

**AN EXAMINATION OF THE STATUS OF WOMEN'S RIGHT  
TO EQUAL TREATMENT IN UGANDA**

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### **APPROVAL**

This is to certify that this dissertation has been submitted for examination with my approval as a university supervisor.

Signature

Date

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NYACEO MARY  
(Supervisor)

## **DEDICATION**

To my sponsor, God Almighty, my mother Edina Ogweng and my supervisor whose extreme tolerance, understanding, guidance and support has brought me this far.

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## **LIST OF INTERNATIONAL CONVENTIONS AND CONFERENCES**

The United Nations Charter, 1945

The Universal Declaration of Human Rights, 1948

The International Covenant on Civil and Political Rights (ICCPR), 1966

International Covenant on Economic, Social and Cultural Right (ICESCR), 1966

The Convention on the Elimination of Discrimination against Women (CEDAW) 1979

The African (Banjul) Charter on Human and Peoples' Rights, 1986

## **LIST OF CASES**

Ajanta Kethan Thakkar V. Kethan Thakkar Divorce Cause NO.3 of 2002.

Alli V. Alli (Unreported)

Anne Musisi V. Herbert Musisi & Lona M. Kiema Divorce Cause No 14 OF 2007

Burch v. Burch [1958] 1 ALL ER 577

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Evans V. Evans [1965] 2 ALL ER 789

G V. G [1964] P. 133 AT 135

Gakwavu V. Mariana Gasengayire [1977] HCB 322.

Godfrey V. Godfrey [1964] 3 ALL ER 154

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Hopes V. Hopes [1949] p. 227 at 235

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pardy V. Pardy [1939] 3 ALL ER 779

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Uganda Association of Women Lawyers and Five Others V the Attorney General  
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Uganda V. Genina Kyanda [1977] H.C.B 111

Veronica Habyarimana V. Perfect Habyarimana [1980] HCB 139

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Weatherley V. Weatherley [1947] AC 628.

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## CHAPTER ONE

### 1.1 Who is a woman?

A woman is defined as an adult human female<sup>1</sup>. The female gender is identified by the physical features it displays, accrued to women.

### 1.2 Background of Women's Rights in Uganda

Uganda's road to securing the rights and freedoms of women has passed through numerous tests and experiments. In a society where culture and norms dictate the nature of duty, obligation and responsibility, it was necessary to involve the language of law and advocacy for a positive impact to manifest in the direction of freedom.

Subsequently, it was important to educate both genders on the advantages of having equal opportunities if development was the country's major objective. A patriarchal community that existed in the country before colonization and during the same portrayed a strict distinction between men and women. This ideology influenced the gender relations, and somewhat the enactment of laws which tended to elevate the authority of man over the woman in a pronounced mode.

#### **Question: *Were women respected and granted their rights?***

With the introduction of religion and capitalism, the wave of emancipation and equality had been set soon enough to stir a revolution in women's role in society; also recognized by law. Considering the dynamic norms and practices of culture and livelihood, women, who hold the majority population in the world, gained a platform of speech and participation in the administration of their communities. At a time where culture, morality and religion were used as tools to dominate women, the rise of advocacy (1930's), was inevitable for women to push for a chair in the room.

Common Law, as in England, was introduced in Uganda during the colonial times, and thus greatly influenced the nature of laws we made or have. However, the need to

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<sup>1</sup> Soaves, Catherine and Stevenson, Angus; 'Oxford English Dictionary', Pg 2024, 2 Edition [Revised], 2005, Oxford University Press Publishers.

evolve with the rest the world paved way for more women to be given a legal recognition in the country's politics.

### **1.3. Rationale for Advocacy for Women's Rights in Uganda**

The battle lay between formal and substantive approach to the new revolution of women and their rights. This is equality versus equity. Whilst analyzing the two, some proponents gave a protectionist approach which tends to involve measures of protecting women from certain activities by the nature of their physical personality.

After numerous trials, talks and decisions made, policies and programs were developed and proposed to effectively address the issues at hand. The Government in its obligation to respect, protect and fulfill steered the formation of making the enjoyment of rights, prevention of violation of these rights and encouraging the civil and political rights which are human rights.

The Convention on the Elimination of Discrimination against Women [CEDAW] adopted in 1979 to legalize the rights the rights of women, adopts and ratifies the rights. All elements of De jure<sup>2</sup> and De facto<sup>3</sup> discrimination were discussed in the Legal Instrument. These, as identified were evaluated on numerous forum that the provisions made thereafter, created a direct approach on the issues of discrimination against women.

For instance; Article 2 of the Convention provides that policy measures to effect development including women's efforts are to be implemented by the Governments to encourage equal representation. Article 16<sup>4</sup> grants woman to formulate a family and choose a marriage relation of their consent<sup>5</sup> Article 21 gives both men and women

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<sup>2</sup> Formal recognition by the Laws

<sup>3</sup> Informal recognition through practice

<sup>4</sup> The Article on equality to enter marriage, to choose a partner, share responsibilities and promote complementary role in decision making concerning the family.

<sup>5</sup> This can be related to the prior norm of choosing partners for girls and women alike in the different tribes. Some of the tribes worsened the practice by allowing widow inheritance by a male relative of her deceased husband. These practices illustrate the little respect and decision making policies accorded to women by some cultural practices in Uganda.

equal status before the Law and further Article 33 of the Convention give the same equal treatment of women to men in development and policy implementation.

**Major Developments that women ought to be proud of include the following;**

**i. Legal Policies and Equality**

a) The formulation of Laws that govern the rights of women and encourage public respect to them as an important gender in Uganda's development was started. Laws like the **Domestic Violence Act** of 2010, a law drafted to protect women especially and men on equal basis from domestic abuse gives women locus to discuss and litigate on the issues covered therein.

The **Female Genital Mutilation Act** of 2010 was also drafted and passed to curb the vice of female circumcision, a practice that had grossly led to several losses of lives among Ugandan girls in the tribes of Sabiny in Kapchorwa-Eastern Uganda.

Other Laws include the Gender Policy of 2007, which aims at;

- Incorporating women in the administration of the country and state affairs.
- Taking all measure to modify equality regulations
- Repealing national provisions which discriminate against women

b) Government put Tribunals to ensure promotion of women's rights; e.g. The Equal Opportunities Commission, at national level. In a bid to ensure impartiality whilst adjudicating on women's issues, the State is advised to refrain from any practice limiting women rights. This The Commission is entitled to monitor and advocate for the equal approach to economic, social and political roles of both men and women. It forwards the need to provide an equal opportunity to all persons regardless of gender while taking all appropriate measures to eliminate discrimination against women at workplaces.

c) The distinction between cultural and universal rights and enforcement of the same posed differences which still exist today. While the first school of thought believes that

African [Ugandan] women ought to be treated accorded these rights as culture speculates, the latter, argues that all women in the world deserve same rights. The biggest argument lies in the differences between the two communities where levels of development are different as well as norms and beliefs.

The change in legal policies that were contrary to the Constitution of Uganda, granted women the right to equality on the grounds petitioned before court. A brief summary here after highlights the issues in contention.

