

THE EFFECT OF CULTURE ON DECISION MAKING IN FAMILY LAW COURTS

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DECLARATION

I SSEMPAGALA ALLAN declare that this is my original work and it has never been produced to any university or institution of learning for academic award. All references cited have been acknowledged

Signature.....

SSEMPAGALA ALLAN

Date.....²⁴11 - sept - 2019.....

APPROVAL

This is to certify that this research was carried out under my supervision and is ready for submission to the academic board of Kampala International University.

Signature.....

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Date.....16/9/19.....

(SUPERVISOR)

DEDICATION

I dedicate this book to my father, Mr. Kalibbala Charles, My Mother Mrs. Vicky Kalibbala for the financial support and advice.

I also dedicate it to my mother the late Nanteza Edith who opened life for me and shaped me, the teachers since nursery to university, my friends, brothers and sisters who have also supported me. May the good Lord reward you abundantly.

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Acknowledge the support and contribution of my family. I on my greatest achievement to my parents and friends who helped me overcome my challenges.

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May God reward you all.

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ABSTRACT

Similarly, to the majority courts in different countries culture has continued to affect decision making. This is based on the fact the culture existed before the law. Therefore according to my observation law is just a modernized culture. It is also a tool to create social order just like culture is.

In consideration of Uganda courts more especially family courts, it is observed that most of the cultures have got law governing them. In other words while deciding in family courts the law that is applied contains the component of culture in them.

Uganda grants a right to culture to its citizen as applied under Article 37 of the Constitution though it doesn't show the limit of culture.

There are also some other factors that affect decision making in family law courts including corruption, precedents, political pressure, public opinion and independence of judiciary leading to bad law hence miscarriage of justice.

It should be observed that culture particularly Buganda culture has some components of discrimination therefore the law covers this discrimination to help all rights to be applied effectively.

Culture has got a position in Uganda legal system and it is the law that is interpreted provide in arguing cases however there or some cultural components that are applied ineffectively leading to errors in decision making in family law courts.

LIST OF ACRONYMS AND ABBREVIATION

HCB	High Court Bulletin
EA	East African Law Report
DNA	Deoxyribo Nucleic Acid
FIDA	Uganda Association of Women Lawyers
ALLER	All England Law Reports
NEMA	National Environment Management Authority
Cap	Chapter

LIST OF CASES

Uganda V Kato and Anor 1976

Uganda V Dande 1975 HCB 339

Re Wingham (1949) P 187 at 196

Nakagggwa V Kigundu 1978 HCB

Lough V Ward (1945) 2 ALLER 338

Karanu V Karanu (968) EA 36

Nyakairu V Nyakairu 1976 HCB 216

Hofman V Hofman 1970 EA 100

Wambwa V Okumu 1970 EA 558

Karanu V Njeru (1968) EA 361

Hyde V Hyde 1886 LRIP &D 130, 133

Mifumi and 12 others V Attorney General

LIST OF STATUTES USED

The 1995 Constitution Of The Republic Of Uganda

International Covenant On Economic, Social And Cultural Rights

The Universal Declaration On Human Rights

The Succession Act Cap162

The Divorce Act Cap249

The Land Act Cap 227

The Children Act Cap 59

The Marriage Act Cap 251

The Customary Marriage (Registration Act) Cap 248

The Institution of Traditional or Cultural Leaders Act 2011

The 2003 UNESCO Convention for Safe Guarding the Intangible Cultural Heritage

The National Cultural Policy 2006

The Local Government Act 1997

The National Environment Management Act

The Uganda National Cultural Centre Act 1959

CHAPTER ONE

1:0 Introduction

According to *Sir Edward Tylor*,¹ culture is defined as the complex whole which includes knowledge, belief, art, moral, law acquired by man as a member of society.

In other words culture is acquired by people as members of the society.

In reference *Atwooki, Rwagweri*² “what makes a human being different from other beings is being rational and the possession of culture; the totality of beliefs norms, practices, styles of communication and behavior. What makes people different from others to constitute an identity is the unique aspect of their culture. God created human being in cultural diversity”

Therefore according to that statement, norms and customs that make up culture are dynamic and are continually being renewed and inherited from indigenous history and sociological realities.

According to *Francisco Espinosa*³ law is actually a product of culture, much like every single other social construction. Our culture defines how we perceive society and our place in it and thus how we perceive what society “ought to be” and the rules it should follow.

Law and culture are two distinct concepts but sometimes influence one another in application.

It is through law that culture influences decision making in family law courts in Uganda. Since the work of courts in Uganda is interpretation of law.⁴

Uganda’s culture is very diverse. The culture of Uganda is comprised of a variety of ethnic groups. Over 50 culturally diverse populations make the portion of Uganda. These various ethnic groups have their own beliefs, culture, traditions, norms and more.⁵

The focus of this paper is on the factors that affect decision making in family law courts in Uganda with a deeper look into the effect of culture on decision making in family law courts.

¹ Sir Edward Tylor. Primitive culture 1871,

² Atwooki, Rwagweri. Toro and her people past present and future

³ <https://www.quora.com/what-is-the-relationship-between-law-and-culture>

⁴ Balogun Mustapha LLB law and corporate law practice university of Ilorin

⁵ (<http://habari-uganda-tours.com/all-you-need-to-know-about-culture-in-uganda>)

The target of this paper is to find out the solutions and recommendations to the bad effects caused by culture in decision making in family law courts.

Culture has remained a big issue in decision making law courts since it is incorporated in the laws of Uganda for example Article 37 of the Constitution provides for a right to culture.

Thus in this research I will give a background of the study analysis on the law in relation to culture, find out factors that affect decision making in family law courts and also find out the solutions to the bad effect of culture on decision making in form of recommendations.

The research was mainly based on the culture in relation to the decision in family law courts.

1:1 Background to the study

Uganda has a diverse culture due to the several groups in form of ethnicity. When we consider Taylor's definition of culture,⁶ a person acquires culture as a member of the society therefore Uganda's culture different basing on the societies people lived.

Uganda was declared a British Protectorate in 1894 and in 1902, the order in council adopted The Foreign Jurisdiction Act which incorporated the British laws to be adopted in foreign jurisdiction.⁷

To create uniformity colonialists used the law since Uganda had very many cultures. However native laws and customs were given a chance to continue operating and that is if it is not repugnant to justice and morality or inconsistent with any order in council or any regulation⁸

The *Article 27*⁹ provides for the right to participate in the cultural life of community. Basing on the fact that the United Nations member states are entitled to include these rights in their constitution this gave Ugandans chance to have human rights respected particularly *Article 37 of the Constitution* provides that every person has a right as applicable to belong to enjoy, practice, profess, maintain and promote any culture cultural institution, language, tradition, creed or religion in community with others.

⁶ Primitive culture 1871

⁷ C.W Kanyeihamba Constitution and Political History of Uganda, Centenary Publishing House Ltd Kampala 2002 Page 33

⁸ Sec 20 Of Orders In Council

⁹ UDHR

In Uganda culture has kept on changing due to various factors and some of these include religion, formal education, technological growth, intermarriage and many others.

The cardinal change of culture in Uganda include the political and legal regime this is more evidenced in the *1995 Constitution* that gave women equality with men that is *Article 21* and also the appointment of a female vice president (Specioza Wandera Kazibwe) proves equality yet initially the Ugandan culture didn't respect women.

Culture has continued affecting decisions in family law courts in Uganda. When you analyze the case of *Mifumi and 12 others V Attorney General*, it was found and that the cultural practice in question was refunding of bride price. Basing on the fact that it was in contradiction with *Article 21 of the constitution* and also interfered with the free consent of women in marriage contrary to *Article 31 of the Constitution* hence culture has influenced and effected decision making in courts.

