KAMPALA INTERNATIONAL UNIVERSITY

RECONSTRUCTING THE CRIME OF RAPE IN UGANDA; A CASE FOR LAW REFORM

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APPROVAL

I affirm that the above declaration is true to the best of my knowledge and that this dissertation has been supervised by me in accordance with the standards of academic requirement of Kampala International University in partial fulfillment for the awards of degree in Bachelors of law of Kampala International University.

MR. WANDERA ISMAIL

Supervisor

Signed  29. OCT. 2013.

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Finally, to my friends, Brenda Akech, winter Sylvia, Christopher, Maureen, Samora and Michael magadi my entire family, thank you very much for giving me the much needed help and strength that I needed.

DECLARATION

I declare that this thesis is the work of OTIENO LINDA ADHIAMBO alone, except where due acknowledgement is made in the text. It does not include any materials for which any other university or diploma has been awarded.

Signature: _____

Date: 29/10/2013

DEDICATION

This research is dedicated to my parents Mr. Aloice Otieno and Mrs.Pamela Otieno and to my siblings: Lillian Makeba, Antony Lwanga, Hellen Mwale and Stacy Kagendo. I love you all.

TABLE OF CONTENTS

CHAPTER ONE

1.0 INTRODUCTION

Rape is a type of sexual assault usually involving sexual intercourse, which is initiated by one person or more persons against another person without that person's consent. The word rape itself originated from Latin verb *rapere* meaning seize or take by force. The act may be carried out by physical force coercion, abuse of authority or with a person who is incapable of valid consent. The term rape is most often defined in criminal law thus in Uganda it is defined in the penal code Act[1] under section 123.It states that;

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

Therefore rape occurs when a male person has sexual intercourse with a woman without the consent of the woman.

The study seeks to illustrate that the above definition of the offence of rape is in adequate and needs to be redefined.

1.1 Background of the study

The Republic of Uganda is a landlocked country in East Africa, bordered on the east by Kenya, the north by Sudan, on the west by the Democratic Republic of Congo, on the southwest by Rwanda, and on the south by Tanzania, The southern part of the country includes a substantial portion of Lake Victoria, within which it shares borders with Kenya and Tanzania. Like any other country in the region Uganda's criminal background is tremendous. The penal code

[1] The penal code Act cap 120

provides for the various types of crimes and gives their definition and punishments however unlike other countries in the region the law makers in Uganda have failed in upgrading the laws and reforming others including the law on the crime of rape which has been narrowly defined leading to injustice.

Sexual harassment is a criminal offense, with penalties of up to 14 years' imprisonment, but the law is not effectively enforced.. Rape is very common in Uganda, and enforcement of existing laws is sporadic. In 2008 there were 1,536 cases reported to the police, which resulted in 241 court cases and only 52 convictions. [2]

Under common law rape developed not so much to protect women against the assault but to protect husband against another man trespassing on his property[3]. Just like the common law in ancient history rape was viewed less a type of assault on the female than a serious property crime against the man whom she belonged, typically the father or husband. The loss of virginity was perceived as severely depreciating her in value hence rapist would be forced to compensate the husband or the father of the victim since the crime was committed against the husband or father because the woman was viewed as a man's property[4]. Originally rape was considered a private crime between the abductor and the legal guardian of the woman who was raped. It was made into a public wrong by the roman emperor Constantine. The crime of rape was viewed as a moral crime and that is why in Uganda the offence of rape is included in the penal code as an offence against morality.

[2]The Eighth United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (2001–2002)
[3]Women race and class vintage Books,NY
[4]McCriff Reform of sexual offences in Victoria: the time to abandon Victorian perspective 1980 4 crim Lj328 378

Article 3 paragraphs 45[6] provides that state parties shall adopt and implement appropriate measures to ensure the protection of every woman's right for her dignity and protection of women from all forms of violence particularly sexual and verbal violence. The 1995 constitution of Uganda provides for protection of human dignity and protection from torture. The penal code is the legislation that defines rape and provides for the punishment of convicted perpetrators of rape. The evidence act provides for evidential rules to be adhered to in rape trials.

This dissertation is therefore premised on the view that though there is law governing the crime of rape in Uganda the law especially the penal code that defines the crime of rape should be reconstructed since time has changed and men are also raped.

1.2 Statement of the problem.

The crime of rape is one of the crimes that violates dignity and lowers self-esteem of women thus leaving them vulnerable and psychologically tortured. The definition of rape is inadequate because of the ingredients which include; carnal knowledge, lack of consent, this shows the inadequacy because recent development shows that even men are rape[7],hence the requirement for carnal knowledge should be re considered, secondly the boundaries of consent should be well established .the rape trial should be in camera as opposed to public proceedings which put the victims through torture because of shame.

This study therefore calls for the reconstructing of the crime of rape in order to cater for the loopholes that the current law has and secondly the study is expected to help the victims to access justice.

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rotocol to the African charter on human and peoples' rights on the rights of women in Africa

1.3 The purpose of the study

This study is carried out with the intention of showing the in adequacy of the definition of the crime of rape since the current definition is narrow and outdated. Some countries have already adopted a definition that is fairly acceptable.

In 2012, the FBI changed their definition from "The carnal knowledge of a female forcibly and against her will." to "The penetration, no matter how slight, of the vagina or anus with anybody part or object, or oral penetration by a sex organ of another person, without the consent of the victim." for their annual Uniform Crime Reports. The definition, which had remained unchanged since 1927, was considered outdated and narrow. The updated definition includes any gender of victim and perpetrator, not just women being raped by men, recognizes that rape with an object can be as traumatic as penile/vaginal rape, includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity, and recognizes that a victim can be incapacitated and thus unable to consent because of ingestion of drugs or alcohol.

Some countries such as Germany are now using more inclusive definitions which do not require penetration and the 1998 International Criminal Tribunal for Rwanda defines it as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive[8].therefore Uganda's law making institution need to update the definition of rape so as to be at par with other jurisdictions.

the method of inquiry to be used in data collection analysis and research process will include information from various textbooks from library , newspapers and the Uganda law reform commission reports, web based data will also be part of data collection.

[8]Akayesu's case

1.4 Objective of the study

The general objective of the study is to examine legal framework of the crime of rape and how effective it is.

The specific objectives of the research study include;

To critically analyze the definition of the crime of rape as stated in the Uganda's penal code Act.

To establish a case for the reconstruction of the crime of rape and propose and recommend the law that needs amendment in order to ensure that victims get justice

1.5 Scope of the study.

The case study of the research will be Uganda and the study will cover the crime of rape as provided under Chapter 14 of the Uganda Penal Code Act CAP 120, its elements, especially the boundaries of consent, the rape trial and the punishment of the convicted perpetrator of the crime of rape.

1.6 Significance of the study

The justification of this study is that the crime of rape has been narrowly defined, the boundaries of consent favors the criminal rather than the victim and the fact that rape trials are held in courts in the presence of the public it becomes unfair to the victims since they cannot access justice because of the in adequacy of law . This study therefore is expected to assist law enforcement offices in handling rape trials efficiently and the victims of the rape access justice. The study is also expected to add to the existing knowledge and help other scholars with intention of

researching on the same topic .it is also expected to help the public to acquire information on the crime of rape.

1.7 Hypothesis

Is the current law on the crime of rape adequate?

Are there other factors that prevent rape victims from accessing justice apart from the narrow definition of the crime of rape?

1.8 Methodology

1.8.1 Introduction This section shows how data was collected and analyzed. It shows how research was designed, the survey population, and sampling procedures, data collection and analysis.

These were essential in the assessment of the effectiveness the legal framework on the crime of rape.

1.8.2 Research design.

The study was carried out using qualitative method and this method was essential in establishing the effectiveness of the legal framework on the crime of rape

Descriptive and analytical methods were combined. Qualitative method was used for documentary analysis during and after field work study especially in finding out the background of crime of rape and how it was defined and the changes that have been made ever since.

1.8.3 Study Population.

The study sought to assess the adequacy of the legal framework on the crime of rape and how it could be modified in order to carter for the loopholes existing in the current definition of rape. The population included law enforcers and law professionals who have dealt with rape cases. The law professionals included prosecutors of rape cases experience this kind of sexual violence.

1.8.4 Data Collection.

Data was collected using both primary method which was through conversations with the law professionals and secondary methods which included library research which was extensively and intensively used to collect information from the existing laws, journals, newspapers, and textbooks, Commission on Law Reform Reports and Amnesty International Reports. The library visited included Kampala International Law library, the Human Rights Library in Nsambia just to mention but a few.

Data collected was critically analyzed to determine the extent to which the crime of rape is being handled in Uganda.

.8.5 Data Processing and Analysis.