- **MIFUMI Case<sup>6</sup>** - a landmark Constitutional case on bride price in which the honorable court ruled that the essence of bride price is not purchase of a bride but a sign of appreciation for grooming children into adulthood. This means that the name had to be softened to suit the argument, and it became 'bridal gifts'
- **Law Advocacy for Women in Uganda V Attorney General** - Constitutional Petitions Nos. 13/05/ & 05/06 [2007] UGCC 1(5<sup>th</sup> April 2007)-a case that ruled in favour of equality under the Law of Succession and expressly provided that both males and females be given equal opportunities to inherit property, as well as having the same grounds for divorce without discrimination.

Women can now claim nationality for their children under the principle of nationality of children that was dictated by the paternity of the child was overruled to be discriminatory. They can also retain their maiden names, nationality and citizenship even at marriage, and also have the right to give the same to their children.

## ii. Leadership

In December 1979, the United Nations adopted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The Convention defines discrimination as;

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<sup>6</sup> Mifumi (U) Ltd & 12 Others V Attorney General, Kenneth Kakuru (Constitutional Petition No. 12 of 2007) [2010] UGCC 2 (26 March, 2010); also chaired by a lady, Hon. Justice Deputy Chief Justice Leticia Kikonyogo of the Constitutional Court.

*"Any distinction, exclusion or restriction made on the basis of sex which has the effect- or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, or a basis of equality of men and women".*

The 1995 Constitution of the Republic of Uganda<sup>7</sup> encourages women to take up positions in Parliament not only as Women Members of Parliament but also as plain Members of Parliament.

With this, we have seen women take up positions like Speaker of parliament<sup>8</sup>. Women have also been given opportunities to take up Ministerial positions, and compete in political systems.

This means that the female gender has been competitive in effecting the role at such high rankings. In light of this, Minister Saida Bumba at the time was ranked as the best finance minister not only in Uganda but also in Africa. This portrays that women can equally deliver once given the platform to exercise the knowledge and authority required to carry out their duties.

Most of the top organizations that have been led by women and are still led by them have been cited as successful for example the Uganda Investment Authority (UIA) that was led by Dr. Maggie Kigozi and URA, under the control of Allen Kagina<sup>9</sup>. Initially, such positions of leadership were dominated by men, with an argument that they are successful compared to women, assumed to lead with emotions blurring their decision making strategies.

Looking at the previous appointments in the position of Mayorship of Kampala, the city had for long been dominated by male leadership in the same office. This gap was filled by the creation of the position of the Executive Director to which a woman, Miss Jennifer Musisi, was appointed to occupy. Remarkable changes in Kampala are evident

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<sup>7</sup> Article 33 (4) of the Constitution of Uganda, 1995

<sup>8</sup> Right Hon. Rebecca Kadaga, the Speaker of Parliament of Uganda, 2012.

<sup>9</sup> Africa Challenge Foundation [AFRICAF], a students' initiative at Uganda Christian University-Mukono, that rewards the most hardworking and anti-corruption advocates in the country's policies, applauded these women in encouraging transparency within the economy of Uganda.

with the first duty of reducing the number of street hawkers who congested the city; a move to create order and reduce traffic jam therein.

In addition, the process of collecting tax has been developed with an accountability element to effectively increase the city funds used for government policies geared at developing Kampala.

Another example is Miss Judith Nabakooba; the Police Spokeswoman in Kampala who also does the female gender pride. The duty of patrolling local areas and maintaining security in the busy city could at one time be argued to befit a male officer. The presence of Miss Nabakooba and many other women, including traffic officers shows the exception that women can efficiently perform the task.

### **iii. Judiciary and the Justice System**

Women have also been influential in the Justice System of Uganda. Justice Julia Ssebutinde<sup>10</sup> who was appointed to the International Criminal Court [The Hague, Switzerland] has given women the zeal and commitment to play a vital role in the world judicial processes. She was the first African woman to be appointed to this position.

There is no doubt therefore that women can champion further development in the Judiciary and give service to the nation. For example; Lady Justice Bamugemereire is very influential in the Anti-corruption Division of the High Court. The number of female lawyers also increases every single year, given the high population of girls in the various Law Schools in Uganda<sup>11</sup>. In legal practice, the ladies are also given opportunities to start up firms. For example Ligomarc Advocates in Kampala, an influential Law Firm was started by Miss Ruth Sebatindira.

International instruments that Uganda has also ratified do promote equality between men and women. The Justice system does not act in oblivion of what the international

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<sup>10</sup> Ugandan Judge who led the Judicial Commission Probe into the, police force to eliminate 'ghost officers' and check on corruption allegations into the authority.

<sup>11</sup> Uganda Christian University in Mukono boasts of over 300 female students in the Faculty of Law. These numbers portray the increased rate of education in a humanitarian and sociological field of public order.

plane suggests. However, it does so within Uganda's interests. Article 1 of *the Universal Declaration of Human Rights*, 1948 provides that men and women have equal rights.

This instrument influences the legal obligation of Government availing equal opportunities and policy development measures to all persons regardless of gender difference are a clear indication that its laws which also provide for women's rights are widely accepted in society. This gives women cause to celebrate as they are no longer viewed as inferior beings.

#### **iv. Religion and Faith based Role of Women**

Some of the religions do not give the Ugandan woman a chance to be clergy in the church. She is painted as a sinner, arguably that a woman is the initiator of all the suffering that the world has been put into. The issue of gender also comes in as far as the responsibilities and activities assigned to men and women in different cultural settings. Where females reject their traditional obligations, severe punishments used to be imposed. In some societies, they still exist. These can be in form of honour killings or banishment from the family. For instance the Somali cultures within Uganda in Nateete and Kamwokya where girls are married off at young ages, and more so kill or banish them if they reject such marriages to avoid 'shame' in the family. Girls that change their religions are treated in the same way, unless they profess to return to the family religions.

However, women have greatly taken up church roles and other faith based beliefs to inspire the spirituality of the nation. An evaluation on the church in Uganda today shows that the ratio of women to men with constant commitment to spirituality bigger in favour of the former.

Examples of women religious leaders making this possible include; Irene Manjeri of Bethel Healing Centre, Pr. Jessica Kayanja and her Girl Power Ministries, at Miracle Centre Cathedral in Rubaga-Kampala, Rev. Nkesiga Janet - the Chaplain of All Saints Cathedral in Kampala, Pr. Patience Museveni, etc.



## **v. Inheritance**

Despite the changes in the law, many communities or traditions do not recognize women to inherit land and other assets yet they are the main breadwinners of the family. Usually, a man will only bequeath property to his sons on the ground that his daughter will get property when she gets married. In some circumstances, husbands do not look at their wives as prospective beneficiaries of their wealth.

Today, there is a myth still held by many of our societies that a woman cannot succeed a throne. Given the fact that kingdoms in our country were revived, this is clearly illustrated by the fact that all these kings are men. Kings had the obligation to beget a male child to succeed the throne. They also went ahead to take on concubines to produce male heirs. In addition such discrimination against women was also illustrated in the Tooro kingdom when the Omukama died, instead of letting the queen take over, her son who was then still young was declared heir of the throne. This is a clear indication that the attitude towards women as leaders in Kingdoms has not yet changed.

## **vi. Education**

Some girls are denied education and forced to marry at an early age (pg 15). This is evident in rural societies like that of the Karamojong where girls are only viewed as a source of wealth. However, there is hope coming from the fact that the first lady<sup>12</sup> of this nation is a minister in charge of Karamoja, an indication that such problem may be addressed the program of enrolling girl-child scholars in schools is a proper initiative although it requires more commitment.