There are very many factors that influence decision making in family law however culture is one of them. Culture had day by day influenced decision making in courts that is in form of giving evidence and also the way of life that is in morals and leadership.

1:2 Problem statement

The Uganda Constitution provides for a right to culture and similar rights.¹⁰ However people in Uganda follow their culture as their background. When we consider these cultures they violate some rights but the law is silent on the limits of culture and its practices.

Culture goes ahead to stretch its territory to family law courts, since law and culture are somehow related basing on the fact that law is as a result of culture.¹¹

There are factors that affect decision making in family law courts in Uganda leading to bad decisions causing injustice in these courts.

The problem of this study is how to have a mechanism within the framework of the entire existing legal regime to control culture on the decision making in family law courts.

¹⁰ Article 37 of the Constitution

¹¹ <https://www.quora.com/what-is-the-relationship-between-law-and-culture>

1:3:0 Objectives of the study

The objectives are divided into two as follows;

1:3:1 The main objective

The main objective of the study is to find out the factors that affect decision making in family law courts.

1:3:2 Specific objectives

Specific objectives include;

To analyze the effect of culture on the decision making in family law courts if any.

To identify the solutions and reforms that should be put up in order to control factors affecting decision making in family law courts.

To analyze the legal position of culture in Uganda.

1:4:0 Scope of the study

The study is intended to cover Uganda legal system so as to expert more the factors affecting decision making giving culture the 1st priority.

This is because it is the law the poses some factors of culture that extends to the family law courts.

1:4:1 Geographical scope

The research shall be conducted in central region of Uganda with the case study of Buganda culture.

The importance of choosing the central region is that I expect accurate research since I have some knowledge on the culture in central and easily accessible.

1:4:2 Time scope

The research will cover a time frame of between the years 1995-2019

1:5:0 Research methodology

Research methodology is way to systematically solve the research problem. CR Kotheri¹² states that “when we talk of research methodology we not only talk of the research methods but also consider the logic behind the methods we use in our research study and explain why we are using a particular method and why we are not using others so that research results are capable of being evaluated either by a researcher himself or others.

In this research, I used qualitative method of research. I used questionnaires as a tool of data collection. My target group was the knowledgeable people on culture who answered questions on culture. This stimulated my mind to relate culture with law and find out the effect of culture on decision making in family law courts. These people targeted were able to give me first hand information on culture and widened my knowledge on culture.

I formulated open ended questions in the questionnaires so as to have the information regarding culture directly from people understanding culture. Some of the questions where; what do you understand by culture in Buganda, what are some of cultural practices that are related to family law? And what are the effect of culture on law and decision making in family law courts.

On top of that, I used the doctrinal method of research where I went to the library, used online sources in order to apply the knowledge on culture and also find out the effects of culture in decision making in family law courts.

I used two methods of research where the qualitative method had to introduce my mind to culture and the doctrinal helped when relating culture and law helping to land of the objectives of the study.

1:6:0 Research design

Research design is the arrangement of conditions for collection and analysis of data in a manner that aims to combine relevance to the research purpose. A research design must contain a clear statement of the research problem. Procedure and techniques to be used for gathering information, the population to be studied and for purposes of the study, the area of study is Uganda.

¹² C.R Kotheri (2004) research methodology, methods and techniques, 2nd edition, new age international publishers new Delhi pg 8

The researcher is to use the qualitative method of data collection and secondary sources of data are to be used as physical archives online sources, Acts of Parliament, decided cases

1:6:1 Synopsis chapterization

The study is divided into five chapters

Chapter One (1) covers the introduction, background of the study, the statement problem, the objectives of the study, research methodology, scope of the study and research design.

Chapter Two (2) shall have the literature review of the topic and the legal position of culture in Uganda.

Chapter Three (3) covers the factors that affect decision making in family law courts.

Chapter Four (4) covers the relationship between law and culture. It also covers the effect of culture on the decision making in family law courts.

Chapter Five (5) possess the solutions, reforms that should be put up in order to control factors affecting decision making in family law courts, conclusion and recommendations.

CHAPTER TWO

LITERATURE REVIEW

Below are some of the reviewed literatures on the topic.

According to the World Book,¹³ culture is defined as a term used by social scientists for a peoples whole way of life. In everyday conversation the word culture may refer to activities in such field as art literature and music. It is further provided that to social scientists a people's culture consists of all the ideas, objects way of doing things created by the group. Culture includes arts, beliefs, customs, inventions, language, technology and tradition. A culture is any way of life simple or complex. Culture consists of learned ways of acting feeling and thinking rather than biologically determining ways, some simple animals act on the basis of information carried in their genes. The part of a cell that determine inherited traits. This also extends the animals way of obtaining food shelter but human beings can experiment learn and work out their ways of doing these things a process that never ends. In the world book it is provided that young children learn from the elders in that culture in human beings is not genetically engineered when we weigh it in terms of professionals and social being also legal officers follow the culture learnt from their way of study and way of articulation of issues besides that the background and also the modern culture. Basing on the fact that judges are given discretional powers, their decisions can influence decisions of other judges for example the culture of use of precedent. The culture set out in the laws for example procedural law precedents and others. Therefore culture in that way influences decision making in family law courts in Uganda

According to *Francisco Espinosa*¹⁴ law is actually a product of culture, much like every other single social construction. Our culture defines how we perceive society and our place in it and thus how we perceive what society "ought to be" and the rules it should follow. Basing on the fact that the function of the judiciary is to interpret the law and law is the product of culture then indirectly culture affects decision making in family law courts in form of written law. When we consider the parliamentary legislations, they aim at inserting order into the society and in most cases the culture is put into consideration for example when we look at the Institution of Traditional or Cultural Leaders Act 2011, it was legislated on cultural institutions but instead of

¹³World Book page 942 encyclopedia C1-C2 volume 4

¹⁴ <https://www.quora.com/what-is-the-relationship-between-law-and-culture>

creating law that deviates from the customs instead laid grounds for culture also Article 37 of the Constitution provides for a right to culture that had already existed therefore culture through law affects decision making in family law Courts

According to Laura Kramer¹⁵ culture is defined as the peoples established beliefs and practices. It serves as a design for living transmitted from one generation to the next and usually slows to change. It is neither all determining nor always consistent. In consideration of this definition it is shown that the practices we perform are determined by culture and this culture is governed by rule of law. Law in Uganda is a codification of culture were by the parliament legislate on already existing circumstances or on development of a new culture for example the parliament legislated on cyber harassment, the new Land Amendment Bill and others. Basing on the fact that courts are entitled to follow the law, and law is a written down culture, therefore culture affects decision making in courts of law

According to *Lloyds*¹⁶, the concept of the law is part of our culture and for our cultural traditions. It plays a role in the way in which ordinary people as well as the legal profession understand their own and other people's action. It is part of the way they conceptualize social reality. But the culture and tradition of which concept is a part provided it with neither sharply defined contours nor clearly identifiable. It is true when we consider Lloyds thought that law is part our culture. Basing on the research I made on culture, it is observed that most of the cultural practices exist in the laws of Uganda supported, modified or taken to be in contradiction with the law and on top of that, law forms a new culture that should be followed. It should not be ignored that law is the main determinant of decision making in courts hence law as our culture affects decision making in family law courts.

According to *Julia T wood*¹⁷ Culture is defined as consisting of structures and practices that uphold a particular social order by legitimizing certain values expectations meaning and patterns of behaviors. When I consider Julia's assertion it is observed that culture create social order this also applies to the law where the law is used in courts to enforce social order that is in case one breaches law he or she is acted upon by the courts. Therefore culture affects decision making in

¹⁵ The sociology of gender 2nd edition

¹⁶ Lloyds Introduction to jurisprudence

¹⁷ Lives communication, gender and culture (4th edition)

family law courts. This assertion works hand in hand with Francisca Espinosa's thought that provides that law is a product of our culture.