The data from the field was analyzed and transcribed. Comparisons and sorting was effective in eliminating irrelevancies, duplications and disorder. The data collected was to determine whether the existing legal framework on the crime of rape in Uganda is adequate and the best way possible to handle the in adequacies especially by re constructing the definition of rape.

1.8.6 Limitation of study.

There were several obstacles that constrained the researcher. These included time factor financial constraints and language barrier among others. The time allocated to this study was short i.e. the time used to collect, analyze data and final presentation of the report. There was lack of financial and other logistics to facilitate the researcher during the exercise and catering for expenses such as printing, transport, and photocopying and internet research

1.9 Dissertation outline

Chapter one : introduction

Chapter one will consist of: introduction, background, and statement of the problem, purpose of the study, the research objectives, the scope, and lastly the significance of the study.

In the introduction the crime of rape will be defined and the laws applicable stated.

The background will contain the status of rape as a crime and how the present law has tackled it. It will briefly discuss what the crime of rape is presently how it was in the past and give some of the reasons why people commit the crime.

Statement of the problem will explain why the researcher is investigating the crime of rape particularly the law on rape as provided for under section 123 of the Penal Code Act of Uganda, it further explained why the researcher thought the definition should be reconstructed.

The purpose of the study stated the general reason for carrying this research on the crime of rape. It clearly mentions the central concept which is the reconstructing the crime of rape and provide the definition of it.

Research objective; the researcher intended to find out whether the crime of rape could be reconstructed and the reforms that could be achieved.

Scope; the study will cover the crime of rape, its elements, especially the boundaries of consent, the rape trial and the punishment of the convicted perpetrator of the crime of rape.

The significance of the study; the justification of this study is that the crime of rape has been narrowly defined, the boundaries of consent favors the criminal rather than the victim and the fact that rape trials are held in courts in the presence of the public it becomes unfair to the victims. This study is therefore expected to benefit the victims of the crime of rape.

methodology ;this will give a detailed summary of the method of inquiry to be used in data collection analysis and research process ,information will be collected from libraries, newspapers and the Uganda law reform commission reports will also be part of my data collection.

Outline of the dissertation; this will give the overview of what the dissertation entails as from the first chapter to the last.

Chapter two; literature review

This will consist of review of related literature.

This will be derived from books in the library newspapers and the net just to reveal contributions made by other writers and researchers, and relate with the researcher's own ideas as far as the research topic is concerned.

Chapter three; legal frame work

The chapter focuses on the legal framework both international and national. In the international legal frame work the researcher focuses on the various laws concerning the crime of rape and how effective they are in practice while at the national level the researcher focuses on laws such

as the constitution and the penal code which is the specific law that deals with the crime of rape in Uganda.

Chapter four; critical analysis of rape in Uganda

The chapter focuses on the findings of the research on the crime of rape in Uganda. It gives a critical analysis of rape in Uganda which will include a critique of the law of rape, its shortcomings and challenges in its application.

Chapter five; conclusion and recommendations

The chapter concludes the issues raised in the thesis and gives recommendations

CHAPTER TWO

2.0 LITERATURE REVIEW

2.1. Introduction

The crime of rape is one of the offences that mostly go unreported and unpunished because of the circumstances surrounding it. The definition of rape varies from one jurisdiction to another. Countries like Rwanda have already redefined the crime of rape[9] however some countries such as Uganda still have the old definition of rape which seems to be narrow and outdated hence causes injustice to the victims.

This chapter examines literature on the crime of rape. The chapter will mainly look at what other scholars have written about the crime of rape especially concerning the meaning of rape, the ingredients of rape especially boundaries of consent, and the rape trial. It will also analyze different articles written by different scholars and different decisions made on different cases.

According to McGlynn and Munto in their book Rethinking Rape Law they state that,

"Rape and rape law have been key sites of feminist struggle whether nationally ,regionally or internationally for decades .the need to lift the veil of privacy in order to protect the vulnerable has been increasingly acknowledged and respect for a person's right to sexual and bodily integrity has become a prevalent theme in contemporary legal and policy discourse .In several countries there has been a marked increase in the number of sexual assaults reported to police however the conviction for rape typically remain disconcertingly low."

The researcher is in agreement with the above thoughts because even in Uganda which is the case study, the same is happening many cases that are reported never reach court and in case they are taken to court they do not succeed because of many evidential requirements. For instance in

[9] supra

the case of *Uganda vs Apai*[10] A sixty year old woman was raped and at the trial she described what happened in the following words;

"*He made me his wife and worked on me*"

Justice Lugayizi acquitted the accused because in his view the complainants evidence was 'vague and meaningless'

According to a report by Physicians for Human Rights in partnership with the Harvard Humanitarian Initiative, Nowhere to Turn: Failure to

Protect, Support, and Assure Justice for Darfur Women, May 2009, Appendix E.in their study on African prosecution of the crime and challenges thereto reported that,

"Sudan's laws concerning rape effectively prevent access to justice for the victims. The law as written defines rape as the shari' a crime of adultery (zina)...if a woman who claims she was raped is unable to prove that she did not consent to intercourse ,she may be charged with the crime of zina, which entails corporal punishment because she has confessed to sexual penetration outside marriage."[11]

The researcher was in agreement with the fact that the Sudan law prevents the women who are raped an avenue for justice therefore such laws should be re-written to make sure that victims of rape are accorded justice. In Uganda though there is law on rape most women who undergo such experience fear to report because of how the society views such victims.

Tibatemwa Ekirikubinza,in her book criminal law in Uganda ;sexual assaults and offences against morality wrote;

"The phrase carnal knowledge means sexual intercourse; it refers to penetration of the male sexual organ into a woman's vagina. Thus if a man forcibly penetrates a woman's anus or if he

[10] 1994 HCB

[11] Physicians for Human Rights in partnership with the Harvard Humanitarian Initiative, Nowhere to Turn: Failure to Protect, Support, and Assure Justice for Darfur Women, May 2009, Appendix E

;ibly inserts any other object into her vagina or anus or if he forces her to have fellatio(oral ex)with him or cunnilingus (touching the female sex organ with the lips and tongue),such conduct does not amount to rape although it may constitute other less serious offences such as indecent assault or carnal knowledge against the order of nature"[12]

The researcher was in agreement with the scholar's thought because in this contemporary time people use many things in committing the crime of rape. It is also worthy to note that men also undergo sexual violence especially in places affected by war[13].

A report by the Canadian correctional service reported that,

"Traditional (male-female) focused rape-related advocacy groups have suggested several tactics to encourage the reporting of sexual assaults, most of which aim at lessening the psychological trauma, often suffered by female rape victims following their assault by male rapists. Many police departments now assign female police officers to deal with rape cases. Advocacy groups also argue for the preservation of the victim's privacy during the legal process; it is standard practice among mainstream American news media not to divulge the names of alleged rape victims in news reports but this practice is becoming increasingly controversial due to well ɔublicized cases of false rape accusations. Traditional rape-related advocacy groups are also ɔeginning to support male-male rape victims as well as female-male rape victims. Other dvocacy groups that support male victims of female rape encourage recognition of female-male ape as rape rather than as a 'love affair', a 'relationship', or as a beneficial form of sex ducation'. However, female-male and female-female rape is rarely recognized as a statistically gnificant form of rape despite research indicating otherwise. Thus reporting rape by females

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ilianTibatemwaEkirikubinza,in her book criminal law in Uganda ;sexual assaults and offences against morality ote;page 4

Gender Against Men(documentary produced by Refugee law ɔject.http:/www.forcedmigrattion.org/video/gender-against-men

remains difficult or impossible especially in jurisdictions where rape by a female is not considered a crime or where the false perception persists that rape of a male by a female is impossible".[14]

The researcher is of the opinion that Uganda should borrow a leaf from the above report and allow female police to cater for female rape victims in order for the victims to feel free to report their cases without fear.

In 2007, the Penal Code Amendment Act abolished the distinction between genders with regard to offences committed against children. This is a step in the right the direction but a similar amendment is required for sexual offences against adults. Specifically, a broader definition of rape and/or all other sexual offences must be promulgated. In 2006, the DRC passed a law that provides a formal definition of rape that includes both sexes and all forms of penetration. Uganda must follow this lead. In her article on sexual violence in Eastern DRC, Jessica Keralis notes that while such a change in legislation is of course necessary, many other additional changes are also necessary to protect male victims of Sexual Gender Based Violence[15]She advocates for the enforcing of existing laws and the ending of impunity, the integration of education on civilian protection and sexual violence into military training. Finally she recommends a change in the cultural awareness and re-education which, she submits, is crucial in encouraging victims to come forward and helping them to heal.