## **vii. Economic Influence**

For such a long time, women have suffered gender related discrimination including voice poverty. In most societies, women form the largest population in both census and

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<sup>12</sup> Hon. Kataaha Janet Museveni, wife to the President of Uganda-His Excellence Yoweri Kaguta Museveni

poverty levels considering the limited access to employment with enough payment/wages.

The International Monetary Fund & World Bank introduced structural adjustment programs like privatization, regulation of labour market, etc, which included women in the role to effect policies in the economy. They are allowed to engage in petty economic production, and make investments in their own businesses. The growth of the Uganda Service Sector gave platform to women to enjoy economic independence, health and food production.

Small scale enterprises however still need to be boosted in funds, research, sensitization and market to increase the rate of production. Furthermore, the stagnant currency value within the economy coupled with high premiums and interests in business tend to diminish the efforts of women economists and business owners.

The Government ought to evaluate the rates mentioned and monitor their changes effectively, having the power to authorize economic targets in favour of the growing economy which has women as the largest number of risk takers in saving schemes and small scale businesses.

#### **1.4. THE STATEMENT OF THE PROBLEM**

Article 33 of the 1995 constitution of Uganda states the right of women and subsection (1) states that women shall be accorded full and equal dignity of the person with men. But in the case of **Gakwavu Vs Mariana Gasengayire**<sup>13</sup> Court held that under section 22 of the divorce Act that a husband can recover damages from any person who commits adultery with his wife, but the reverse is not true.

This shows inequality where women are undermined customarily.

Accordingly, the man/ husband is compensated in case of a woman's adultery, however the wife not compensated because customarily the wife has no proprietary rights, but is a husband's property.

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<sup>13</sup> (1977) HCB 322

In the **R Vs Amkeyo**<sup>14</sup>, the issue was whether a woman married under the custom of the society from which the appellants came would properly be regarded as a wife.

Hamilton C.J. proved the view that woman in question could not be considered a wife for various reasons;

- i. The woman was not a wife within the English sense.
- ii. The wife was not a participant in the agreement of her marriage which was essentially conducted by her relatives on behalf of the man's side and her own relatives and therefore, there was lack of the element of consent which is a requirement in the English marriage.
- iii. The marriage was potentially polygamous given the fact that the man would marry more than one woman therefore, did not conform with the notion of marriage as understood among civilized societies.
- iv. The woman between the man and the woman was founded on the payment of bride price and that therefore; the union was a wife purchase in which case the woman was no more than a chattel (movable property/ good).

### **1.5 THE PURPOSE OF THE STUDY**

The broad purposes of this study is to critically analyze whether the rights of women can be realizable in the Ugandan context, bearing in mind the socio-legal factors which impinge on the realization or implementation of this right. And also to show whether women are accorded equal opportunity with men.

### **1.6 OBJECTIVES OF THE STUDY**

1. To examine the constitutional provisions that can be used to interpret the rights of women.
2. To find actual problems that women face during and after the dissolution of marriage.
3. To suggest reforms in both law and policy relating to the enforcement and implementation of the rights of women as regards divorce.

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<sup>14</sup> (1917) KLR Vol. 1 Page 14

## **1.7 RESEARCH QUESTIONS**

The research questions to be tackled include;

1. Examine the constitutional provisions that can be used to interpret the rights of women?
2. Examine problems that women face during and after the dissolution of marriage?
3. Suggest the reforms in both law and policy relating to the enforcement and implementation of the rights of women as regards divorce?

## **1.8 HYPOTHESIS**

1. Lack of laws and policies protecting the rights of women have led to persistent discrimination against women.
2. Demeaning cultural practices, societal attitudes, among others, have inhibited the realization or implementation of these rights.

## **1.9 SCOPE OF THE STUDY**

Owing to the requirements, the paper only covers the legal status of women in Uganda as regards the violations of their rights by the Divorce Act.

In analyzing whether the rights of women can be realized, we shall attempt to interpret the 1995 Constitutional provisions relating to women's rights generally as well as the Divorce Act. Our study will be limited to the Ugandan context.

## **1.10 SIGNIFICANCE OF THE STUDY**

The purpose of this study is to help identify the major reasons for discrimination and unfair treatment of women as well as the sections of the Divorce Act that are discriminatory towards women.

It will also help in promoting changes that need to be made towards the development of a society in which women hold equal status to men.

## CHAPTER TWO

### LITERATURE REVIEW

The Domestic Relations Law of Uganda is one of the laws received from England during the colonial era. Much as there have been reforms in the laws of Britain, the repealed laws of England still serves as good law in Uganda and yet little has been done to modify or amend them. To this effect a number of scholars have written on the subject. Although extensive literature has been written with the view of appraising women's rights, in Uganda literature on the specific inequalities in the Divorce Act has been limited.

Much as different authors have written on divorce, some have written on the subject as it stands in their countries. For example **Bromley 1987**<sup>15</sup>, and **Grant and Levin 1982**<sup>16</sup>: look at divorce as it is in Britain. It is relevant to the present study in comparing the reforms in the divorce laws of Britain with the provisions in the Divorce Act of Uganda.

**Bitariho Grace**<sup>17</sup> agrees that African culture has retarded the recognition of women's rights. She further articulates that demeaning African culture can be transformed or replaced for the benefit of equality.

**Manfred Nowak in his book introduction to international Human Rights Regime**<sup>18</sup> argues that all human rights are for all: under the principles of universality, equality and interdependence of human rights. He further argues that there is now a need to move from merely the promotion of human rights to protection and prevention of abuse of human rights. This work is very useful if contextualized within the situation in Uganda where the state only seems to be merely promoting human rights without making any concrete policies for the protection and prevention of human right abuses.

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<sup>15</sup> P. M. Bromley & N.V. Lowe: *Bromley's Family Law*. Dublin.

<sup>16</sup> Grant & Levin. *Family Law*, 4th Edition. Sweet & Maxwell. London. 1982.

<sup>17</sup> Bitariho G.K. *Reproductive Rights the Ugandan Perspective* In papers written in partial fulfillment of The Masters in law Degree (LLM) Program, Law and Advocacy for Women in Uganda. 2000, page 179-209.

<sup>18</sup> Martinus Nishoff Publishers, 2003. Page 25-27.

**Manisuli Ssenyonjo** stated that in 1995 Uganda adopted the Constitution of the Republic of Uganda 1995 which protected a wide range of human rights including women's rights to equality and freedom from discrimination. Article 33(6) of the Constitution prohibited laws, customs or traditions which are against the dignity, welfare or interest of women. However, more than ten years later legislation, customary laws and practices have continued to be in force largely due to the lack of political will to confront issues of inequality and discrimination in a holistic and comprehensive manner. His article examines such discriminatory laws against women and the jurisprudence of Uganda's Constitutional Court in the areas of divorce, criminalization of adultery, succession and marriage laws. Using a comparative approach, it observes that these laws conflict with Ugandans Constitution as well as regional and international human rights treaties to which Uganda is a State party. It recommends that discriminatory laws should be harmonized with principles of equality and non-discrimination, and advocates for a litigation strategy<sup>19</sup>.