2:1The legal position of culture in Uganda

Uganda's laws have addressed culture in the following ways

*Article 37 of the constitution*¹⁸ provides for a right to culture and similar rights. In that every person has a right as applicable to belong, to enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition creed or religion in community with others.

This is a credit given to the government of Uganda for the incorporation of the right to culture however it doesn't disclose what exactly culture should be limited hence going ahead to affect courts in deciding cases

*Chapter sixteen of the 1995 Constitution*¹⁹ grants for the institution of traditional or cultural leaders providing that the institution of cultural leaders may exist in any area of Uganda in accordance with culture, customs and traditions or wishes and aspirations of the people to whom it applies.

Article 246 (2) of the Constitution further provides that in any community where the issue of traditional or cultural leaders has not been resolved the issue shall be resolved by the community concerned using methods prescribed by parliament.

Clause 6 further provides that for purposes of this Article "cultural leader" means a king or similar traditional leader or cultural leader by descent in accordance with the customs, tradition, usage or consent of people led by the traditional or cultural leader.

This Article²⁰ gives culture recognition by giving cultural leaders authority and rules governing them. This shall be credited at the state of culture however it has some limitation to culture for example cultural leaders are denied chance to participate democratically in politics of the nation. And the issue of equality should be given credit in whatever is done or respect for culture as prescribed under *Article 21 and 246(3) of the Constitution*. However since culture is changed

¹⁸ Of the Republic of Uganda 1995

¹⁹ 1995

²⁰ Article 246 of the Constitution

gradually and learnt from the community as stated by Taylor in his book “*primitive culture*” Ugandan cultures have by time to time streamlined inequalities among men and women in the home for example the man’s totem is to extend to the children and not the mothers names are not carried by the children. The extents even to the ladies after marriage they adopt the man’s name.

In Uganda culture is governed by different indigenous communities as specified under *The Third Schedule of the Constitution* as it was in 1926 however cultures have changed due to intermarriages by different tribes that have caused culture to cross in different tribes. The other effect is the civilization that has faded away the cultures in Uganda also technology has changed culture for example when you look at what was considered as dowry due to change in technology people have changed to luxurious things like solar panels, water tanks, vehicle and other which has affected culture hence changing the understanding of culture in Family Law Courts.

The 2003 UNESCO Convention for Safe Guarding the Intangible Cultural Heritage was ratified by the Uganda government in 2009. This convention gives culture strength in the laws of Uganda in that state parties are required to identify, define and advise appropriate means of preserving intangible cultural heritage in other words. The convention offers an opportunity to Uganda to derive benefit from sharing international best practices and ensuring its heritage is protected and recognized in the global development. This gives culture in Uganda a position legally hence culture in Uganda is strengthened.

Culture is also observed under Article 3 of the Constitution²¹ which mandates regional assemblies under the regional tier system of governance to handle cultural matters relating to the traditional or cultural leaders, clan and sub clan leadership, cultural and traditional practices and cultural institutions by establishing specialized committees for them. However this, article moves hand in hand with the rights and freedom of human more so *Article 37 of the constitution*

The National Cultural Policy²² also takes into account the diversity of Ugandan cultures by recognizing the importance of culture in Uganda’s development process and the institutions responsible for the promotion of culture. This policy defines culture as a sum total of the ways in

²¹ (Amendment) (No.2) Act 2006

²² 2006

which a society preserves, identifies, organizes, sustains and expresses itself the national policy aims at promoting culture and enhancing its contribution to community empowerment through cultural industries, research and development, performing art, indigenous knowledge, language and literary art cultural beliefs, traditions and values and cultural sites and monuments.

When we look at the Local Government Act 1997²³ cultural affairs are listed as one of the decentralized services, activities and functions of the district authorities. It also gives mandate to the ministry of local government to assess the performance of culture in local governments and to ensure that the culture functions benefits from grants sent to the local government. This Act derives its validity from *Article 178 (a)(ii)* that assigns responsibility for promoting local cultures to local authorities. The Local Government Act provides opportunities for culture to be integrated into local government programs. The Act legalizes culture although Uganda culture is being accorded low priority in national development planning and budgeting at local and national levels.

The Land Act 1998 also accords culture a priority through the land tenure system in that under the customary land tenure a certificate of customary ownership may be acquired by persons holding former public land in customary tenure under *section 5*. *Section 65* provides for the establishment of land committee that shall process applications for each certificate in accordance with *section 6*. This legalized culture in land possession through land tenure.

The National Environment Management Act²⁴ *General Principle (2)(d)* provides for conservation of the cultural heritage and use of environment and natural resources of Uganda for the benefit of both present and future generations. The Act integrates culture into Environmental Management Principles as one way to sustainably conserve the environment however; the Act does not provide much information on how to integrate culture in the environment management but provides NEMA with the responsibility to preserve cultural heritage.

The Customary Marriage (Registration) Act also legalizes culture where by *section 6* provide for registration of customary marriage and after it is accepted as legal marriage. Customary marriage

²³ Amended 2002

²⁴ 1998

has principles of culture based on the society's celebration. The celebration of customary marriage is also observed under *section 4 of this Act* in that it may be celebrated in any part of Ugandan and it may be polygamous.

The Act puts restriction on the validity of marriage registered under culture as provided under *section 11 of the Act* that a customary marriage shall be void if, the female party to it has not attained the age of sixteen years, the male party to it has not attained the age of eighteen years, one of the parties to it is of unsound mind, the parties to it are within the prohibited degrees of kinship specified in *the second schedule to his Act* or the marriage is prohibited by the custom of one of the parties to the marriage or one of the parties has previously contracted a monogamous marriage which is still subsisting. Basing on the observation of the Act above, culture in form of customary marriage is legal however it should be registered.

The Institution Of Traditional Or Cultural Leaders Act²⁵ was brought into play the operationalization of *Article 246 of the Constitution* on the institution of traditional or cultural leaders; *section 3 of this Act* provides that subject to the constitution the institution of traditional or cultural leader may exist in any area of Uganda with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. Cultural leaders may be instituted in accordance with the culture customs and traditions of the people to whom it applies. *Section 9 of the Act* further provides for the roles of traditional leaders as to promote and preserve cultural values, norms and practice for the well being of people. Also development should be promoted. Culture is given apriority in Uganda to the extent that cultural leaders are paid by regional government and the benefit shall be free from tax therefore culture is given a legal limitations put on culture as provided under *section 14 of the Act* that provides that "a traditional or cultural leader or institution shall not practice any custom culture, usage or tradition that detracts from the rights of any person as guaranteed under the constitution or contravenes the constitution or any other law" therefore law draws stream lines the shape of culture that should be followed in relation to human rights.

²⁵ 2011

Culture is also recognized under the Uganda National Cultural Centre Act²⁶ through the profession of cultural centre. This Act²⁷ establishes a trust known as the Uganda National Cultural Centre Trust that is entitled to administer, control and manage trust property in accordance with the Act. The trust is entitled to provide and establish cultural centre and theatres also encourage the development of cultural and artistic activities. The board of trustees shall run the trust as provided under *section 4 of the Act*. Basing on that it is observed that culture is given a priority in the laws of Uganda in that the protection of cultural centre is paramount in Uganda hence giving culture a chance in the legal system of Uganda.

According to the above reviewed literatures, it is observed that culture doesn't affect decision making in family law courts directly but instead the decisions are affected by culture through laws. When we consider Francisco Espinosa who wrote that law is a product of culture, it is true that laws came into existence as a result of culture.