[14]7. ^ CASE STUDIES OF FEMALE SEX OFFENDERS IN THE CORRECTIONAL SERVICE OF CANADA. Correctional Service Canada

[15]Interview with Congolese refugee, April, 2011

CHAPTER THREE

3.0 LEGAL FRAME WORK

3.1 Introduction

This chapter analyses the legal frame work of the crime of rape at the international, regional, and national levels.

INTERNATIONAL LEGAL FRAMEWORK

Uganda has ratified several international treaties that are relevant to the rights of women and girls. These include:

African Charter on Human and Peoples' Rights (ACHPR);article 2 provides for non-discrimination on the basis of sex .this falls short of an outright prohibition on sexual violence against men or women. To redress such lack of prohibition the African Union adopted the protocol on the rights of women in Africa[16],a supplementary protocol to the (ACHPR)which calls for an end of all forms of violence against women including sexual violence and contains recognition that the protection from sexual violence is inherent to the right of dignity .

International Covenant on Economic, Social and Cultural Rights (ICESCR),article 25 states that parties shall take the necessary legislative or other measures to provide for the setting up of appropriate ,easily accessible rape crisis 0or sexual violence referral centers for victims in sufficient numbers to provide for medical and forensic examination ,trauma support and counseling victims.

International Covenant on Civil and Political Rights (ICCPR),article 36 states that parties shall take necessary legislative or other measures to ensure that the following international conduct are criminalized. Under paragraph (a) engaging in non-consensual vaginal ,anal or penetration of sexual nature of body of another person with any bodily part6s or object.

[16] The Uganda Penal Code Act CAP 148

Convention on Elimination of All Forms of Discrimination against Women (CEDAW),under the specific recommendation of the CEDAW ,recommendation 24 paragraph (b) it states that parties should ensure that laws against family violence and abuse, Rape ,sexual assault and other gender based violence give adequate protection to all women and respect their integrity and dignity.

Uganda has signed, but not yet ratified, the African Charter on Human and Peoples' Rights Protocol on the Rights of Women in Africa, commonly referred to as the African Protocol on women's rights or the Maputo Protocol. The Protocol guarantees a wide range of women's civil and political rights as well as economic, social and cultural rights. These rights include the right to life, integrity and security of person; protection from harmful traditional practices; prohibition of discrimination and protection of women in armed conflict. The

Protocol also guarantees the right to health and reproductive rights of women and access to justice, among others.

Uganda submitted its combined fourth, fifth, sixth and seventh periodic report on the implementation of CEDAW in May 2009. In it, they responded to the concerns raised by the CEDAW during consideration of the Uganda's third period report in 2002. In 2002 the Committee expressed concern at "the high incidence of violence against women, such as domestic violence, rape, including marital rape, incest, sexual harassment in the workplace and other forms of sexual abuse of women." It called on the Ugandan government to address the 'persistent patriarchal patterns of behavior... and the existence of stereotypes relating to the role of women in the home and society... that perpetuate direct and indirect discrimination against women."

)MESTIC LEGAL FRAMEWORK

'HE CONSTITUTION

Uganda's Constitution[17] provides that "women shall be accorded full and equal dignity of the Person with men" (Article 33(1). Article 33(2) further provides that;

"The state shall provide the facilities and opportunities necessary to enhance the welfare of the women to enable them to realize their full potential and advancement."

Article 33(6)[18] provides that;

'Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this constitution."

Though the constitution prohibits cultures, customs or traditions which are against dignity velfare and interest of women in most cases women fear men and therefore they are even afraid f reporting the concern at the slowness of the law reform process, given the Constitutional rovisions that promote equality between women and men and prohibit discrimination on the ounds of sex.

2007, the Constitutional Court struck down some discriminatory laws from the statute book. e court addressed the discriminatory aspects of adultery and divorce where the law previously ıder the Penal Code Act) in effect made it lawful for a married man to have an affair with an narried woman but unlawful for a married woman to have an affair with an unmarried man. In lition the divorce law set stricter evidentiary standards for women, when seeking a divorce. men had to show that their husbands had not only committed adultery, but also provide lence for additional grounds for divorce such as bigamy, sodomy, rape and desertion. The

95 uganda constitution article 33(1)
ɔra

Court decided therefore, that the grounds for divorce as set out under the Divorce Act, should equally apply to both sexes. Women, like men, should have the right to divorce their husbands for the sole reason of adultery. The compensation for adultery, alimony and settlement related with the divorce should also equally apply to both sexes. Therefore even the crime of rape should be re-constructed so that even the male victims of sexual violence can sue and get justice otherwise the present definition of the crime of rape is discriminatory against men.

PENAL CODE ACT

Under the Penal Code, acts of sexual violence against women in Uganda are legally viewed as crimes against morality or honor, not as crimes against the physical and mental integrity of women and girls. The definitions of rape, defilement, prostitution, and other sexual offences fall under the Offences Against Morality section of the Penal Code Act. These definitions obscure the victim's lack of consent to sex and focus instead on notions of "moral versus immoral" sex. In addition, focusing on protecting "the honor of the victim" may also lead to seeing her family and her community as the wronged party instead of the victim herself.

Uganda amended its Penal Code Act in 2007, expanding the definition of defilement (unlawful sexual intercourse with a minor under the age of 18) to include boys as victims. Section 129 provides the death penalty for the offence of aggravated defilement "if the offender is infected with the Human Immunodeficiency Virus (HIV)". An adult suspected of defiling a child is required to be taken for both psychiatric and HIV/AIDS tests. If the suspect is found to be HIV positive then the case becomes one of aggravated defilement, which is punishable by the death

penalty, a punishment which Amnesty International opposes under all circumstances. Apart from the organization's opposition to the death penalty, Amnesty

International is concerned that securing evidence proving that HIV was transmitted during the alleged defilement is very difficult. Basing a criminal sentence on the medical status of the accused can be legally insufficient as it does not consider minors who may have been infected with HIV in-utero or through other means before the assault. A suspect risks the death penalty if he and the victim both test as HIV positive at the time of investigation if the accused is unable to show that the victim did not contract the virus from him. There is a risk that mandatory testing of people charged with sexual offences could undermine a victim's ability to make informed decisions about their health by providing misleading information about the suspects HIV positive or negative status: a survivor might not obtain HIV post exposure prophylaxis (PEP) because of . false negative HIV test result from the accused. All victims or rape and other forms of sexual assault should be offered post-exposure prophylaxis, irrespective of the test results of the alleged perpetrator.

The offence of rape is defined as "the unlawful carnal knowledge [by a person] of a woman or girl without her consent or with her consent, if the consent was obtained by force, threats or intimidation." Rape is punishable with the death penalty[19] and attempted rape with life imprisonment [20]. Amnesty International opposes the death penalty as the ultimate cruel, inhuman and degrading punishment the researcher agrees with the views expressed by Amnesty report that the death penalty is degrading. Amnesty International notes that Ugandan law accords the ultimate punishment to sexual crimes while failing to act effectively to prevent them, and

Section 124 of the penal code Act
Section 125 of the penal code Act

allowing discriminatory attitudes towards women and their sexuality to continue. This discriminatory attitude encourages the persistence of rape and sexual abuse of women and girls. Focusing on providing harsh punishment does not absolve Uganda of its international obligations to protect women from violence. There is additional need to focus on the prevention, investigation and protection elements in cases of gender-based violence.[21]

3.2meaning of the crime of rape

The definition of rape varies both in different parts of the world and at different times in history[22].In Uganda the penal code Act defines rape as;

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

From the above definition it is only a male person who can be guilty as a direct participant in a rape case this is inferred from the phrase 'carnal knowledge' which means the penetration of the female organ .

Briton defined rape shortly after AD 1290 as a felony committed by a man by violence on the body of a woman whether she be a virgin or not.[23].Other authors just define rape as unlawful sexual intercourse achieved through force and without consent.[24]

From the above definitions it is pertinent to note that in the early times rape was just a crime committed by a man on the body of a woman against her consent and will. though with time

[1] Amnesty international reportViolence against women in Uganda unchecked and unpunished Index: AFR 59/001/2010 Amnesty International April 2010

[2]

[3] Briton ,edited by Francis Morgan Nichol reprint published by W.M W Gaunt &sons inc 1983 vol 1 at p 55

[4] Students study guide ;Steven Chermark,5th edition criminal justice ,a brief introduction ,frank schmalleger.

there was need to develop a standard definition of the crime of rape because many women took advantage of the fact that they could report any sexual intercourse they had with men in the name of rape hence the development of some conditions to be fulfilled before one could be convicted of rape. This included, screaming of the woman to show resistance, emission of semen was to be proved among others. However with the many changes and the growth of immorality, the definition of rape has been reformed to accommodate the new circumstances.