**Joseph Kakooza** says that the growth of individual economic strength has put asunder the social structure of long ago. The movement is from communal to individual life from communal to individual life the search for independent life has led to migration, emigration and immigration<sup>20</sup>. The economic attraction of centers of learning has led to breaking up of homes and families. He adds that the weakening of parents' authority over their children has led them to be financially independent. A daughter would not listen to parents choosing her a partner nor will a son do so. His assertion is true as to the causes of breakdown of marriages today. The partners meet and decide to marry without first inquiring from their parents. When the weaknesses of each spouse show up, the instability of the marriage crops up and the end result is marriage breakdown. Marriages have also broken down because the parents disagree on the way their children's marriages are handled.

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<sup>19</sup> **Women's rights to equality and non-discrimination: discriminatory family legislation in Uganda and the role of Uganda's constitutional court.** Oxford university press. 2007.

<sup>20</sup> **J.M.N. Kakooza: Family Law and Social Change.** East Africa Journal. June. 1967. Page 24.

**Sylvia Tamale** in her article points out that there is no law in Uganda that exemplifies the discriminatory character of our law than the law governing divorce in Uganda<sup>21</sup>. This law does not grant equal rights and duties upon the dissolution of marriage between the husband and the wife. She also analyses the civil divorce where adultery is the pre-emptive ground for all divorces. However the law requires that the husband only needs to prove adultery while the wife must couple it with other grounds such as cruelty or desertion<sup>22</sup>. She adds further that under civil divorce only the husband is entitled to monetary damages from a co-respondent in the event of adultery with his wife<sup>23</sup>. There is an assumption that no harm has been done to a wife.

**The report made by the commission on marriage, divorce and the status of women** provides that divorce is the most important and difficult subject<sup>24</sup>. The report lays down the problems that exist in the divorce law. It provides that the protestant church does not approve of divorce yet they are forced to advocate for divorce. The Roman Catholic maintain the mediaeval position in full and do not approve of divorce, yet they advocate for judicial separation. The report finds out that the question of divorce and the problems attendant thereon, are not as simple as it all sounds. The report addresses the problems and biases that exist while petitioning for divorce and it covers almost all tribes in Uganda.

Some writings on the law of divorce are too general for example in the book, **What the Law Says about Divorce, published by the Department of Women in Development, 1994**, which restates the substantive law on divorce under customary law, Islamic law and the Divorce Act. It does not critically analyze the effect of divorce laws Vis a Vis the rights of women; which the present study intends to do.

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<sup>21</sup> **Sylvia Tamale: EAU Of Peace And Human Rights On Law Reform and Women's' Rights In Uganda 1993. Volume no, 2. Page 173. Published by Makerere University, Human Rights And Peace Centre.**

<sup>22</sup> **Section 4 of the Divorce Act, Cap 249.**

<sup>23</sup> **Section 21 of the Divorce Act, Cap 249.**

<sup>24</sup> **Report of the Commission on Marriage, Divorce and the Status of Women. 1965. Government Publishers. Nairobi. Paragraphs 104 and 105.**

A number of authors have attempted to show the biases in the divorce laws in Uganda; however some authors have limited themselves to specific issues relating to divorce without giving a critical assessment to other issues in the divorce laws which discriminate. For example **The Uganda Women's Network (UWONET) News, 1997**, which makes general observations on the present laws governing divorce. It reports that under the present laws, women are treated very unfairly for instance grounds for dissolving a marriage include adultery. It also recommends that the grounds for divorce be uniform for both men and women.

**Gender Alert Magazine, 1995**, precisely expresses the need for women to be treated fairly with their husbands when it comes to divorce. It further makes criticism on the double standard required by women and men on the ground of adultery. In addition to the grounds of divorce as shown above to be one of the discriminatory areas in divorce proceedings, my study intends to analyze whether the grounds for divorce under the Divorce Act are the same for both men and women.

**Esther Mayambala's Study, 1994<sup>25</sup>**, dealt with the rights to divorce under the customary marriage, Islamic marriage and civil marriage. However her study makes a general critical examination of the law governing divorce in Uganda in line with the effect of the practice of polygamy and the rights of women. My study however, intends to examine the Divorce Act Vis a Vis the rights of women in Uganda.

**Grace Bantebia's study, 1996**, confronts a multitude of problems which have led to the discrimination against women and have hindered the emancipation of women under the divorce laws. In her view, the laws governing divorce do not reflect the equality principle observed in the constitution rather they are discriminatory in nature. Her study further makes findings on issues related to divorce.

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<sup>25</sup> Esther Mayambala, "Changing the Terms of the Debate to Resolve the Polygamy Question in Africa," Georgetown University Law Centre. May 1994. Page 20.





The need to reform divorce laws has been expressed over the past years, for example, the **Kalema Report, 1965**<sup>26</sup>, which comprises of a number of proposed recommendations including those on divorce. The recommendations however are not relevant in the present day.

The promulgation of the **1995 Constitution of the Republic of Uganda** has attracted the attention of legislators. Attempts have been made to reform of the laws of divorce in order to reflect the provisions of the constitution such as Article 21, Article 31 (1) which guarantees equality of the spouses at the dissolution of marriage and Article 33.

A need to reform the Domestic Relations Law has been appreciated by the Uganda Law Reform Commission so much that the Domestic Relations Bill was presented in parliament in 2009. The bill however has not yet passed into law.

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<sup>26</sup> **W.S. Kalema. Report of the Commission on Marriage, Divorce and the Status of Women. Government Printer, Entebbe, Uganda.1965.**

## **CHAPTER THREE**

### **RESEARCH METHODOLOGY**

#### **3.0 Introduction**

In this chapter, the description of the methods and techniques that the researcher employed in conducting the research from the time of constructing the research topic, assumptions, objectives, and the real field study are discussed. These methods comprised mainly of; data collection methods, sampling, interviews which included both in-depth and group interview.

#### **3.1. Sampling methods**

Sampling is the process of selecting elements from a population in such a way that the sample elements selected represent the entire population. Population samples were taken from Kawanda Division- Wakiso District and the type of population mainly comprised of the single mothers who have been divorced and living with their children who have experienced knowledge as pertains the research. The rational was because this category of women are greatly sorrowful and heavily burdened because they look after themselves and their children.

The sampling method was used because of its cost effective nature. Cost of transport and communication were reduced since few samples of population were interviewed. The sampling was through random selection and covered around 20 families (homes) around Kawanda, 5 local council leaders from the family protection unit of Kawanda Police. 15 people from concerned Non-Government agencies and others interviewed include 5 government officials in the ministry of gender, labour and social development, particularly under the women's department.

To achieve the purpose of the study, the researcher also collected data from other specialized agency offices which included National Association of Women Organizations of Uganda (NAWOU), Federation of Women Lawyers (FIDA), Uganda Women's Network (UWONET), Forum for Women in Democracy (FOWODE), Action Aid, in addition to the library of Kampala International University, Makerere University Main library, the

Ministry of Gender and Labour, and from Newspapers in the course of conducting the research.

### **3.2 Data Collection Instruments**

Data were collected from primary and secondary sources. Primary sources provided data directly from the respondents through unstructured interviews [both in-depth and group interview] which included 'one on one' interviews with the selected population samples. While secondary data were collected by looking at the available literature, published and unpublished data, newspapers, text books, libraries and searching the internet. All these were subjected to crucial analysis.

### **3.3 Individual — In-depth Interview**

An in-depth interview involves a thorough and complete interview with the respondents on 'one on one' basis. The in-depth interview was mostly carried out with elderly people, middle aged male and female from Kiwafu and Kikubamutwe zones and divorced single mothers whom the researcher was able to interact with. The researcher interviewed among others two women in Nsambya Kirombe Zone. The interviews were conducted in English, however the researcher used a translator where need arose. This particular method of data gathering was preferred because of its flexibility, effectiveness and convenience and as a result the researcher was able to formulate questions accordingly as he was interviewing the respondents.