²⁶ 1959

²⁷ section 3

CHAPTER THREE

3:0 Introduction

Article 28 of the Constitution provides for a right to fair hearing where anyone who commits a breach of law is entitled to be heard in courts of law. Also *Article 129* establishes courts of judicature empowered to exercise judicial power as follows; the Supreme Court of Uganda the Court of Appeal of Uganda, the High Court and such subordinate courts as parliament may by law establish including quadhis courts for marriage, divorce inheritance of property and guardianship as may be prescribed by parliament.

Article 126(2)(a) recognizes the need for the judiciary to administer justice to all irrespective of social or economic status, the frames of this Article intended to safe guard among others, undue social and economic technicalities that could hinder dispensation of justice.

The courts posses judicial officers who interpret the law and perform duties of the courts which is application of justice. However in performance of justice, there are factors that influence decisions that are derived at hence affecting decision making in family courts.

3:1 Factors affecting decision making in family law courts

The following are factors that affect decision making in family law courts

The first factor that affects decision making in the family law courts is the law. The courts are supposed to make their rulings based solely on the law.²⁸ This is rule of law as provided by the constitution. *Article 2 of the constitution* provides for supremacy of the constitution where all other laws derive their validity. The court should follow the law and procedures before making judgments or decisions. For example *Order 21 Civil Procedure Rules* prescribes the law of judgment *rule 5* provides that the court shall state its decision on each issue or controversy therefore the court follows the law and it caters for only provisions of the law hence law influences decision making in family law courts.

²⁸ <http://e notes.co>homework-help/what factors influence court decisions-419708grqid=qyk822ck&s=1&hl=en-ug>

The second factor that determine decision making is precedents. In Uganda we have three courts of records and that is the Supreme Court, Court of Appeal (Constitutional Court) and the High Court. The decision of one of these courts binds on all subordinate Courts. When judges are making decisions they apply precedents for example the case *Uganda Association of Women Lawyers and 5 other v Attorney General*,²⁹ the petitioners sued to have several provisions of the Divorce Act declared void on the grounds that they discriminated on the basis of sex. The court held that *Sections 4, 5, 21, 22, 23 and 26 of the Divorce Act* are void in so far as they discriminate on the basis of gender, so the grounds for divorce as listed are available to both genders and the compensation of adultery costs against a correspondent alimony and settlement are applicable to both genders. This changed the position of the law and while deciding on cases pertaining divorce, the judge should address his/her mind to this precedent therefore precedents affect decision making in family law courts.

The other factor that affects decision making is corruption under the judicial system where the neutrality of the judge is interfered by corruption leading to miscarriage of justice. According to the Uganda corruption report,³⁰ it is stated that there is a high risk of corruption in Uganda judicial sector in part due to political interference. It is further stated that nearly half of Ugandans perceive the judiciary as corrupt and also nearly half of those who have come into contact with the courts in the past twelve month which was 2015. Chief Justice Bart Katureebe acknowledged the extent of corruption in Ugandan society and the fact that also infiltrates the judiciary. Katureebe indicted that in several cases corrupt judicial officer have been found guilty by the court but were ultimately set free by the corrupt system³¹ Therefore corruption affect decision making in family law courts and this leads to creation of bad law since the person who bribes the judge, the petition ruled in his or her favor then thus decision making infiltrates into the law in form of precedents.

We should fight judicial corruption to promote access to justice³² it was provided that according to study carried out in Gulu and Lira district by the institute for human security of Tufts university in the US with assistance from Ugandan researchers, respondents revealed that

²⁹ Constitution Petition no 2 of 2003

³⁰ <https://www.gainintegrity.com/partial.country-profile/uganda/&hl=en-ug>

³¹ the Ugandan today April 2017 article

³² Badru Walusansa New Vision 15th May 2017

ordinary people engage in corruption (in form of giving and taking bribes) as a means of accessing the courts to pursue justice or to manipulate it for private gains. This locks out the poor, vulnerable and others due to corruption that is almost becoming a norm in the judicial decision hence affecting decision making in family law courts.

The other factor that affect decision making is the financial strength of the parties in court. It is very easy for a person who is financially strong to get a good lawyer who can argue out the case properly and stimulate the judges mind which is not to a poor person. On top of that in respect of matters pertaining children as provided for under *section 3(1) of the Children Act* that states the welfare of a child shall be a paramount consideration whenever the state, a court, a tribunal, local authority or any person determines any question in respect to the upbringing of a child, the administration of a child's property or the application of any income arising from that administration. This can affect the position of the judge in deciding on the child since it is more possible for a person with a strong financial position to fulfill the welfare of the child than the person who is financially weak.

When we consider the case of *Nyakairu V Nyakairu*³³ court provided in its holding that in applying the welfare principle court has to consider the other ancillary circumstances for example such matters as who of the spouses was to blame for the breakup of the marriage who if the spouses were financially equipped to look better after the interest of the children and which of the spouse could provide a more comfortable home.

This factor can be more evidenced in the persuasive case of *Hofman V Hotman*³⁴ where court held further that although the father's supreme financial position over the mother was irrelevant in custody cases, it could not be ignored, if it could be proved that the father could use his superior financial position to cater for the welfare of the child better than the mother whose financial inferiority would stand in her way. Therefore the financial strength affects the decision making in family law courts.

The other factor is the evidence put on record. Assign on the fact the judicial officers are not present in the field where the cause of action initiates from, they rely on the evidence given for

³³ (1979) HCB 261

³⁴ (1970) EA 100

example some evidence is given through affidavits as provided under *Order 19 Rule 1* that provides that any court may at anytime for sufficient reason order any particular fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable except that where it appears to the court that either party bonafide desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorizing the evidence at the witness to be given by affidavit. Evidence can also be given in open court and there is cross examination to prove the authenticity of the evidence to be relied on to come up with a genuine decision. Where evidence is tempered with the wrong decision is arrived at. When we consider *section 71 of the Children Act*, prima facie evidence is provided in application for parentage so court can rely on that evidence when deciding on an application for parentage. This section provides prima facie evidence of parentage to be the appearance of the fathers or mothers name in the register of birth, instrument signed by mother of the child and by any person acknowledging that he is the child and an instrument signed by the father of the child and by any person acknowledging that she is the mother of the child or instrument signed jointly or generally by each of those persons in the presence of witness. However there is also conclusive evidence which is DNA test which can't be challenged by anyone in court hence evidence can also affect the decision making in family law courts.

In the case of *Ruth Nsubuga and Anor V Peter Nsubuga and Ors*³⁵, the issue was whether the will was valid and if so whether the plaintiffs were entitled to grant of probate? The facts for this case were the plaintiff was a widow of deceased by 2nd marriage, she sought a declaration that she was the lawful executor and trustee of the deceased by his 1st marriage who challenged the validity of the will and counter claim that an issue of the testator was too ill to have been fit to make a will. The judge discredited the evidence of the defendant that the will was invalid basing on the mistakes of the years of birth. Therefore evidence determines the effect of culture on decision making on family law courts.

The other factor that affect decision making is the court process though there is existence of *Article 126 (2)(e) of the constitution* that provides that substantive justice shall be administered

³⁵ HCCS 103 1988

without undue regard to technicalities, section 19 of the Civil Procedure Act³⁶ provides that every suit shall be instituted in such manner as may be prescribed by rules. Where the civil procedure include service of summons, period for filing of a defense, way of commencing different suits and one of the most cardinal one in family law courts due *Order 32 Rule 1(1) of the Civil Procedure Rules* that provides that every suit by a minor shall be instituted in his or her name by a person who in the suit shall be called the next friend of the minor and where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the plaintiff taken off the file with costs to be paid by the advocate or other person by whom it was presented. Therefore where the child wants to apply for anything for example parentage, custody and others it should be done through a next friend.