Rape is defined in many jurisdictions as sexual intercourse, or other forms of sexual penetration, of one person by another person without the consent of the victim The United Nations defines it as "sexual intercourse without valid consent," and the World Health Organization defined it in 2002 as "physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object"

In 2012, the FBI changed their definition from "The carnal knowledge of a female forcibly and against her will." to "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." for their annual Uniform Crime Reports.

Some countries such as Germany are now using more inclusive definitions which do not require penetration and the 1998 International Criminal Tribunal for Rwanda in the case of Prosecutor Jean-Paul AkayesuICTR 96-4-tdefines it as;

"a physical invasion of a sexual nature committed on a person under circumstances which are coercive

Other countries or jurisdictions continue to define rape to cover only acts involving penile penetration of the vagina, treating all other types of non-consensual sexual activity as sexual assault. Uganda for instance, requires that a rapist commit a sexual assault with a penis, so only males can legally be rapists.

3.3 Ingredients of rape

Ingredients of rape are the elements that must be established before a crime can be termed as rape. There must be proof that they occurred before a person can be convicted of rape, and they include;

Unlawful carnal knowledge,

Absence of consent.

Use of force.

3 .3.1 Unlawful carnal knowledge

The phrase carnal knowledge means sexual intercourse; it refers to penetration of the male sexual organ into a woman's vagina. Thus if a man forcibly penetrates a woman's anus or if he forcibly inserts any other object into her vagina or anus or if he forces her to have fellatio(oral sex)with him or cunnilingus (touching the female sex organ with the lips and tongue),such conduct does not amount to rape although it may constitute other less serious offences such as indecent assault or carnal knowledge against the order of nature[25].

[25]LilianTibatemwaEkirikubinza, criminal law in Uganda ;sexual assaults and offences against morality at p 4

In *Uganda* v *kyamusungu Ivan*[26], court held *inter alia* that carnal knowledge means penetration of the sexual organ into the female sexual organ .if there was no penetration then the offence of rape is not established.

It was further held in *Uganda* v *Odwang Dennis and Olanya Dicson*[27]that rape cases the prosecution must prove penetration of the male reproductive organ into female reproductive organ.

When the issue of carnal knowledge is mentioned, what comes to mind is penetration thus it raises the issue of emission which is discussed lengthily below.

Common law courts in the eighteenth and nineteenth centuries struggled in confusion over the Sufficiency of evidence required to show the actual commission of the offence of rape. All courts agreed that penetration was an essential element. Some said that the hymen had to be ruptured; most, however, disagreed with that view. Some said that the evidence must show the emission of semen; but a significant body of authority disagreed with that view as well. Some said that penetration was prima facie evidence of emission; others reversed it, saying that emission was prima facie evidence of penetration. And everyone was confused on what to do if penetration fundamentally, the crime concerned penetration without consent, not whether the man achieved a sexual climax.

Twelve judges split evenly on issue in *R. v. Duffin*[28] Six judges concluded that both penetration and emission had to be established by the evidence. The six other judges expressed the opinion that emission inside the body was not necessary.

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[26]criminal session case No 107/96 High Court

[27] (1992-93)HCB 71

R. v. Russell[29], discussed infra.

The point was made well by Edward East in his Treatise of the Pleas of the Crown, although some may wish to strip away some of his eighteenth century prose and paternalistic sentiments: Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further enquiry were unnecessary after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace. The second point concerns the practicality of requiring proof of emission. In some cases, this proof will unquestionably exist. A sample of semen may have been taken shortly after the incident. Or the man may have said something tending to confirm the fact. In the majority of cases, however, the evidence will be quite circumstantial -- sometimes amounting to nothing more than an assumption on the part of the complainant. Proof becomes even more difficult where the complainant is in experienced, as with very young children.

The analysis of this issue should start with the three leading eighteenth century cases: *R. v. Duffin* In which the jury found that emission was not required

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[28](1721), 1 East P.C. 437-8.

[29](1831), 1 M. and Rob. 122; 174 E.R. 42,

The case, *R. v. Russen*,[30] is the most important because the trial judge conferred on the issue with the other 12 members of the court in a recognized procedure known as "Crown cases reserved". The accused was a schoolmaster charged with having raped a young student in his care. Medical evidence established that her vagina was so narrow that a finger could not be introduced, and that the hymen was perfectly whole and unbroken. The girl claimed both penetration and emission, and her testimony at trial was confirmed by other evidence. The trial judge left the issue of penetration to the jury, saying that if there was any, however small, the rape was complete in law. The jury found him guilty, and the judge referred the case to the rest of the court to assess whether his direction was correct. It was unanimously concluded that the charge was perfectly correct. The least degree of penetration was sufficient to establish the offence. The accused was sentenced to death, and was executed.

At this stage, therefore, the weight of authority favored the proposition that proof of emission was not necessary. This is also the position in Uganda as it was echoed in the case of *Muzeeyimana Philipo v Uganda* criminal appeal No. 85/1999 the appellant was convicted of defilement. On appeal the defense counsel argued inter alia that the medical evidence submitted was inconclusive. There was no mention of penetration and that the discharge in the complaint's private parts did not contain any sperm, in his view there was no evidence of sexual intercourse having taken place.

On appeal it was held inter alia that:

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[30] (1777)

Regarding the medical report , it is trite law that the slightest penetration is sufficient. This was manifested by the inflammation of the vestibule. The report states that such inflammation may usually follow an act of sexual intercourse. It is also well established that emission is not necessary for the offence to be established.

In *Uganda V Mugoya Wilson* Criminal Session Case No.170/93 High Court[31]it was held inter alia :

The slightest penetration is enough so it is not a defense to say that one just stopped at the mouth of the vagina, it is not also a defense to say that the accused did not ejaculate, because ejaculation is not one of the ingredients of the offence[32]

It is also important to note that rapture of hymen need not be proved this was stated in the case of *Uganda v Mulengera*[33] where it was held that no proof was needed to establish the rapture of the hymen as the very slightest penetration without rupturing the hymen by the penis of a man is sufficient in defilement.

From the above discussed issues the courts seems to have the welfare of the victims at heart however in some instances it is not the courts that denies the victims justice but rather the procedure that is the police.

3.3.2 Absence of consent

Rape only occurs if a man has sexual intercourse with a female without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by false representation as to the nature of the act or in the case of a married woman, by

[31] Confirmed by the court of Appeal and the holding were not overturned.
[32] Halsbury's laws of England volume 10, 3rd ed. para 1438 p. 746
[33] (1994-5)HCB 28

impersonating her husband, this was stated in the case of *R* v *Case*[34].Section 123 of the Ugandan penal code is to the same effect. Therefore in a case where a woman was given liquor by a man hence become insensible had sexual intercourse, the man was convicted of rape[35].

In *DPP* v *Morgan &3 others*[36] Lord Hailsham said *inter alia*that ;

Rape consist s in having unlawful sexual intercourse with a woman without her consent and by force.....it does not mean there has to be a fight or blows have to be inflicted .it means there has to be some4 violence used violence used to overbear her will or that there has to be of threat of violence as a result of which her will is overborne (208)

Further the law punishes a man who through fraud or false representation gets consent of the woman. However the provision is to the effect that the fraud must be to the nature of the act. For instance where a woman is ignorant of sexual matters and is persuaded to engage in sexual intercourse in the mistaken belief that this constitutes some other beneficial benefit such as medicinal treatment such would constitute rape[37].in *Williams*[38] a conviction of rape was upheld where a singing master had sexual intercourse with a girl pupil by pretending that it was a method of improving her voice.

In the view of Lillian Tibatemwa an author of criminal law books is that where women go to medicine men to cure their barrenness and end up having sexual intercourse with the medicine men in the belief that they would be cured such fraud does not go to the nature of the act and

[34] (1850),169 ER381
[35]Camplin (1845)1Den.89,169 ER163
[36] [1976]AC 182
[37] Sexual assault and offences against morality (supra) 7
[38] [1923] 1 KB 340

thus does not amount to rape.[39]I would agree with the above mentioned author because when a medicine man asks a woman to have sexual intercourse with her she has an option of either accepting or refusing hence if she consents then it should not be termed rape The law can also invalidate consent in the case of sexual intercourse with a person below the age at which they can legally consent to such relations with older persons. Such cases are sometimes called statutory rape or "unlawful sexual intercourse", regardless of whether it was consensual or not, as people who are under a certain age in relation to the perpetrator are deemed legally incapable of consenting to sex. In *Nakholi* V *Republic*[40]it was held on appeal that;

Lack of consent is an essential ingredient in the proof of rape and although a girl may be of such a tender age that mere proof of age is sufficient to establish lack of consent, this must be proved before convicting.