### **3.4 Group Interview**

This involves direct interaction and discussions with the respondents. Through group interview, I was able to discuss my assumptions with respondents I met at Rubaga Miracle Centre cathedral in Rubaga. Questions related to the topic would be put across to the interviewees, who would then give me various responses. But because of the fact that, most of the respondents were found to have little knowledge as regards the legal framework governing the violation of women's right in Uganda, I majorly posed questions in regards to the causes, impact and possible remedies to eradicate the vice. One thing I liked about this method was that, every response by the respondents was

subjected to scrutiny from other members of the same group; hence I was able to pick out vital information that won the support of most members.

### **3.6. The limitations of the study**

The researcher experienced financial hardships in conducting the study. The study needed some enough fund at hand for traveling to the area of study, fund for printing the typed work and data from the internet, and fund for the necessary phone calls. But he however, managed to overcome this by making calls to relatives and good friends for financial bailout.

Limited time was yet another problem; the research needed much time than what was available to the researcher. The limited time came about as a result of the fact that, the mandated time for carrying out the research collided with the time slated for final exams, yet the researcher was in his last year last semester. However, because of the considerable nature of the administration of Faculty of Law, the deadline for submission was stretched hence enabled the researcher to complete the study. Coupled with the above was the researcher's determination to work all nights and days.

Language barrier and limited response from some respondents was yet another obstacle. Because of the language diversity in Uganda, the researcher was unable to speak most of the languages, but because of the hastened intervention of an interpreter, the research got facilitated. I managed to be sensitive while interviewing; by taking interview in camera and again I tried interviewing people who were free to express themselves. Like in group interview, I approached a group of women whom we interacted with freely and this gave them the chance to open up to the interviews, hence enabling me obtain primary information.

## **CHAPTER FOUR**

### **THE LEGAL FRAME WORK FOR WOMEN'S RIGHTS TO EQUALITY**

#### **4.0 INTRODUCTION**

This chapter sets out the legal framework for women's rights generally as well as the right to equal protection by the law in particular. The right to equal treatment cannot be looked at independently because it is intertwined with other rights like non-discrimination. They are implied to life, survival, liberty and education. I shall look at international legal framework then regional legal framework and lastly the national legal framework. The several conventions and laws lay down the principles of equality and right to equal treatment for all.

The recognition of women's rights in international law is relatively recent. 'Human' rights, of course, include the rights of women as well as the rights of men, Women, like men, are entitled to all of the protections and assurances set out in the International Bill of Rights, that is the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (the Civil Covenant) and the International Covenant on Economic, Social, and Cultural Rights (the Economic Covenant.) Non-discrimination has been a keystone of international human rights since 1948 and all three instruments explicitly bar discrimination on the basis of sex. Indeed, women are singled out for special treatment in Article 10 of the Economic Covenant, which assures mothers special protections while pregnant and after giving birth. Where women are treated differently from men, in short, they are treated better than men. The need to address women's human rights as a separate issue, accordingly, is not obvious from a cursory overview of human rights law. The need exists, however, for two reasons. First, as a practical matter, women in fact remain second-class citizens, subordinated throughout the world, despite their equal treatment in these foundational human rights instruments. Second, from a more theoretical perspective, focusing on women's rights exposes the gendered assumptions of human rights discourse itself. That is, critics argue, human rights law incorporates a gender perspective; it focuses on issues or

problems that affect men more than women or that affect men differently than they affect women<sup>27</sup>.

**4.1 THE INTERNATIONAL LEGAL FRAMEWORK**

**4.1.1 The United Nations Charter<sup>28</sup> and the Universal Declaration of Human Rights<sup>29</sup>.**

According to **Nafis Sadik<sup>30</sup>**, the international approach to human rights derives from principles of the United Nations charter and the universal declaration of human rights. The universal declaration of human rights remains a beacon in the history of humanity since its proclamation and adoption in 1948<sup>31</sup>.

The most fundamental achievements of the Universal Declaration is the setting of international standards which have influenced legislation, incorporation of charters, resolutions and the development of an international human rights regime<sup>32</sup>. It has thus created a moral obligation on states and has entrenched itself in national constitutions of numerous states including Uganda.

The preamble to the universal declaration of human rights provides that states have a duty to protect their citizens’ individual and collective rights. The convention is not legally binding but its provisions have been recognized by most countries as providing a standard for the achievement of human rights enforcement<sup>33</sup>.

The preamble of the United Nations charter (1945) states, “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” One of the purposes of the United Nations is to achieve international cooperation in solving international problems

<sup>27</sup> **Barbara J. Stark. Women’s Rights. Oxford University Press, 2009. Page 2.**  
<sup>28</sup> **United Nations Charter signed 26 June 1945, San Francisco at the conclusion of the United Nations. Conference on International Organizations.**  
<sup>29</sup> **Adopted by the United Nations General Assembly Res. 217 A (III) 10 Dec. 1948.**  
<sup>30</sup> **Sadik N. The State of World Population. UNFPA, 1997, page 9.**  
<sup>31</sup> **Sewanyana, L and Kakaire, A.” impact of UDHR in Uganda” Your Rights Magazine, vol. 1, no. 2, November 1998, page 6.**  
<sup>32</sup> **Ibid**  
<sup>33</sup> **Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948**

of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion<sup>34</sup>.

### **Articles relevant to equal treatment and non-discrimination**

The Articles of the Universal Declaration of Human Rights (1948) which are relevant to the discussion are:

Article 1 states that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." This Article discourages subordination of women. In effect therefore men and women are equal. Article 2 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

*Article 7* states that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Thus a woman's right to equal treatment should also be recognized.

It has been noted by amnesty international that the core human rights treaties flow from the 1948 Universal Declaration on Human Rights<sup>35</sup>. They include International Covenant on Economic, social and cultural Rights, the International Covenant on Civil and Political Rights, and its Optional Protocols, and the Convention on the Elimination of Discrimination against Women and its Optional Protocol.

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<sup>34</sup> **Article 3 of the United Nations Charter, 1945.**

<sup>35</sup> **Amnesty international. "Respect, Protect, Fulfill Women's Human Rights. State Responsibility for Abuses by Non- State Actors" Amnesty international, June 2000.**



#### **4.1.2 The international Covenant on Civil and Political Rights (ICCPR)<sup>36</sup>.**

The Articles related to our topic in the Covenant include:

Article 3 which states that "states undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the convention." This means that states must enforce laws which promote equality as well as prohibiting discriminatory laws that affect women. The relevance of this is that states should borrow from these conventions when formulating their own policies and laws.

*Article 23(4)* provides that "states parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." This provision recognizes that equality at, during and at dissolution should be a right guaranteed by states. This means that men and women should be accorded equal treatment at dissolution of marriages.

Article 26 states the same principle as article 7 of the universal declaration of human rights. It provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." This will in effect ensure that women will not be discriminated against because of their sex.

Article 17 states that "(1) Everyone has the right to own property alone as well as in association with others" while (2) states that "No one shall be arbitrarily deprived of his property." This means that every person regardless of whether they are a man or woman can own property.