Furthermore where there is a breach of the process the case can be dismissed for example failing to pay court fees, failure to file a defense in time and on service of summons therefore breach of court process can also affect decision making in family law courts hence one fails to attain justice.

The behavior of the lawyer is also affect decision making in family law courts. According to the interview made by Timothy J Capurso³⁷ on the unnamed judge A, circuit court associate Judge Maryland (March 14 1997) the preparation of the lawyer he further noted that interestingly judge A remarked that prepared lawyer one who is fully able to answer the judges concerns is highly persuasive. This is due to the jurists' perception that the attorney has thoroughly completed the necessary research on the questionable topic thereby instilling confidence in the judge that the conclusion advanced by the attorney's argument is correct. On top of this there are some judges that lose temper because of this arrogance of the lawyer and due to discretion the case of hand is affected basing on the fact the judges are people and they get annoyed hence the behavior of the lawyer affect decision making in family law courts.

Culture is also another factor that influences decision making in family law courts. When court is proving whether there exist customary marriages, one should prove that the rituals were fulfilled according to their culture. This is justified by *section 1 of the Customary Marriage (Registration)*

³⁶ Cap 71

³⁷ How Judges Judge: Theories On Judicial Decision Making page 29. IV balt LF10

*Act*³⁸ which defines customary marriage as “a marriage celebrated according to the rules of an African community and one of the parties to which a member of that community or any marriage celebrated under part III of this Act”. One of the cardinal requirements of customary marriage is bride price which is cultural. The case of *Mifumi (U) Ltd and 12 Others V A.G & Anor*,³⁹ the principle of bride price was considered where Hon. Justice SBK Kavuma recognized that payment of bride price is widely practiced in Uganda. When we consider the case of *Namukasa Joweria V Kakandere Livingstone*,⁴⁰ on the issue of whether there is a valid customary marriage between the petitioner and the respondent, it was provided that there was a valid marriage basing on the evidence of PW1 he and PW2 called on the respondent and gave him the gifts of three cows as ‘Emihingiro’ which is the norm after celebrating of a traditional Kinyankole marriage hence culture is one of the factors that affect decision making in family law courts.

Therefore in conclusion, the discussion given above provides the factors that affect decision making in family law courts.

³⁸ Cap 248

³⁹ Constitutional Petition No 12 of 2007

⁴⁰ Divorce Cause No 30 of 2010

CHAPTER FOUR

4:0 Relationship between law and culture

According to *Francisco Espinosa*⁴¹ law is actually a product of culture, much like every single other social construction. Our culture defines how we perceive society and our place in it and thus how we perceive what society “ought to be” and the rules it should follow. It is through cultural practices, components and legal provisions that we can show the relationship between law and culture.

Some of the cultural practices and components that are related to law include

Language is one of the components that show the relationship between law and culture. According to *Laura Kramer*⁴² language is the primary vehicle for the construction and transmission of culture. Through the language people learn values, beliefs and sociology defined facts or view of reality of their culture. This is evidenced in Uganda where there were different tribes in Uganda passing on culture through their languages. Equally the language of law is English

The other cultural practice that is related to law is succession; Succession in Uganda (Buganda) culture is of essence in that it acts as a tool for wiping away tears when someone dies, they replace that person with the successor known as the *customary heir*. This person is entitled to carry on responsibilities of the deceased for example carrying a farm work. In this succession, gender is important in that a male can't be succeeded by a female and most probably the deceased and the customary heir should belong to the same clan. Initially the 1st boy born would be the customary heir of the father whereby the successor was entitled to take all the wealth of the father. However when time passed by and civilization came the customs began to respect the wish of the deceased in that the father shows the heir in the will in that he observes who the most responsible person is. On top of that a person may decide to distribute his property in his will and also distribute responsibilities.

Both culture and the law aim at creating social order for example when we relate Ugandan leaders they are chosen basing on culture for example in Buganda the king is chosen in form of lineage following and the way the leader is chosen in law is based on *Article 1 of the Constitution*

⁴¹ <https://www.quora.com/what-is-the-relationship-between-law-and-culture>

⁴² the sociology at gender 2nd edition Laura Cranmer

that provides for sovereignty of the people where all powers belongs to the people who shall exercise their sovereignty in accordance with this constitution. On top of that, culture distributed responsibilities as it was done by the constitution. In case of breach of social order, culture had sanctions also this is seen in different statutes for example penal code and others. According to Aristotle law refers to reason. Man by nature is entitled with reason hence law and morality are connected. Natural law is an objective norm or set of objective norms governing human behaviors and binding on all people alike. Basing on Aristotle culture in form of norms is law.

Law and culture are connected in the way that law aim at impacting a now culture in the society. In other words law affects culture in setting and this is the one that in most cases change or make culture dynamic. It is observed that when law changes also culture is affected. Law and culture are the significant forces in human life, both shaping and influencing the conducts of individuals, communities and societies and the value they develop. The emergence of values and norms of traditions and beliefs of law is a chronological phenomenon, taking place through the evolution of history and the influential forces of the present. But these laws are not static. Change is an ongoing process a restless development and dynamic interaction of legal, cultural, social and human reality.⁴³ This assertion is justified by the constitution that provides supremacy of the Constitution under Article 3. It is also justified under the case of Mifumi (U) Ltd and another VAG and Anor, where the refunding of bride price was challenged being unconstitutional in that it was contradiction with Article 21 of the constitution hence changing the position of culture therefore law and culture are related.

When we look at the law, it specifies succession into two categories and those are testate and intestate succession. Testate succession is where a testator writes a will.

A will is the expression by a person of his/her wishes which is intended to take effect only at his death. In order to make a will valid, testator must have testamentary intentions for example he must intend the wishes which he gives deliberate expression to take effect only at his death. Literally a will is written statement usually signed made by an individual who directs the distribution of their property when they die.

⁴³ (<http://criticallegalthinking.com/2015/04/23/law-and-culture-conference-2015-change/>).

Section 36(1) of the Succession Act ⁴⁴ provides that every person of sound mind and not a minor may by will dispose of his or her property. Other people that can make a will under Section 36 of the Succession Act include; married woman, deaf, dumb or blind in case they understand.

In the case of *James Katende V Dan Byamukama*,⁴⁵ Byamigisha J as then she was held that the making of wills is governed by provision of Section 46 SA (now 36 of Succession Act here in after) which state that every person of sound mind and who is not a minor may by will dispose his property. A will in the ordinary sense must be in writing and signed by the testator or someone in his presence and at his direction. The signature must be made by the testator in the presence of two witnesses or more who must be present together at the same time and see the testator affix his signature as required under *Section 50 of the Succession Act*.

In other words both the wills in the law and in culture are effective with evidence of a testator and witnesses. However in law the will are effective after death of the testator and this also applies in culture.

This applies even in the Christian culture as stated in the book of *Hebrews 9:16-17*⁴⁶ that for where a testament is there must also of necessity by the death of the testator for a testament is of force after men are dead otherwise it is of no strength at all while the testator lives.

In the law and others the will is effective at the death of the testator.

In the case of *Ruth Nsubuga and Anor V Peter Nsubuga and ors*⁴⁷, the plaintiff was a widow of deceased by 2nd marriage she sought a declaration that she was the lawful executor and trustee of the deceased by his 1st marriage who challenged the validity of the will and counter claim that or issue of the testator was too ill to have been fit to make a will. The issue was whether the will was valid and if so whether the plaintiffs were entitled to a grant of probate? Court held that although the testator was confused as evidenced in mistake regarding years of birth, he was never mad. The judge was on to say that the defendants are not happy about the controls of the will but

⁴⁴ Cap 162

⁴⁵ administrative cause no 201 of 1992

⁴⁶ KJV Bible

⁴⁷ HCC S 103/1988

I am not convinced by defense evidence or any other evidence that the will was not made according to the law the will is valid.