A conviction of rape may be entered, though no evidence is tendered to show violence or resistance. Thus in *Fletcher (*1859)[41] the accused was convicted of raping a13 year old retarded girl who had not resisted his advances. Rejecting the contentions based on earlier authorities that force was an essential element of the offence, chief justice Lord Campbell said at page 134:

I am of the opinion that the conviction must be affirmed. The case has been very well argued. The definition of rape may be considered res judicata.The question is, what is the proper definition of rape? Is it the carnal knowledge of a woman against her will , or is it sufficient , if it be without consent of the prosecutrix? if it must be against her will , then the crime was not proved in this case; but if the offence is complete where it was ....without her consent, then the

[39] ibid
[40] [1967]EA 337
[41] 8CoxCC131

prisoner was properly convicted....the law therefore must now be taken to be settled , and ought not be disturbed...

Lord Campbell further added:

It would be monstrous to say that if a drunken woman from the market lay down and fell by the roadside ,and a man , by force, had connexion with her whilst she was in a state of insensibility and incapable of giving consent he would not be guilty of rape.

Secondly lack of injury does not proof that the woman consented. Therefore the court of Appeal of Uganda in the case of *Oyeki Charles V Uganda*[42] held that the presences of injuries on the body of a woman alleging rape is not an ingredient of the offence. Court can convict in the absence of injuries ,what is necessary is proof of penetration and lack of consent.

Sexual intercourse without the woman's consent will only be unlawful if it is outside marriage. The law exempts a husband from the offence of raping his wife. Historically, and still in some countries, consent was assumed within the marriage contract in *Clarrence*[43], justice Hawkins said that the consent of the wife was given on marriage and is irrevocable.

On the other hand Hale wrote:

The husband cannot be guilty of a rape committed upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract[44]

[12] Criminal appeal 126/1999

[13] (1888)22 QBD 51

[14] Quoted in freeman M.D.A. rape by husband in New Journal Vol .129 April 1979

Such cases and others make spousal rape impossibility; however, spousal rape is now repudiated by international conventions and increasingly criminalized. There are exceptions to the rule that a man cannot be guilty of raping his wife, these include, where divorce proceedings have been instituted in a court of law and a decree *nisi* has been pronounced secondly where a lawful separation order which contains a non molestation clause pronounced in court has been pronounced in a court of law. In some jurisdictions a married man can be convicted of raping his wife even without separation order. For instance in Scotland in the case of *HM Advocate v Duffy*[45] the accused person was indicted for assault and rape of his wife. At the time of the assault the two were living apart although no decree of judicial separation had been pronounced. Lord Robertson observed that the whole position of marriage and the status of women today is different from what it used to be in the past. If a man could be found guilty in whatever way and degree of seriousness of violence against his wife, it would be unreasonable not to find him guilty of rape of the same wife if the necessary facts were proved. The court held that the marital exemption, if it had ever had ever been a part of the law of Scotland was no longer so.

Marital rape has also been criminalized in South Africa under the Domestic Relations Act 2000 and in Namibia under the Combating of Rape Act 2001. This was mainly due to the high HIV infection rates in these countries.

In Uganda the issue of marital rape has never been brought before court. However the commission on law reform reported on its finding that sexual intercourse by a husband without consent of the wife does occur though not reported.

[45] (1989) SLT 469

It is also pertinent to note that Consent can always be withdrawn at any time, so that any further sexual activity after the withdrawal of consent constitutes rape. For instance if a woman agrees to have sexual intercourse with a man and later on in the course of the intercourse she objects and the man continues that constitutes to rape however this is not the case in many courts .The International Criminal Tribunal for Rwanda in its landmark 1998 judgment used a definition of rape which did not use the word 'consent': "a physical invasion of a sexual nature committed on a person *under circumstances which are coercive.*"[46]

Use of force

A conviction of rape may be entered, though no evidence is tendered to show violence or resistance[47] for instance where a man impersonates a husband of a married woman.

3.4 The rape trial

The three basic ingredients which the prosecution must prove in a rape case are vaginal penetration by the penis that is carnal knowledge, lack of consent by the complainant, and it was the accused who committed the crime[48].

The constitution of Uganda provides for the presumption of innocence until proven guilty, in line with this principle the onus of proving each ingredient lies on the prosecution and the standard must be beyond reasonable doubt.[49] This was further echoed in the case of *Uganda v Moses Bagada* criminal case No. 98/90 where the High court restated this principle and stated:

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[46] supra

[47] Sexual assaults and offences against morality page 8

[48] Katumbajames v Uganda criminal Appeal No. 45/1999 supreme court

[49] Sexual Assaults and offences against morality supra page 1 7

The accused (in rape cases) has no duty to prove his innocence even if his defence is disbelieved .where he puts up an alibi...he does not assume the duty of proving it. It suffices if he manages to raise some doubt in the court's mind.

From the above it seems that the law is unfair in rape cases since the onus of proving does not shift yet the general rule is that he who alleges must prove.

3.4.1 Proof of rape.

For rape to be proved in a court of law the following must be proved:

- Proof of sexual intercourse
- Absence of consent
- Identification of the accused

3.4.2 Proof of sexual intercourse

1. Testimony of the victim

2. Testimony of other witnesses

who saw the act

who the woman reported the assault to

n the case of *Oyeki Charles v Uganda* criminal Appeal No.126/1999 court of appeal for Uganda ıeld inter alia

Aedical evidence for instance .fluids from the man's body found in the woman's body or clothes. Aedical evidence is certainly the best evidence to prove sexual intercourse but it is by no means 'he only one .Other cogent evidence could also do.

'he trial judge was justified in basing her judgment on the evidence of the two witnesses (the ictim and the eyewitness) that sexual intercourse had been proved beyond reasonable doubt.

The evidence was also adequate to prove that the sexual intercourse was without the victim's consent. He grabbed her from behind, threw her down when his trousers were already removed and had sexual intercourse with her.

Proof of penetration without medical evidence[50]

It is possible to prove penetration without adducing medical evidence. It can be proved through the testimony of the victim.

In *Katumba James v Uganda* Criminal appeal no 58/97 Court of Appeal.

The court of Appeal held:

There can be no doubt that there was penetration, notwithstanding that no medical evidence was led on the point. The complainant was an old woman of 40years.She had 9 children. It was her evidence that the appellant inserted his penis in her vagina and accomplished the sexual act twice before PW2 arrived at the scene. It was her evidence that when PW2 arrived the appellant's penis was still inside her vagina She must have known what she was taking about.

3.4.3 Absence of consent

Proof that the victim did not consent to sexual intercourse with the accused may be by:

- Testimony of the victim
- Evidence of a struggle
- The state of the victim when she first reported

It should however be noted that it is not part of rape that the victim should have injuries. What is necessary is the proof of penetration and lack of consent as discussed above. At common law the accused in a rape trial is allowed to adduce evidence of previous consenting sexual relations

[50] Sexual assaults and offences against morality supra p 18

›etween himself and the victim, on the ground that such evidence makes it more likely that the ictim consented on the occasion in question[51].

n Uganda section 154(d) of the Evidence Act [52]provides that:

The credit of a witness may be impeached in the following ways by the adverse party:

When a man is prosecuted for rape or an attempt to ravish, by evidence that the prosecutrix was of generally immoral character.

his in my view treats the victim as an accused because she has to prove that her conduct was ot questionable. It is important to note however that some courts have challenge this section for ıstance in the case of *R V Seaboyer*[53]the supreme court of Canada observed by justice .'Heurex-Dubethat:

n my opinion evidence of prior acts of prostitution is never relevant and besides its irrelevance, highly prejudicial, I vehemently disagree with the assertion that a prostitute is generally more illing to consent to sexual intercourse and is less credible witness because of that of mode of fe.

.4.4 Identification of the accused

he third element which the prosecution must prove is that the person accused was the one who :tually committed the crime. In *Uganda v Geoffrey Agudi* criminal session No.02/97the court ;ld inter alia that:

Sexual assaults and offences against morality supra p 20
Chapter 6 Laws of Uganda(Revised Edition,2000)
1991), 66 C.C.C.

In ascertaining whether or not the accused was properly identified, the court is required to take into account such factors as whether the witness knew the accused before the incident, the time when the incident is claimed to have occurred the length of time and opportunity the witness took observing the accused and the distance between the two.

CHAPTER FOUR

The critical analysis of rape in Uganda

4.1 Introduction

This study investigated the inadequacy of the definition of the crime of rape, this was in light of the fact that the current definition is narrow and outdated ,the ingredients that have to be proved in rape trials mostly favors the perpetrator as opposed to the victim therefore the study was intended to establish a case for reconstructing the crime of rape.

The data from the field was analyzed and transcribed. Comparisons and sorting was effective in eliminating irrelevancies, duplications and disorder. The data collected was to determine whether the existing legal framework on the crime of rape in Uganda is adequate and the best way possible to handle the in adequacies especially by re constructing the definition of rape.