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<sup>36</sup> Adopted by UN General Assembly, Res.2200A (XXI), 15 Dec, 1965, 21 UN, G.A.O.R. sup. No 16, at 52 (UN Doc A/63 13, 1966).

### **4.1.3 The International Covenant On Economic, Social And Cultural Right (ICESCR)<sup>37</sup>.**

This entered into effect in 1976. It incorporates core understandings based on the Universal

Declaration including the right of women to be free of all forms of discrimination

The provisions of the covenant which deal with principles of equality include; Article 2(2) which states that "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Thus discrimination on grounds of sex is prohibited as a violation of human rights. Women must not be discriminated against in divorce matters on grounds of their sex. The fact that they prove different ingredients shows that they are treated differently on the basis of their sex.

*Article 3* states that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." This provision ensures that women and men have the right to equal treatment and should be able to enjoy their rights without discrimination. A woman should be able to own property just like a man would. A woman should not be denied the right to enjoy her social and cultural rights on the basis of being a woman.

*Article 5(1)* provides that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant." Article 5 (2) provides that "No restriction upon or derogation from any of

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<sup>37</sup> Adopted by U.N General Assembly Res. 2200 A X'X), 21 UN GAOR sup. No.16, at 49.UN document 1966.

the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.” The rights of people are therefore non derogable and states should ensure that they do not enact laws that are discriminatory on the basis of sex. The Divorce Act would therefore be a discriminatory law.

#### **4.1.4 The Convention on the Elimination of Discrimination against Women (CEDAW)<sup>38</sup>**

It represents the most concisely articulated statement by the international community on the question of human rights<sup>39</sup>. The convention set clearer definition and standards than the earlier covenants and expanded the protection of women against discrimination.

The convention recognized that because socially defined gender roles differ, provisions against discrimination and abuse cannot simply require equal treatment of men and women, there must be a more positive definition of responsibilities that applies appropriate rights standards to all<sup>40</sup>.

*Article 1* of the convention provides that “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

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<sup>38</sup> Adopted by the UN General Assembly on 18 December 1979.

<sup>39</sup> Oloka -Onyango, J and Sylvia Tamale. “The Person is Political” or Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism. *Human Rights Quarterly: A comparative and International Journal of the Social Sciences Humanities, and Law* vol. 17, No.4 November 1995. Page 714.

<sup>40</sup> Preamble to the convention.

*Article 2* provides that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

This shows that the convention advocates for the elimination of laws that lead to the discrimination of women.

*Article 15(1)* state that "States Parties shall accord to women equality with men before the law." This means that the law should be good for both men and women and should accord both of them equal protection.

## **4.2 REGIONAL HUMAN RIGHTS FRAMEWORK.**

### **4.2.1 African (Banjul) Charter on Human and Peoples' Rights<sup>41</sup>**

The African charter on human and peoples' rights was adopted on 27 June 1981 and it entered into force on the 21 October 1986. It is a more applicable convention because it applies to the African continent and is thus more in touch with the problems faced by African people in their respective countries.

Article 2 provides that "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3(1) state that "Every individual shall be equal before the law." While Article 3(2) provides that "Every individual shall be entitled to equal protection of the law."

*Article 18 (1)* provides that "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

*Article 18 (3)* provides that "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

*Article 19* provides that "All peoples shall be equal; they shall enjoy the same respect and' shall have the same rights. Nothing shall justify the domination of a people by another."

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<sup>41</sup> Adopted 27 June 1981, OAU Doc, CAB/LEG/67/3 rev, 21 .L.M. 58 1982), entered into force 21 October 1986

## 4.3 NATIONAL LEGAL FRAMEWORK

### 4.3.1 The Constitution of the Republic of Uganda 1995

The 1995 Uganda Constitution has been applauded by many as gender sensitive. This among other things is by virtue of the fact that its several articles on equality between persons specifically outlaw the use of sex as basis for according different treatment<sup>42</sup>.

The Articles relevant to the topic include;

Article 21 on Equality and freedom from discrimination

*Article 21 (1)* states that "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."

*Article 21(2)* provides that "Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability." While *Article 21(3)* states that for the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Article 31 provides for the Rights of the family

*Article 31(1)* states that "Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution." This shows that the constitution does recognize the fact that marriage can be dissolved and in so doing it provides that men and women should be accorded equal treatment during the proceedings and even after the dissolution is final.

*Article 33* provides for the rights of women

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<sup>42</sup> Lillian Tibatemwa Ekirikubinza, "Is There any Hope in the 1995 Constitution?" *married Women's Property Rights and the Gender Question in Uganda* 1997 page 10.

- (1) Women shall be accorded full and equal dignity of the person with men.
- (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.
- (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
- (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
- (5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

The relevance of these Articles of the Constitution is that they can be used as a ground for challenging unfair laws and also it lays down the standard of treatment that should be afforded to persons since it is the supreme law of the land and thus all other laws should conform to it.

#### **4.4. CONCLUSION**

The above chapter dealt with the laws that provide and recognize the rights of women. The laws recognize women's rights as human rights and thus should be accorded full and equal treatment as men. Women should be protected and also taken care of. The conventions encourage states to step up the fight against discrimination of women.

## **CHAPTER FIVE**

### **THE EFFECTS OF FIDA CASE ON RELATION TO THE RIGHTS OF WOMEN IN UGANDA UNDER THE DIVORCE ACT!**

#### **5.0 INTRODUCTION**

Perhaps nowhere has the observance of women's human rights been more distant for women than in the area of divorce in Uganda. Women have continued to be discriminated against as a result of discriminatory divorce laws which do not grant equal rights and duties upon the dissolution of marriage. The absence of adequate divorce law has led to violation of women's rights in Uganda. The Divorce Act as it is has not realized the fact that women should be accorded equal treatment as men and thus causes loopholes in the law. The Act is also in contravention with the equality Articles of the Constitution.

#### **5.1 POSITION BEFORE 2003**

The Divorce Act under Section 4 (1)<sup>43</sup> provides that a husband needs to only prove adultery by the wife in order to be given a decree of divorce. Thus a husband needs to prove only one ground for divorce. Section 4(2) on the other hand provides that a wife in divorce proceedings has to prove adultery coupled with bigamy, desertion, cruelty, rape, sodomy or bestiality.

From the above provisions it is clear that a woman in Uganda may be forced to live in an abusive relationship or live with an adulterous man just because she cannot prove any other offence on the husband's part as required by the Divorce Act.

The British law has been reformed in order to conform to the changes that have faced the world since 1904 when it was enacted. The Ugandan Divorce Act that was adopted from the British in 1904 is still the same and no provisions have been changed or amended in order to conform with the needs of society in the current world that we live in. There is need for Ugandan courts to adopt some of the reforms from other countries which have reformed their divorce laws such as Britain, the United States and

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<sup>43</sup> Cap 249 Laws of Uganda.



Zimbabwe which have moved away from fault divorce to a no fault divorce which is otherwise known as irretrievable breakdown of marriage<sup>44</sup>.

Section 21 of the Divorce Act provides that a husband may, by petition, claim damages from any person on the ground of his having committed adultery with the wife of the petitioner. This right is however not available to a wife whose husband is guilty of adultery or any other matrimonial offence. In the case of **Taylor V. Taylor**<sup>45</sup> it was held that a wife cannot claim damages against a woman who commits adultery with her husband.