In order for the will to be effective it should be free from vitiating factors for example undue influence or fraud both in culture and in law therefore this proves the interconnectedness of law and culture.

The payment of dowry or bride price in the Buganda culture is of importance in that it is a sign of appreciation to the family of the bride in other words it was considered as money for purchase of the bride by the groom.

It was the family of the bride to determine the price of their daughter and how much they need for their daughter. This was of essence and it helped to control family break ups since once the bride is paid there was no any way of going back to her family unless she is paying a visit to her parents. The parents of the husband become the bride's parents and in case the women needs to consult or report any mistake she reports to her new parents

The people consulted explained that the consent of the father cultural wise is very important in this marriage and in Buganda one to obtain the fathers consent he must pay a tribute known as "omutwalo gwa taata". Also the bridegroom is entitled to give the brothers to the bride a cock. In case the bride is found virgin there should be respect and appreciation by giving a goat or a calf.

The marriage under Buganda culture was polygamous in that one man could marry several women for as long as he fulfills the requirements.

According to the case of *Uganda V Kato and Anor*⁴⁸ the accused was charged with murder and he contended that PW6 was his wife. She had apparently lived with the accused as husband and wife for 3 years and had children together. They had not married in court and the accused had not paid dowry nor did the parents consent to the marriage.

The issue before court was whether the parties were husband and wife the judges stated that the test of determining what a marriage is whether the man treated as marriage but the laws or custom of the nation race or sent to which the parties belong that the act refers to a marriage recognized under customary law and this excludes customs or usage that haven't matured into

⁴⁸ 1976

fruits. That in order for a union to be a marriage under the law the parties must have gone through a ceremony of marriage as regard under their community and the marriage ought to be not void or voidable but it does not matter whether the marriage has been registered under Customary Marriages Registration Act. As a result the accused and PW6 could not be considered husband and wife for purpose of section 12 of the Evidence Act because the accused didn't tender dowry to PW6s parents nor did they consent to the marriage as required by the Banyoro custom.

The case was criminal however it brings out the legal bit of customary marriages as a culture in Buganda therefore marriage as a culture is related to law for example the practices here that are related to law are bride price which is provided for in the case of *Uganda V Donde*⁴⁹ where court held that bride price had not been paid in full hence there was no subsisting marriage between the complainant and the adult woman for they were not to be considered husband and wife.

The second is the consent of the parties in that the practice of consent is related. Cultural wise the girl that was to get married would consent through the father or the uncle however Article 31(3) of the Constitution resolves the issue of consent and provides that the marriage shall be entered into with the consent of the parties. The conflicts of the spouse were settled by the parents of the man in the family however this still goes on but also the family courts were brought up also to resolve those conflicts.

In the law under *section 67*⁵⁰ of the *Children Act* declaration of parentage is done to a person who is the mother of the child, father of the child, guardian of a child and the child himself of herself through a next friend or woman alleged to be the mother of the child.

Section 68 provides for application for the declaration of parentage that it is made to court on time before the child attains eighteen years of age, within three years after the death of the alleged father or mother, With leave of family and children court, an application for a declaration of parentage may be made at any time after the three years specified in subsection 1(c) of the *Act*⁵¹

49 1975 HCB 339

50 Children Act

51 (section 68(2) of the Children Act)

*Section 71 of the Children Act*⁵² provides for prima facie evidence of parentage to be the appearance of the fathers or mothers name in the register of birth, instrument signed by mother of the child and by any person acknowledging that he is the child and an instrument signed by the father of the child and by any person acknowledging that she is the mother of the child or instrument signed jointly or generally by each of those persons in the presence of a witness.

An order for maintenance made against a person under any written law is prima facie evidence of parentage in subsequent proceeding whether or not between the same parties under *section 71(3) of the Act* and some others.

When we try to relate parentage of Buganda culture and the one legal is that; Culture declares parentage at any age for example a mother could declare parentage over another man at any age like even 60 years old and that family where that person is sent to the other family. However when we come to law under *section 68(1)* which provides that an application for declaration of parentage may be made during pregnancy and at anytime below the child attains the age at 18 years and within 3 years after the death of the alleged father or mother.

The second comparison is culture caters only for the side of the mother since it is the father who owns children this is evidenced on the names given to most of the Ugandans in most cases they belong to the clans of their fathers however under the law both mother and father even the child can apply for declaration of parentage as scheduled under *section 67 of the Children's Act* as amended.

In consideration of the *Children Act on culture practices under section 7(1)* a person shall not expose a child to any customary as cultural practices that is harmful to his or her health, well being, education or social economic development. *Subsection 2* further provides that harmful customary or cultural practice means any activity that is mentally physically socially or morally harmful to a child and includes on activity that interferes with a child's education and social development this is like a give and take where the child is entitled to teach his children cultural practices but at the end of the day there are limitations.

52 CAP 59

When we consider the persuasive case of *Wambwa V Okumu*⁵³ court held that the customary law did not take into account the welfare of the infant and that in absence of exceptional circumstances the 4 year old girl should be looked after by its mother.

Also in the case of *Karanu V Njeru*⁵⁴ where in an appeal to the High Court evidence as to kikuyu also by which the parties had been married was advised which was that the children would by custom to go to the father because he had not demanded bride price. Court held that this custom was not repugnant to justice and morally and not inconsistent with only written law and the court must therefore be guided by it in spite of its possible effect on the children. However this position may not stand in light of the modern flexible approach taken by court the married it would not further the welfare of the child. Therefore though culture is recognized by law, there are also limitation hence related

4:1 Effect of culture on decision making in family law courts

According to the law society of Upper Canada⁵⁵ courts administering family law include the provincial court family division. The provincial courts family division have jurisdiction over charges under the criminal code that involves members of a family including corrupting children, failing to provide the necessities of life for children, adult dependants common assault and threats of bodily harm involving families unless where the accused elects trial by jury when charged with an indictable offence. There are different things that the family court in Uganda and some of these include; administration cases, family cases that is adoption, guardianship, affiliation, maintenance, miscellaneous cases miscellaneous applications, civil appeals, civil suits, originating summons and civil revision and divorce cases.⁵⁶

According to law, Culture has affected decision making in Uganda and still affecting decision making in family law courts .Courts of law are continued to apply this law in deciding cases.

When we consider **Francisco's** understanding, law is a product of culture which is also observed when considering the Uganda's cultural understanding and applicability in things like marriage, succession, trust and others which in law have been codified. The other thing is that most of the Acts we posses in Uganda are as a result of the European culture for example Penal Code Act

53 [1970] EA 558

54 [1968] EA 361

55 Corswell legal publications in family law 1983-1984 page 350

56 www.judiciary.go.ug/date/sm

,Succession Act and others .Also the Land Act therefore indirectly culture affect decision making in family law courts in Uganda. *The Historical school* that arose in German jurisprudence in the first half of the nineteenth century, views law as a product of a nation's culture and as emailed in the daily practices of its people .It is further provided that statutes are not meant to create law rather their function is to reflect existing social practices.