In 2012, the FBI changed their definition from "The carnal knowledge of a female forcibly and against her will." to "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." for their annual Uniform Crime Reports. The definition, which had remained unchanged since 1927, was considered outdated and narrow. The updated definition includes any gender of victim and perpetrator, not just women being raped by men, recognizes that rape with an object can be as traumatic as penile/vaginal rape, includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity, and recognizes that a victim can be incapacitated and thus unable to consent because of ingestion of drugs or alcohol.

Some countries such as Germany are now using more inclusive definitions which do not require penetration and the 1998 International Criminal Tribunal for Rwanda defines it as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive .therefore Uganda's law making institution need to update the definition of rape so as to be at par with other jurisdictions.

4.2 Findings.

While very few cases of rape are reported, even fewer go to court and actually end in convictions. The Penal Code under Section123 provides:

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by impersonating her husband, commits the felony termed rape."

Under Section 124 rape is a capital offence punishable by death. The major ingredients for this offence are lack of consent and vaginal-penile penetration.

Under the law, it is immaterial at what point the consent was withdrawn. It is also not a defence to say the woman's behaviour provoked the man to rape her.

However, in real life often questions revolve around what the victim was wearing and her behaviour towards the accused. Section 150 of the Evidence Act allows a man to put up the

defence of general immoral character on the part of the woman in order to impeach her credibility.

It is also assumed that only a woman can be raped and only a man can commit the offence. In addition, the offence falls under those against morality other than those against the person. In drafting this law, the legislators reflected the general notion that views rape more as a violation of the woman's "owner's" (usually her father or husband) rights other than a violation of the woman's personal bodily integrity.

The courts in Uganda still require proof that force has been used, yet in some cases the victim may choose not to struggle to lessen the physical pain and severity of the experience. For example, in biblical times a woman had to scream otherwise it would not be viewed as rape. Marrying the victim was and is still a remedy for rape in some African countries.

In Uganda even though it is not legally sanctioned, it is morally acceptable for a man to offer to marry a woman and salvage her reputation after he has raped her. This attitude explains the high number of many out of court settlements.

Saying rape can only arise through penile-vaginal penetration is to ignore other ways that a person can be sexually violated that may even be more traumatising. For example, penetration with objects like sticks and bottles, anal penetration with a penis or other object and being forced to perform canniglus or fallitio.

It also ignores cases where a woman rapes a woman or a man rapes another man. The Ugandan law greatly relies on historical attitudes towards rape that are gender biased and have since been proven untrue. Case study shows that men are also victims of rape.

One of the few academics to have looked into the issue in any detail is Lara Stemple, of the University of California's Health and Human Rights Law Project. Her study *Male Rape and Human Rights* notes incidents of male sexual violence as a weapon of wartime or political aggression in countries such as Chile, Greece, Croatia, Iran, Kuwait, the former Soviet Union and the former Yugoslavia. Twenty-one per cent of Sri Lankan males who were seen at a London torture treatment Centre reported sexual abuse while in detention. In El Salvador, 76% of male political prisoners surveyed in the 1980s described at least one incidence of sexual torture. A study of 6,000 concentration-camp inmates in Sarajevo found that 80% of men reported having been raped.

In Uganda, survivors are at risk of arrest by police, as they are likely to assume that they're gay – a crime in this country and in 38 of the 53 African nations. They will probably be ostracized by friends, rejected by family and turned away by the UN and the myriad international NGOs that are equipped, trained and ready to help women. They are wounded, isolated and in danger. In the words of Owiny: "They are despised."[54]

In addition International human rights law leaves out men in nearly all instruments designed to address sexual violence, The UN Security Council Resolution 1325 in 2000 treats wartime sexual violence as something that only impacts on women and girls. This should be changed in

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order for party states to rectify and reform their laws in order for the law to carter for both men and women hence discrimination is eliminated.

From the above the research established that there was need for the reconstruction of the crime of rape.

Aquinas, the biblical scholar, viewed rape as an offence but one not as bad as, say, masturbation since it at least could result in reproduction. There are numerous theories that seek to justify the crime, and some biologists believe some men, like animals, are genetically inclined to rape women.

They reason that it is nature's way of ensuring that their seed is planted and they too have offspring's.

It is not the first time that science, morality and religion have come up to downplay the plight of women.

For example, in Uganda today, a lot of time and precious resources are geared towards fighting consensual homosexual sex. Something many deem a far worse crime than, say, men battering their wives or raping a woman for that matter.

The second objective was to establish whether the rape trials are fair and competent. In Uganda, once a case file is opened, a Criminal Investigation Officer forwards the file to the Department of the Public Prosecutor (DPP), where a State Attorney reviews the file. If the State Attorney is satisfied that there is sufficient information that a crime may have been committed, he/she

advices the police what charges to apply in the case. If the State Attorney finds the evidence insufficient, he/she instructs the police to conduct further investigation or close the file and release the accused. Any formal charges applied at the direction of the State Attorney at this time may be different than those recorded at the time of the arrest.

At times, prosecutors take the accused to court without evidence before the 48-hour time limit expires. The magistrate may choose to allow the investigation to proceed, and the prosecutor is required to inform the court of the progress of the investigation every two weeks. The accused must also appear in person before the court every 14 days. In this scenario, a case is considered "on mention." . If the judge deems that insufficient progress has been made in the investigation, he or she can dismiss the case. In practice, individuals can be detained for up to five years for awaiting trial for serious offenses such as rape. Over two-thirds of the prison population in Uganda is composed of prisoners awaiting trial.

By the government's own admission to the African Commission on Human and Peoples' Rights, the administration of justice in Uganda is "painfully slow".

The judiciary is understaffed and under-funded. It cannot effectively respond to the level of crime, particularly in the lower courts.[55] Amnesty International's research revealed a number of obstacles for women trying to access justice through the court system.

Only a small proportion of reported cases go to court, and many of these fail to reach a conclusion. It is reported that, between January and June 2009, there was 1.83 per cent

[55]The Republic Of Uganda 2nd Periodic Report To The Commission On Human And Peoples' Rights Presented At The 39th Ordinary Session Of The Commission on Human and Peoples' Rights Banjul, The Gambia May 2006, Para 48.3.

conviction rate for rape and a 5.89 per cent conviction rate for defilement cases.
According to CID records documenting sexual violence cases in the three Kampala police Stations visited by Amnesty International between January and June 2009, of 366 rapes reported, 109 were taken to court resulting in 2 convictions, 11 dismissals and a balance of 96 pending in court.[56]

Secondly many rape victims commented that, "the rape trial is equivalent to a second and third rape". this is because the prosecution asks question that are intimidating to the women and they need straight forward answers, for instance in the case of Uganda v Apai 1994,an elderly woman one Regina ...60 years took shelter from the rain on the verandah of the accused one Stephen Apai. The later emerged from his hut, forced her inside and raped her. At the trial she described what happened in the following words;

"*He made me his wife and worked on me*"
Justice Lugazi acquitted the accused because in his view the complainants evidence was "vague and meaningless" he commented the following,
"The complainant has only herself to blame for the fact that this case collapsed ...she stubbornly refused to say what exactly took place inside the accused's hut on the day in issue."
From the above the research established that the justice is not fully achieved by the victims due to strict rules that are very unfair.

[56] ibid

The research also shows that when women and girls go to a police station, information is first taken at the main desk, which is often surrounded by people waiting to see a detainee or to lodge a complaint. There is no privacy for the victim who is required to give her details. Women said: "it is embarrassing to report rape next to a man who has come to report the theft of his cattle." Under international law, Uganda must ensure that its state agents do not intimidate, threaten or humiliate women and girls who are filing complaints of sexual or gender-based violence when they report it or during the subsequent investigation. The police should immediately ascertain if the complainant is at risk of further violence and if so, ensure that she receives appropriate protection. The insensitivity of the police in dealing with gender-based violence is major factor contributing to the low rates of women reporting crimes to police. Failure to contact the criminal justice system puts the victim at additional risk of re-victimization, and denies her access to justice through the state system where forensic evidence can link the perpetrator to the assault leading to an arrest and possible conviction. On the other hand men who are raped by fellow men fear to report their cases to the police because they fear being arrested as homosexuals.[57]

Another issue that makes rape cases not to succeed in court is that although forensic evidence is key in successful conviction in sexual violence cases, there are very few police surgeons and forensic experts in Uganda. This often leads to delays in medical examinations, production of results from criminal laboratories and other expert evidence which may be necessary to charge a suspect[58].though the Police Form 3A was amended in February this year it is pertinent to note

[57]Eunice Owiny had been employed by Makerere University's Refugee Law Project (RLP) to help displaced people from all over Africa work through their traumas where she found out that men were being raped

[58]The Republic Of Uganda 2nd Periodic Report To The Commission On Human And Peoples' Rights Presented At The 39th Ordinary Session Of The Commission on Human and Peoples'

that the police especially those who deal with the forms need training in order to make sure that justice is acquired by rape and sexual violence victims.