This provision therefore discriminates against women because it only considers the feelings of a man and not those of a woman. The injured feelings of a woman are not considered as if it does not count. In the Kenyan case of **Legeyt V. Legeyt**<sup>46</sup>, the husband claimed for damages against the respondent and court held that damages against a co-respondent are compensatory based on actual loss to the husband, depending on the actual value of the wife, the injury to feelings, the blow to his marital honour and family life.

The Section also contravenes Articles 21(1) and (2), Article 31(1) and Article 33(1) of the 1995 Constitution on the equal treatment of all by the law as well as the preservation of the rights of women.

There is need to reform the law such that it conforms to the provisions of equality between men and women. Nigeria for example has the Nigerian Matrimonial Causes Act No. 18 of 1970 which provides that both the husband and wife have a statutory right to claim damages from the party who has committed adultery with the other spouse, either in a claim for dissolution or for Judicial Separation. In the case of **ALLI V. ALLI**<sup>47</sup> a

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<sup>44</sup> Regina Lule Mutyaba; *A Comparative study of the status of women under the Laws of Divorce and their Economic status in Uganda and other countries*. Georgetown University Law Centre. Washington D.C. 1994. Page 4.

<sup>45</sup> (1921-52) I.T.L.R, 737.

<sup>46</sup> (1950) 24 K.L.R 57

<sup>47</sup> Unreported but cited by Esther N. Mayambaa, "Changing the Terms of the Debate to resolve the polygamy Question in Africa," Georgetown University LW Centre. May 1994 Page 59

wife was awarded damages against a co-respondent for adultery with her husband on the basis of being deprived of the enjoyment and association with her husband.

The law therefore needs to be reformed in order to enable men and women equal rights to damages from the co-respondent of the adulterous party.

## **5.2 MAINTENANCE**

Section 24 of the Divorce Act provides that on a decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by a wife, the court may order the husband to secure to the wife such sum of money as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it thinks reasonable. The husband is therefore supposed to pay alimony. Despite the relief being accorded to a woman, the means of enforcing it are difficult thus making it a meaningless remedy.

This Section is criticized for not granting men the same right in case of divorce. This section is also criticized because it is claimed that it encourages women to be dependents of men.

As long as such a provision is still in place, women cannot be able to claim an equal footing with men because they are dependents of men and thus will continue being the inferior gender.

The section is in contravention of Articles 21 and 31 of the 1995 Constitution which discourages discrimination by the law. The Articles regard all human beings as being equal before the law and thus the Divorce Act contravenes these provisions.

Considering the constitutional provisions on equality, the above section should be granted on the basis of the party who is at a better financial position than to a woman alone.

## **5.3 PROPERTY RIGHTS**

Section 26 of the Divorce Act provides that "When a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife, and the wife

is entitled to any property, the court may, notwithstanding the existence of the disability of covertures, order the whole or any part of the property to be settled for the benefit of the husband, or of the children of the marriage, or of both.”

This Section penalizes a woman who has been guilty of adultery by taking her property and placing it in the care of either the husband or children. There is no equivalent section for a man. So a man can be guilty of adultery but his property will not be distributed amongst the wife and children. This therefore makes the section discriminatory on the basis of sex. It leads to the question of whether a married woman can own property or not in Uganda.

However a few cases have been decided that recognize a woman’s right to own property. In **Uganda V. Genina Kyanda**<sup>48</sup> court held that a woman can own property in her own right.

The case of **Moonlight Sengooba Salongo V. Administrator General**<sup>49</sup> also restated the principle by holding that the Married Women’s Property Act of England which allowed women to own property on their own is also applicable in Uganda.

The Constitution under Article 26(1) states that “Every person has a right to own property either individually or in association with others.” This therefore means the Constitution recognizes the right for anyone to own property. The Divorce Act on the other hand disallows women from holding or owning property when they are found guilty of adultery. Since most women in Uganda are not aware of some of the rights accorded to them, such laws will continue oppressing them.

The Section is therefore in contravention with Articles 2 1(1) and (3), 31(1), and 33(1) of the 1995 Constitution of Uganda. It is discriminatory against women because it gives preferential treatment to men even though they may have committed the same offence as a woman.

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<sup>48</sup> [1977] H.C.B 111

<sup>49</sup> H.C.C,S No. 894 OF 1973.

Section 22 of the Divorce Act provides that a correspondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery with the wife of the petitioner has been established against him; except that he shall not be ordered to pay the costs of the petitioner;

- (a) If at the time of the adultery he had no reason to believe the respondent to be a married woman;
- (b) If the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute.

This Section is discriminatory because it is only available to a man and not to a woman. A man can claim costs from the person who has been adulterous with his wife but a woman whose husband has been guilty of adultery with another woman cannot claim the payment of costs by the correspondent.

The Section is also in contravention with Articles 21(1) and (2), Article 31(1) and Article 33(1) of the 1995 Constitution because these Articles provide for the equal treatment of all by the law while the Divorce Act discriminates on the grounds of sex.

Section 5 of the Divorce Act states that "Where the husband is the petitioner, he shall make the alleged adulterer a correspondent to the petition unless he is excused by the court from doing so on one of the following grounds;

- (a) That the respondent is leading the life of a prostitute, and that he knows of no person with whom the adultery has been committed;
- (b) That he does not know the name of the alleged adulterer although he has made due efforts to discover it; or
- (c) That the alleged adulterer is dead.

The Section allows a husband to make the alleged adulterer with his wife a correspondent in the proceedings while the same is not available to a wife whose husband is guilty of adultery. The Section is therefore discriminatory and is also in

contravention with Articles 21, 31 and 33 of the 1995 Constitution of the Republic of Uganda.

From the above discussion, it is clear that the Divorce Act is a law that needs to be reformed in Uganda because it is discriminatory and is also in contravention with the Constitution which is the grand norm. The Sections are placing a very high burden on a wife to prove not just one ground but at least in order to have a decree of divorce to be granted on her favor. The Constitution is also clear that a law that is in contravention with its provision is a nullity and should therefore be done away with.

The above discussion also discloses the problems women face during the dissolution of marriage. On the issue of custody, it is upon courts discretion to decide whom to grant custody. From the above, women will normally be the ones depending on men. This therefore makes them not to have any source of income and thus when court looks at whether the woman can be able to sustain the children, then they find she cannot and thus her chance is lost.

The problem of not being able to enforce maintenance orders sometimes is also a problem. A woman may end up taking forever before receiving her money.

#### **5.4. POSITION AFTER 2003**

The land mark decision in **Uganda Association of Women Lawyers and Five Others V the Attorney General**<sup>50</sup> ushered in a new era in the divorce laws of Uganda. This was a petition by the six petitioners brought under Article 137 of the Constitution seeking the following declarations:

- a) Section 4(1) of Divorce Act (Cap.249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution;
- b) Section 4(2) of the Divorce Act (Cap.249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution;

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<sup>50</sup> **Constitutional Petition No 2 of 2003**

- c) Section 5 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution;
- d) Section 21 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution;
- e) Section 22 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution.
- f) Sections 23 and 24 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) and Article 31(1) of the Constitution;
- g) Section 26 of the Divorce Act (Cap.249) is inconsistent with and contravenes Articles 21(1) & (2), Article 31(1) and Article 33(1) of the Constitution.