Culture has promoted gender inequality in the decision making of family law courts. When we consider the issue of bride price, it is a sign of gender inequality contrary to Article 21 of the constitution. The word Bride-price literary means⁵⁷ property or other form of wealth paid by a groom or his family to the family of the woman he will be married to or is about to marry .This being a one way thing it creates gender imbalances in petitions for marriage .The case of Mifumi(U) Limited and 12 ors V AG and Anor attempted to create equality however it only looked at refunding of the Bride price and neglected its payment .This case recognized that the payment of bride price is widely practiced in Uganda .The culture o bride price is the key aspect of customary marriage when we look at the case of Nemezio Ayiia Pef V Sabina Onzia Ayiia⁵⁸ it was held that before all dowry is paid a man and a woman cohabiting can be regarded as husband and wife but the customary marriage is not valid until all is paid . Therefore culture that stretches its arms to the law has led to gender discrimination in decision making in family law courts since bride price is like wife purchase.

When we look at the *Kenyan case of Re Kibiego*⁵⁹ culture was of essence and affected the decision on the application. In the case the applicant applied for letters of administration intestate to the estate of her husband a Nandi. The question whether the widow of an African of the Nandi tribe who died intestate may apply for a grant of letters of administration? This is because under the Nandi tribe on intestacy the family elders would always appoint the eldest son of the deceased as administrator. Held in the absence of a valid reason such as grave unsuitability, a widow of whatever race living in the country is entitled to apply to court for the grant of letters of administration more so when the children as in the instant case are minor. Per madam J “A widow is the most suitable person to be obtained representation to her deceased husband's estate. In the normal course of events she is the person who would rightfully, property and honestly

⁵⁷ [http:// en .wikipedia .org/wiki/Bride-price](http://en.wikipedia.org/wiki/Bride-price)

⁵⁸ Devorce petition No 8 of 1973

⁵⁹ [1972] EA 179

safeguards the assets of the estate for herself and her children. It would be going back to a medical conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself into the aspiration of people which if is supposed to safeguard and serve". In this the judges used the discretion to match culture with the essence of administration under this the culture affected decision making in the family law court as it acted as the weighing scale.

When we consider the case of *Best Kemigisha V Mabel Komuntale*, In this case Kemigisha challenged a caveat lodged by the defendant against the property of her deceased husband. The defendant claimed that under Toro custom the queen could not administer property of the kingdom. However evidence showed that some of the property was written in the names of her husband the king and was not property of the kingdom. Court held that the custom that a married woman cannot inherit the property of her deceased husband was held repugnant to justice. This case consider law rather than culture and custom in that under culture a woman cant inherit a man so the decision is affected in the eyes of the members of that culture though culture was the land mark of the case hence affecting the decision making and considered injustice to the Toro people.

Culture has created loose of confidence in the decisions of the family law courts for example the issue of the formalities of a will. In culture it is either the oldest son to inherit the property or the testator may talk any time he feels like or this is changed in the eyes of the law and decisions in that the will should be written and annexed by the testator. In the case of *James Katende V Dan Byamukama Administrator*,⁶⁰ *Byamugisha J* (as then she was) held that the making of will is governed by provisions of *section 46 of Succession Act*⁶¹ which state that every person of sound mind and who is not a minor may be will dispose his party. A will in ordinary sense must be in writing and signed by the testator or someone in his presence and at his discretion. The signature must be made by the testator in the presence of two witnesses or more who must be present together at the same time and see the testator after his signature as required under *section 50 of the Succession Act*. Culture is affected basing on the fact that if the will is not written then the

⁶⁰ Case No 201 of 1992

⁶¹ now 36 of the Succession Act herein after S.A

succession will be considered intestate in case it is not written and the distributions of property will be governed by the Succession Act. However culture penetrates into the distribution of property under *section 27(2)* recognizes the customary heir who is traced in culture though he attains only one percent instead of all property as it is in culture. Basing on the fact that distribution is done by legal offices, culture affects decision making in family law courts.

The other law that considers culture is the evidence law on compellability of giving evidence where customary marriage is given a priority that is in case bride price was paid and customary marriage was celebrated. In matters of giving evidence for one to have the privilege marriage should be proved that is in matters of husband and wife. The law of evidence cuts across all types of laws that is civil and criminal law therefore affecting decision making in family law courts

In Ugandan culture in marriage the husband is the overall in the family he is also responsible for the family and maintenance of his wives and children in terms of providing house, food and lead in the family in any way in other words the husband is the president of his home. This was well brought by my primary teacher who taught us that the father is the head of the family. The position under common law is a husband has a duty to maintain his wife which gives a wife a right to maintenance but she shouldn't exercise it against people who have better claims e.g. creditors to whom the husband may have mortgaged the matrimonial home. When we consider the argument in the case of *National Provincial Bank V Ainsworth*⁶², where the husband deserted the wife and left her in the matrimonial house. He then conveyed the house to company in which he had a contrary interest. The house was then mortgaged to a bank for a loan. The bank sought possession of the property and the wife contested this on the grounds of her right to occupy the house under the deserted wife's equity. Court held that the bank was entitled to possession. That the wife's right to occupy the matrimonial home were personal rights against her husband following from her status as a wife and didn't confer on her any equitable interest nor could it override the banks interests.

⁶² (1965) ALL ER 472

The issue of maintenance under culture has been upheld by *section 39 of the Land Act*⁶³ in that it provides for restrictions on transfer of land by family members it goes on to provide that no person shall sell, exchange, transfer pledge, mortgage or lease any land, enter into a contract for the sale exchange transfer, pledging, mortgage or lease or any land or give away any land inter-vivo or enter any other transaction in respect of land in case of land on which the person resides with his other spouse and from which they derive their substance except with the prior written consent of the spouse. The position of culture stresses its hand in land act affects the decision in family law courts and also undermines the right to property as portrayed under *Article 26 of the Constitution of the Republic of Uganda* and provisions of the Registration of Titles Act. In other words this brings confusion in the decision in the family law court.

In addition to that in culture the maintenance of a wife by the husband depends on the conjugal rights and even contribution. This also stretches its hands in divorce whereby when we shift the case of *Edith Nakiyingi*⁶⁴ the wife contributed to the building and maintenance of the matrimonial home for 12 years. The husband in divorce proceedings sought to evict her from the home. Court held inter alia that the husband has a duty to provide the wife with a home and if he wants to evict her he must find alternative accommodation. That since it is the husband who terminated the marriage in the eyes of equity he couldn't chase the woman from the house to which she substantially contributed there the court applied the morals of appreciation termed as equity hence depended on effect of culture in family law courts.

Culture affects decision making in the way that due to the powers given to it by the Constitution of the Republic of Uganda under *Article 37*. It makes it lawful and on top of that culture is incorporated in very many laws for example the marriage and divorce law where there is existence of Customary Marriage (Registration) Act that provides for customary marriage and its celebration.

Basing on the case of *Nassanga V Nanyonga*⁶⁵ court held that where the parties were from different tribes, the custom of the woman would be the one to be followed in the case of marriage. This brings confusions to the judges on whose culture should be considered when the

⁶³ Cap 227

⁶⁴ (1978) HCB 107

⁶⁵ (1977) HCB 314),

case arise the polygamous marriage which culture should be considered since the husband is bound to many cultures hence culture affects the legal reasoning of the judges hence culture affects decision making in family law courts.

When you look at the law governing children, the welfare principle has provided loopholes for culture to penetrate as it's upon the law enforcers to determine the correct welfare of the child. This gives the judge a chance through a welfare officer to apply their culture in their decision for example the child belongs to the clan of the man; this can influence the decision in family law courts.

In the case *Ogwang V Ojok*⁶⁶, there was failure to adduce evidence and court held that the customary law was that a girl was not validly married with the full bride price had been paid. The father of the bride was therefore entitled to compensation for the pregnancy that occurred before the marriage was validly contracted.

