, among other things, whether:

i. Bride price promotes inequality and violence in marriage (the issue of inequality was raised but not commented upon by the Constitutional Court).
ii. Bride price fetters the free consent of persons intending to marry.
iii. The custom and practice of demanding the refund of bride price was unconstitutional.

In the lead judgement, Justice Tumwesigye (JSC) ruled that:

i. Bride price does not promote inequality and violence in marriage. While bride-price may lead to inequality and suffering in some cases, there are many more husbands who give bride price but who do not use it as a justification for inflicting violence and abuse on their wives. Rather, it is valued by many as a token of gratitude to the bride's family for the girl's nurturing and upbringing. It had also been said to promote stability in marriage.

ii. Bride price does not fetter the free consent of persons intending to marry. The payment of bride price is a decision relating to form of marriage, rather than whether to marry in the first place.

iii. The custom and practice of demanding the refund of bride price after the breakdown of a customary marriage is unconstitutional. Article 32(2) of the Constitution provides that laws, cultures, customs and traditions that are against the dignity, welfare or interest of women or that undermine their status, are prohibited. The custom of refund of bride price devalues the worth, respect and dignity of a woman. The custom completely ignores the contribution of the woman to the marriage up to the time of its breakdown. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. This cannot be ameliorated by predicating any refund on a valuation of contribution to marriage, taking into account for example the length of the marriage and the number of children she has produced in the marriage. A woman is not property that should be valued. Furthermore, a man is not subjected to valuation for the refund of bridal gifts on breakdown of the marriage. To hold the refunding of bride price to be constitutionally acceptable would therefore ignore Article 31(1)(b) of the Constitution, which provides for men and women to have equal rights on the dissolution of marriage. In any event, bride price constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being a gift(s) should not be refunded.

Additionally, Justice Tumwesigye was of the view that the refunding of bride price had negative implications with regard to the fact that the bride price was held by a third party (the bride's parents or relatives). It is unfair to the parents and relatives of the woman to be asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund. It may also be unfair to the wife, who may be trapped in a violent relationship. The Court remarked that:

> *… the effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble if they are unable to refund bride price or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them…*
>
> Furthermore, if marriage is a union between a man and a woman, it is not right that legal recognition of the dissolution of a customary marriage should depend on a third party satisfying the condition of refunding bride price.

In the partially dissenting decision of Justice Kisaakye (JSC), she, *inter alia*, considered that, although Article 37 of Uganda's Constitution grants citizens the right to enjoy and practise their culture, the practice of payment of bride price was not such a practice envisaged to be upheld by the Constitution.

Points to Note

- The ruling upheld the dignity of women through its articulation of the definition of bride price and declaring that that the woman is not property that should be valued.
- It saved the positive aspects of bride price by those who cherish it but ordered the government, together with local governments, to regulate its use by passing regulations.
- The Court sought to distinguish itself from the colonial tradition that required strict proof of customs to take judicial notice of such practices. It also limits the adverse effects that may be attributed to refund of bride price in the dynamics of marriage dissolution. The case initiated the long-awaited reform of a customary practice that had become so firmly entrenched and so longstanding as to become untouchable, thereby reducing inequality between women and girls on the one hand and men and boys on the other.

Tanzania 

Nyakanga v Mehego [1971] HC

Principle or Rule Established by the Court's Decision

Where conditions of a valid marriage are met under customary law, the "husband" is required to pay bride wealth.

Judge: El Kindy | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed	High Court/Appellate (Tanzania)	HCD 270; delivered on 28 July 1971	Child marriage

Case Summary

The appellant sued the respondent for unpaid bride wealth in respect of his daughter. The respondent and the appellant's daughter were living together, the girl having eloped to live with him. The respondent had first stated that he considered the appellant's daughter his "wife" but later he stated that he did not wish to marry her. The primary court found for the appellant, but the district court reversed the decision, holding that, as the respondent did not wish to marry, he could not be forced to marry. The case was appealed to the High Court.

The issue for determination at the High Court was whether, in light of the facts, circumstances and customary law, the respondent was married to the appellant's daughter.

The High Court found that:

i. In terms of the facts, *"It may be that not much weight can be put on the contradictory states of mind of the respondent, but it cannot be ignored that he categorically considered the appellant's daughter as his 'wife'."*
ii. The circumstances suggested that the appellant wanted to avoid the relationship being categorised as a marriage because *"he wants to have the appellant's daughter in his house without paying for it"*.
iii. *"The respondent eloped or abducted the appellant's daughter and therefore by this process their customary law (Kurya) considered the respondent as having been validly married."*

The respondent was therefore validly married to the daughter. The respondent was ordered to pay the standard bride price of the Kurya tribe (23 heads of cattle).

Points to Note

- The decision is important because it shows the existence of early or forced marriage of young girls under customary laws, in this case under Kurya customs, and exchange of bride wealth. It shows that this is not a matter of the past: it exists in society.

- According to Kurya customs, for a marriage to be recognised, bride wealth must be provided to the bride's family and non-payment renders the marriage void until it is paid. This may explain why the Court seemed more interested in addressing whether this customary rite had been fulfilled, rather than the age of the girl. It should be noted that this case was decided in 1971 before the Law of Marriage Act came in effect.
- Bride wealth sometimes renders a bride more likely to endure violence and abuse for fear that, if she leaves the homestead, demand for return of bride wealth will follow. The bride may not be received back to her family with open arms for fear of a demand for the return of bride wealth.