From the above it is important to note that even though the definition of the crime of rape under section 123 of the Uganda's penal code act is narrow and outdated it is not the only factor that contributes to the injustices faced by victims of rape these include the customs for instance, in Africa no man is allowed to be vulnerable," says RLP's gender officer **Salome Atim.** "You have to be masculine, strong. You should never break down or cry. A man must be a leader and provide for the whole family. When he fails to reach that set standard, society perceives that there is something wrong." hence many men who are victims of sexual violence would prefer to suffer in silence.

Apart from that the whole process of getting justice is perceived as very expensive because of the money the victims have to pay to the police for fuel and other stuff some victims have to travel from one town to another and they even have to pay transport fees for their witness this has proven to be expensive hence some victims give up on the way before they can get justice.
In addition since the penalty for a convicted rape perpetrator is death many victims fear the family of perpetrators and hence opt for settlement out of court in that some victims end up getting married to the rapist .I find this very unfair because the victim will not be able to forget the torturer she went through when she persistently sees the man who inflicted the pain on her. Others are compensated this is also unfair because money cannot pay the dignity the woman has already lost and cannot heal the psychological trauma she went through.

Rights Banjul, The Gambia May 2006, para 44.3.

The research established that there is a lot to be done by the government of Uganda as far as reforming the crime of rape is concerned in order for justice to be achieved by the victims of rape. Therefore the researcher came up with some recommendations which will be discussed in chapter five.

CHAPTER FIVE

5.0 INTRODUCTION

Every state needs to adopt a legal framework that anticipates the full range of challenges that a victim of violence faces when seeking justice; states must ensure that they monitor legal frameworks to be aware of the challenges, and adopt changes promptly to ensure that challenges are overcome. Laws must be comprehensive and rigorously enforced. Practices must be constantly scrutinized to ensure that they do not become unintended obstacles to accessing justice[59] it is against this requirement that this chapter discusses conclusion and the recommendations the researcher thought necessary on reconstructing the crime of rape.

5.1 CONCLUSSION

This study was undertaken with a view of establishing a case for reforming the law on rape in Uganda.

In 2007, the Penal Code Amendment Act abolished the distinction between genders with regard to offences committed against children. This is a step in the right the direction but a similar amendment is required for sexual offences against adults. Specifically, a broader definition of rape and/or all other sexual offences must be promulgated. In 2006, the DRC passed a law that provides a formal definition of rape that includes both sexes and all forms of penetration. Uganda must follow this lead.

Having done extensive research the researcher feels that the law needs to be reformed if justice is to be acquired by rape victims. Sexual violence, whether it is perpetrated against a male or female victim is one of the most fundamental invasions of a person's privacy and well-being, and

[59] Amnesty inernationalreport

the consequences remain with the victim for life, long after the physical scars have healed. A holistic reappraisal of the whole issue of sexual violence is required in order to address the vulnerability of male victims. The time has come for the division between male and female victims of sexual violence to be bridged. All definitions of acts of sexual violence, at the national, international level and regional level must explicitly refer to male and female victims. Ingrained stereotypes of sexuality, gender and power relations must be dispelled and we must begin to appreciate that men are also vulnerable and in need of protection. The researcher also felt that it is not only the definition of rape that has to be changed but rather the whole crime of rape in that the process of reporting the crime should be changed. It is upon these concerns that the researcher came up with the following recommendations.

5.2. RECOMMENDATIONS

The Ugandan government has an obligation to do more to protect women and girls from gender-based violence and to ensure that survivors of such violence gain access to justice.

The government should take immediate action to provide survivors of gender-based violence with legal support and to meet their health, safety, and shelter requirements. It should also take steps to prevent violence against women by addressing its root causes.

GOVERNMENT

The government through the law making organ should review the definition of the crime of rape and re-construct it.

In 1997 at the request of the government of Uganda the Uganda Law Reform commission undertook a study on the law relating to sexual offences. Following the field study the commission came up with recommendation for the amendment to the law on sexual offences.

The recommendations culminated into the sexual offences (miscellaneous amendments) Bill, 2000[60]

The law on rape has been criticized both for its narrow focus on vaginal penetration by the male organ and for its failure to recognize that other forced sexual acts may have serious impact on the victims as vaginal penetration .in the proposed amendment rape was redefined *inter alia*as;
Any person who performs a sexual act on another person without that person's consent commits a felony known as rape.

It goes ahead to defining 'Sexual acts' to mean penetration of the vagina ,mouth, or anus ,however slight of any person by a sexual organ or the use of any object or by a person on another person's sexual organ.

The above recommended amendment is of value because it gives a wide range of acts that constitutes to the felony of rape it further ensures equality because it does not discriminate between men and woman in that it recognizes that both men and women can be raped, and both can commit the crime.

The aim of making the crime gender-neutral comes out clearly in the proposed section 117(1) (c) where it is provided that;
A person who performs a sexual act with the consent of another person when the consent has been obtained ...in case of a woman by personating her husband or in the case of a man , by personating his wife commits a felony known as rape.

[60] Sexual assaults and offences against morality Pg101

The commission also recommended that the maximum sentence for rape should be reduced from death penalty to life imprisonment. Several reasons for the reduction of the sentence were given and they include;

The first one is that, the rising of the penalty for rape, and for defilement of females under the age of 18 from life imprisonment to death penalty in 1990 automatically meant that only the high court had the jurisdiction to try rape cases. This has led to high increase of prisoners on remand since the high court does not have enough judges to handle the huge number of rape cases. This also violates the constitutional right of speedy trial. The amendment would be of value because magistrate courts which have the jurisdiction to try cases punishable by life imprisonment are many it would ensure speedy trials.

Secondly it has also been argued that the attachment of death penalty to rape and defilement cases may in fact be leading to none reporting of such cases. According to the findings of the law reform commission, victims fear the wrath of the perpetrators' family.

Though the Uganda law reform come up with the above recommendations the bill has not yet been passed. The Parliament should therefore prioritize the passing and adoption of pending legislation that addresses sexual and gender-based violence.

Parliament should draft new legislation which prohibits all acts of violence against

Women, whether committed by state officials or private individual.

The government of Uganda should allocate secure, long-term government funding, or actively seek donor funding, to ensure that appropriate shelters are set up across the country in sufficient numbers, in collaboration with NGOs experienced in working to protect women from violence.

The government should allocate secure, long-term government funding, or actively seek donor funding, to provide financial compensation to victims, allowing victims to access medical and legal resources in pursuit of justice as well as recompense for loss of wages as a result of the crime and the costs of transport to the police station, medical institution and court.

The government should set up a functioning cross-referral system with regards to gender based violence cases, involving key players such as medical institutions, legal aid providers, shelters and police.

The government should set up a panel to identify obstacles to the effective investigation and prosecution of crimes of sexual and gender-based violence. The investigation panel should include members of the police force and delegates from other relevant government entities as well as delegates from NGOs that work with victims of sexual and gender-based violence. The investigation panel should give particular attention to the situation of poor women and women living in rural areas.

POLICE, CRIMINAL INVESTIGATION DEPARTMENT

The police should explain to women who are reporting sexual or other gender-based violence their rights to file a complaint, seek protection, obtain medical attention, and be kept apprised of the progress of the investigation.

The Criminal Investigation Department should interview all victims of sexual and other gender-based violence and keep them updated of the progress of investigations of their case.

The paramount priority of the police when investigating domestic violence should be the safety and security of the victim and any children who are at risk, not reconciliation. In all cases where police receive a report of sexual or other gender-based violence, they should assess the risk of further violence to the victim and take appropriate measures to ensure her security.

The police unit and office of the prosecutor should regularly publish statistics on the resolution of investigations and provide information on the cases disaggregated by factors including sex and age.

The police, medical personnel, investigators within the Directorate of Public Prosecutions and judges should be trained in working with women and girls making complaints of rape or other forms of sexual violence. Training should include the appropriate use of medical evidence, and use of expert evidence, such as psychological or psychiatric reports.

All judges, magistrates and lawyers should receive training on the international human rights law relating to violence against women to enhance knowledge and ensure the effectiveness and sensitivity of the judicial officers in the prosecution of acts of violence against women.

Legal aid and paralegal services should be provided to victims of sexual and other gender-based violence.

PRISONS

Perpetrators convicted of crimes of sexual violence should be given access to appropriate rehabilitation programs.