Also in the case *Uganda V Dande*⁶⁷, court held that since bride price had not been paid full, there was no subsisting marriage between the complainant and the adult woman for they were not to be considered husband and wife hence culture affects decision making in Uganda courts particularly, family law courts and on family matters.

In conclusion, the Legal culture of precedents has also affected decision making in family Law courts .The law that courts make and apply becomes a distinctive cultural system. Legal scholars internalize this culture in course of their studies and professional activity .This internationalization comes to constitute, direct and delimit the way there practitioners think, argue, resolve cases and provide justification. The legal culture affect decision making in the way that practitioners apply decided cases following the hierarchy of courts for example when we observe the case of *Namukasa Joweria V Kakondere Livingstone* the supreme court judgment in *Mifumi (U) Ltd and 12 ors Vs The Attorney General* was applied and found that the practice of return of bride price as demining the dignity of women and in violation of married women's constitutional rights to be equal co-partners to men. Therefore the practice has a form of dissolution of customary marriage is repugnant to natural justice, equity and good conscience

⁶⁶ (1971) HCB 11

⁶⁷ (1975) HCB 339

CHAPTER FIVE

5:0 Recommendations

Solutions to the cultural interference and other factors influencing culture as explained under chapter four include the following recommendations.

The law is the main factor that affects decision-making in other words it's the culture we follow in Uganda. Law is the suspension bridge that tests everything or act that is to take place. It is law that creates the social order in the Ugandan people. The constitution is the grand norm where every law derives its validity. It is the constitution that distributes administrative powers and grant of rights. Therefore the parliament should use the law to bridge gaps that render effective application of justice in Uganda. There should be a law that sets a leveled ground to show the universal components in culture coming up with a similar culture in order to let the judiciary know its limits in ensuring the constitutional right to culture as provided under Article 37. The law permits a universal culture which confuses the judicial officers.

The parliament should equally revise the procedural law since it has led to the miscarriage of justice. Very many cases have been dismissed because of procedural error. Although there is the existence of *Article 126(2)(e)* to let the courts administer justice with undue regard to technicalities, but the Civil Procedure Rules have got mandatory words "shall" on most of the proceeding hence affecting decision making in family law courts.

When we consider the issue of cultural interferences, in cases of determining marriage in terms of customary law, the government through parliament should put a uniform cultural requirements and also consider the birth of children as a requirement since it confuses due to differences in culture hence forcing culture interfere decision making.

There should be a body made to regulate the marriages in Uganda under which it should make sure that the requirements are complied with for example set strict compliance with the age of the marriage, limits on women married and also advise the judges in different cultures in order to maintain justice and neutrality by the judges.

The society should be given a chance to be informed on the compliance with the law and also translate the law into local languages which can be understood by everyone. This will control

indirectly conflicts as a result of culture and other hence limiting culture on decision making since in the face of the society when considering public interest, they will know the position and the reason for that reasoning.

The issue of equality should be digested as stated under *Article 21 of the Constitution* however the chance to practice culture is provided for under *Article 37 of the Constitution*. This is like a give and take culture does not recognize equality yet it is a provision of the constitution. So it is the work of the government to follow up that to make sure that the position of equality is put into consideration once this is shown right from the children, there will be decrease in effect of culture in decision making since the position of supremacy of men will be rubbed on their brains brining up judges who consider law.

The government according to my findings should form a judicial decisions review commission in order to review the decision before they are passed since some decisions are in contradiction with the law since there are factors that affect decision making due to culture, bias, confusion, precedent and many others.

According to the case of *Attorney General V Nakibuule Gladys Kisekka*⁶⁸ discretion was defined to refer to the power or right given to an individual to make decisions or act according to his/her own judgment. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on her opinion but within guidelines. The discretion given to the judicial officers is the driving or push factor for most of the factors affecting decision making in courts. Therefore strict guidelines should be put in place to control the judges' discretion.

When considering succession there should be strict compliance with the law and some cultures should be stopped for example when someone makes a will as provided under Succession Act, in inheritances of Islam it is not respected they instead apply the distribution as provided for by the Quran which is in contradiction with *Article 21 of the Constitution*. however when it happens that the judge is a Muslim he won't be able to apply the law but instead comply with the religion so these cultures for example Baganda inheritance, Islam distribution of property should be prohibited hence solving the problem.

⁶⁸ constitutional appeal no 02 of 2016 [2018] UGSC

The judiciary should be protected and implement independence of the judiciary as provided for under Article 128 of the Constitution and also the appointment of judicial officers should be left to judges and judicial service commission. It is to create neutrality in the family law court.

The independence of the judiciary is a central principle of democracy. Judicial independence permits judges to make ruling based on legal principles instead of politics or public opinion. An independent court system allows fair and impartial decisions in legal cases. Some judicial officers are easily altered by the political climate and public opinions hence leading to the effect in decision making. Therefore in parliament should enact laws that grant the judiciary full independence in order to prevent the other organs from interference.

The issue of precedents has helped to save courts time however it ignores some components in the cases. On top of that it ignores the communal development and change in culture, commercial and other things therefore precedents should be limited and left only to explain but not relied on hence lower the effect of precedent and culture on decision making in family law courts.

When precedents are not limited then the culture or other factor that affect decision in one case, will be carried on to the other hence lowering justice leading to less trust in the judiciary.

The judicial service commission should review and limit the use of precedents in order to prevent further interference of culture on decision making. In other words each case must be decided on its merits.

On the issues of corruption which has also been made a culture in Uganda. The government should besides the Anti-Corruption Act set spies in order to capture all judicial officers that take bribes.

An effective judiciary guarantees fairness in legal process; it's a powerful weapon against corruption. But people's experience in court is often far from fairness. Most people in contact with court face demands for bribes. Their payments total staggering amounts court efficiency is crucial. A backlog of cases creates opportunities for demanding bribes to fast track a case. Court personnel can be paid to slow down or speed up a case or dismiss a complaint.

Judges can also bribe or be bribed or they can suffer pressure from above. If politicians abuse their powers, they can influence decisions and distort appointment process.

The government should fight hard to bridge the gap between the rich and the poor. Besides prosperity for all, the government should find possible ways to eradicate poverty since it has influenced bad decision making. The poverty level increased to 21.4 percent as it was provided by the Uganda bureau of statistics.⁶⁹ The government should work hard to bridge the gap between the rich and the poor by lowering the poverty rate. Poverty is the cause of corruption in courts hence in order to curb down the issue of financial status effect on decision making the people standards of living should improve.

The courts of law should set an investigative team in order to verify the evidence brought on record in order to prevent false evidence from affecting decisions of the court. The court should also consider the strictness on affidavit evidence in order to help those who made mistakes to attain justice instead of those other parties taking advantage over that. If that has failed, the judges are advised to move court in order to have the judges rule in the area of interest in case of succession on distribution of property, grant of letters of administration and others. In most cases the evidence is on the ground and can't be carried to court.

When we look of the issue of behavior of the lawyer, decision making is affected due to judges falling to control their emotions leading to bad decisions. This should be solved by the parliament limiting the immunity of lawyers in courts by providing a remedy in form of punitive damages since it is the client to suffer at the expense of a lawyer. When the judge is annoyed, he will rule in favor of the opposite party therefore leading to miscarriage of justice. Although there are some punishments but they are not strict enough to prevent lawyers from misbehaving in courts of law.

⁶⁹<https://www.monitor.co.ug.news.naitonal.poeveryt-level-increasepercent-UBOS/6883344368774>

5:1 Conclusion

In my conclusion, Uganda is invested with many cultures as a result of different people in tribes. It is also found that the colonialists brought law which was enacted from their culture. Therefore under family law, Uganda adopts their culture hence in every corner culture affects decision making in family law courts in form of written laws and the African culture.

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