The court decided that the above mentioned sections of the Divorce Act were unconstitutional and void for being in contravention with the stated Articles of the Constitution. Court also stated that all the grounds of divorce mentioned in section 4 (1) and (2) are available to both parties to the marriage and the provisions of the Act relating to the naming of a co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage. Both parties can rely on any of the grounds found in the Act as their basis for divorce. The provisions of the Divorce Act therefore apply to both men and women.

In dealing with the provisions of the impugned sections of the Divorce Act, Twinomujuni JA said:

*It is, in my view, glaring impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are derogation to articles 21, 31, and 33 of the Constitution."*

**Okello JA on his part said:**

*"In the instant case, the evidence available reveals that sections 4(1) and (2), 5, 21, 23, 24, and 26 of the Divorce Act discriminate on the basis of sex. This brings them into contact with articles 21 (1) (2), 31 (1) and 33*

*(1) all of which provide against discrimination on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sex, contrary to the articles 21 (1) & (2), 31 (1) & 33 (1) of the Constitution, they are all null and void."*

This decision ushered in a new era in Uganda because it set a precedent on divorce cases and although the Act still remains intact, the case can be used to challenge the inequalities parties face during divorce. The case is not the set law but it plays a very decisive role in divorce proceedings in Uganda.

Since the decision in the above case, there has been change as well as judicial activism in regards to discriminatory laws against women in Uganda. Courts have followed the above decision especially in divorce causes but some judges are still rigid and continue applying the provisions of the Divorce Act as they are.

In the case of **Law and Advocacy for Women in Uganda V. Attorney General**<sup>51</sup>, the case of Uganda Women Lawyers was referred to by court when they were determining that some sections of the Succession Act were discriminatory against women. Court made reference to it in showing that court can declare some sections inconsistent with the Constitution and thus should not be relied upon anymore. In the above case court used the 2003 decision as a persuasive authority.

In the case of **Anne Musisi V. Herbert Musisi & Lona M. Kiema**<sup>52</sup>, the petitioner sought orders for dissolution of her marriage with the respondent on the ground of adultery with the co-respondent. The respondent justified his adulterous behaviour by the fact that his marriage with the petitioner had irretrievably broken down before his affair with the correspondent. Court held that with the establishment of the ground of adultery, which under Section 4 of the Divorce Act is sufficient ground for dissolution of the marriage, the marriage between the petitioner and the respondent was dissolved.

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<sup>51</sup> **Constitutional petition No 05/2006**

<sup>52</sup> **Divorce cause No 14 OF 2007**

The situation has been that most judges have had regards to the 2003 decision in recent divorce petitions. The grounds of divorce have been made available to both parties and the remedies are now awarded to both men and women equally. This has helped to reduce the degree of inequality that used to occur before the decision that declared the sections of the Divorce Act unconstitutional.

In the case of **Ajanta Kethan Thakkar V. Kethan Thakkar**<sup>53</sup> the grounds for divorce were the respondent's change of religion and his adultery coupled with desertion. The petitioner in the petition, *pleaded adultery coupled with desertion* as is required under Section 4(2) of the Divorce Act, cap 249. The court considered the provisions of Section 4 of the Divorce Act in as far as it provided for a husband to prove only adultery as a ground for dissolution of his marriage and a wife to prove adultery coupled with desertion or cruelty as a ground for dissolution of the same marriage, to be unconstitutional and of no effect. This court would refuse to apply or give effect to it on that account as required by Article 2 of the constitution- (the supremacy clause).As it stands, Section 4(2) would be in direct conflict with the equality rights and anti discrimination provision set out in Article 21 of the constitution. It would also be inconsistent with the provisions of Articles 31(1) and 33, of the Constitution providing for equal rights during marriage and at its dissolution and dignity between men and women in all areas of human endeavor. In those circumstances, the court applied the provisions of Article 273 of the constitution which requires courts in this country, after the coming into force of the 1995 constitution, to construe all existing laws, 1with such modifications, adaptations, limitations and qualifications as may be necessary to bring it into conformity with this Constitution".

The effect of applying Article 273 of the Constitution to Section 4 of the Divorce Act is, quite clearly, that the grounds for divorce provided under that section apply equally to husbands and wives. In other words, if a husband can secure a decree nisi for the dissolution of a marriage between him and his wife, a wife can equally obtain the same

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<sup>53</sup> **Divorce Cause NO.3 of 2002.**



decree upon the same ground but not upon the same ground coupled with some other ground. The latter would be placing the wife under a burden or disadvantage not placed upon the husband under the same law. That would amount to discrimination based upon sex. That is clearly forbidden by the constitution under the equality clause and the equal dignity clauses.

The case therefore although it was decided before 2003, did consider the provisions of the constitution that regard both men and women as being equal. The judges were ready to introduce changes into the divorce arena by trying to balance what was in the Act and what changes are required by the current world. Although it is not easy to trace cases which have been decided following the 2003 decision, some judges who are gender sensitive have regarded the case in their decisions while others have not. It is upon the government to change the law so as to conform with the provisions of the Constitution as well as the changes introduced by the case.

## **5.5. CONCLUSION**

The above chapter has analyzed the way the Divorce Act affects the rights of women by being discriminatory towards them. The law as it is needs changes in order to conform to the Constitution and other laws as well as conventions that promote women's rights to equal treatment. The changes introduced by the 2003 case have also been discussed by the above chapter. After the landmark decision, there has been change in the divorce laws. Although this decision introduced change, the law as it is has not changed. Judges have therefore to exercise judicial activism and interpret these provisions with the later and spirit of the Constitution, 1995.

## **CHAPTER SIX**

### **FINDING, RECOMMENDATIONS AND CONCLUSION**

#### **6.0. RECOMMENDATIONS**

Having highlighted the discriminatory Sections of the Divorce Act and how they interfere with women's rights in chapter five, this part offers some recommendations on how the situation can be changed and on how to eliminate the discrimination.

##### **6.0.1 BASIS FOR DIVORCE**

The parliament should take positive steps to amend the law to reflect the FIDA case.

##### **6.0.2 MAINTENANCE AND ALIMONY**

Since men and women should be treated equally, the provision on awarding a wife alone alimony should be balanced. Maintenance should not be based on sex but rather on who is at a better financial position. The spouse at a better financial position should be the one to maintain the other party.

##### **6.0.3 PROPERTY**

The provision on the division of property should be abolished. In its place, division of property should be according to the contributions of each party. Property that was acquired before marriage and after dissolution should remain the private and personal property of the individuals. Property acquired during marriage should be divided according to the input of each spouse to it.

##### **6.0.4 GOVERNMENT**

The Government has a duty to create an enabling environment for the promulgation of a new law as well as its enforcement. It should also be ready to accept and promote the realization of the rights of women to equal treatment as well as protection by the law.

##### **6.0.5 LEGISLATURE**

The Ugandan legislature must move to create a divorce law that considers the rights of women and balances the needs of both parties during dissolution. The Divorce Act cap 249 should be repealed and a new law put in place to protect the rights of women.

## **6.1. CONCLUSION**

This research paper has mainly dealt with the issues of the examining the status of women's right to equal treatment in Uganda. The grounds of required of a man are not the same as those of a woman. The Divorce Act also has other discriminatory provisions.

Women's rights encompass all those fundamental Human Rights which are spelt out in the Constitution as well as the different International Instruments to which Uganda is a party to. Such rights include the right to be treated equally with men and the right to be protected by the law.

In spite of all the above provisions, the recognition of such rights has been difficult to achieve because of unequal treatment basing on customarily practices which undermine women.

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