THE INTERNATIONAL COMMUNITY

The international community, including the UN, key donors and the Justice Law and Order Sector (JLOS) donor group should support the government of Uganda in its efforts to address violence against women and ensure that the victims of gender-based violence have access to justice.

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KAMPALA INTERNATIONAL UNIVERSITY

THE INDEPENDENCE OF JUDICIARY IN UGANDA IS A REALITY OR A MYTH? CASE STUDY UGANDA

A RESEARCH REPORT SUBMITTED TO THE FACULTY OF LAW FOR THE PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF

THE DIPLOMA IN LAWS AT

KAMPALA INTERNATIONAL UNIVERSITY

BY ABIMANYA NATHAN

REG.NO LLD/35808/113/DU

SEPTEMBER, 2013

SUPERVISED BY MATOVU AKRAM

Declaration

I ABIMANYA NATHAN declare that this dissertation has never been published any time in whole or at any point and it has never been published for the award of Diploma at any institution. I am therefore wholly responsible for my errors, emission and general information found in it.

Signature _____

Date 30th oct 2013.

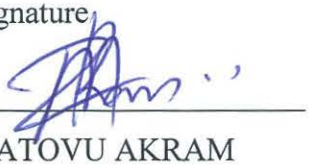
Dedication

I dedicate this dissertation to my father Mr. Mushabe Samuel and his family members, MR. Amos Kaguta. Our Grandfather, Mrs FlaviaNabakooza Karungi, The Mastrate grade 1 Makindye Chief magistrates court, Mrs.Brig Proscovia Nalweyiso who been supportive both financially and morally, my friends who have endeavored to encourage me very much during my pursuit of this course.

Approval

This work is submitted under/with my authority as the supervisor for partial fulfillment of the requirement for the award of Diploma in Laws at Kampala International University.

Signature



MATOVU AKRAM

(SUPERVISOR)

DATE 1st November 2018

Acknowledgement

The research paper of this nature that dissolves unto sensitive constitutional and political issue of contemporary manner is not possible without the tacit support and assistance from a number of people organization and the institutions' I wish to acknowledge and express my thanks first and foremost to my supervisor Mr. Matovu Akram whose parental intellectual and professional input enabled me to come up with this work.

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Abstract

The study was aimed at establishing the independence of judiciary in Uganda whether it is a reality or whether a myth.

During the study/research the following objectives were to be studied.

To analyze the independence of judiciary in Uganda, the rule of law, the doctrine of the separation of powers, and the intervention of the other arms of government in the administration of justice in Uganda.

The variables were tested using both primary data from the field and secondary data from the physical books, internet and other literature.

The study was both significant to researcher, Judiciary, Government and General Public.

The researcher found that though the Judicial Independence in Uganda is a reality but there are still some weaknesses.

Therefore, the findings of the study showed that the Independence of Judiciary in Uganda is not strictly observed which affects the performance of Judiciary.

It is therefore recommended that the principle of separation of powers be up held as provided in the constitution of the republic of Uganda 1995. This therefore will create the total reality of the independence of Judiciary in Uganda and Administration Of Justice with out fear or favor or ill will.

ΓABLE OF CONTENTS

CHAPTER ONE

1.1 Introduction

The notion independence of the judiciary requires the court and the Judge to do justice without fear or favor of any individual or authority. Judiciary being one of the main institutions in any democratic settings, It is charged with the tasks of determining disputes which arises between individual and government or individuals and other individual against the excess of government powers and arbitrary actions of government officials.

The Judiciary is the guardian of the basic human rights and freedoms. The promoter of the rule of law, Judiciary can only achieve these goals through the impartial and just settlement of disputes between citizens and the state. The Constitution of the Republic of Uganda[1] provides for the **independence of the judiciary.**[2] The courts exist principally to do justice between parties having a dispute/disputes. These courts include the Supreme Court,[3] Court of Appeal which also sits as the Constitutional Court in determining matters that require Constitutional interpretation[4], and the High Court[5]

The judiciary has a very detailed network of legal norms to review administrative decisions of the legislature or the executive, adjudicate disputes between individuals and claims in the public interest and review legislations against the Constitution. Therefore concepts such as reasonableness, proportionality fairness, public good, public health etc are frequently used and balanced where they are competing values, through the judgments

The judiciary therefore restates and clarifies the scope of the Constitution and other written laws, common law, equity and custom. The paper seeks to answer several questions that arise from the judiciary and "independence of Judiciary as an institution, administration and the rigidity of the doctrine of Independence of Judiciary.

The constitution of the republic of Uganda 1995

Article 128 (2) provides that "in the next exercise of judicial power the shall be independent and shall not be subject to the control or direction of any person or authority.

Supra note 1 at Article 129

Supra note 1 at Article 134 and 137

Supra note 3

1.2 Background

Majority of the disputes in pre-colonial Uganda were resolved informally, for instance family heads and elders participated in dispute resolution. Disputes were also resolved by clan heads meeting together. With the establishment of the colonial government, formal courts using legislation and precedent were established in Uganda[6] and rules of procedure had to be followed in the settlement of issues in courts of law which still exist to date.

Rule of Law, according to the Justice Kanyeihamba, 'It is merely a collection of ideas and principles propagated in the so-called free societies to guide lawmakers, administrators, judges and law enforcement agencies. The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land.

According to the Greek scholar, he said that the rule of law is preferable to that of any individual. Writing in the 13th century, Aristotle said that, the king himself ought not to be subject to man but to God and the law since the law makes him king. Therefore let the king if render to the law what the law has rendered to the king is dominion and power, for there is no king who will use rules and not the Law.[7]

The Roman Emperor Justinian defined Rule of law as the set and constant purpose which gives everyman his due. The law is the practical expression of justice, for the precepts of law are these: to live honestly, to injure non-one and to give everyman his due[8].

The whole idea is that the role of the Rule of law is to ensure that no man is punishable for distinct breach of law established in the ordinary legal manner before the ordinary courts of the land, that every man is subject to the ordinary law of the realm and that the right of personal liberty or public meetings, are the result of judicial decisions determining the rights of private personal in particular cases brought before the ordinary courts of the land.

Historically prior to the colonizing of Uganda, enforceability of African laws and customs depended on two major operational premises, namely, reliance upon the parties in dispute to accept without further argument, the final judgment of the people and the fear of upsetting the

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The Uganda order-in- council, 1902
George Kanyeihamba constitutional and political History of Uganda from 1984 to the present, p, 302
Ibid, p, 302

balance of nature or of the community, which is the vital force. The disregard of either principle was believed to lead to the punishment and destruction of the community as whole.

1.3 Statement of the Problem

ndependence of Judiciary is one of the tests for determining whether or not a country enjoys a ıigh standard of justice, any individual or authority who tries to interfere with justice while aking its course is on the other hand trying to interfere with independence of Judiciary. The udiciary in recent times has been under attack and influence in various paths by the government especially the influence of executive and has also seen attacks by the military /army, this has ıampered with the role of the judiciary in carrying out its role as a carrier of justice in Uganda to lay, hence destroying the core objectives and the concept of judicial independence. A judicial officer ceases upon the incumbent certain obligation in respect of his personal conduct.

They have responsibility of administering justice to all people without fear or favor, ill-will or ıffection

Dispensing justice is peace making and the public must have confidence in peace makers if they ıre to take their disputes to the courts and accept their decisions.

1.4 Objectives of the Study

) To examine obstacles o the Independence of the Judiciary in the administration of justice.

i) To explore the nature of Court hierarchy and its effect on the administration of justice.

1.5 Significance of the study

The study will cover and evaluate the independence of the judicially in ensuring access to justice n Uganda.

I. It will assist in Identifying ways of strengthening the judicial independence given the political, social and economic set up of Uganda.

2. In strengthening Constitutional activism, the paper will examine how the principle of the independence of the Judiciary has been addressed in Uganda over the years.

3. This paper will assess the role of the Ugandan judiciary from the colonial period to 1995

1.6 Methodology

The method of gathering information depends on the kind of research being carried out and for that matter, the legal research will require multiple methods to be employed and these includes:

1.6.1 Library Research

This is when the relevant information that is useful to the research is consulted the use or utilization of the libraries in obtaining the information takes the maximum extension in the library the researcher was able to access, text books, legal journals, magazines, news papers, paper presentation and law reports for information review.

1.6.2. Through questionnaires

This is when the information is gathered through questions set by researcher to the responsible people, this makes the data collection becomes simple.

This is when the questionnaire is given to the responsible persons to answer the question which are put to him this type of the Information gathering keep the sample records of the researcher for further reference.

1.7 The Scope of the study

The study will cover the recent years where calls have been made from within the judiciary itself and outside judiciary from the academia, human activist to come up with a mere activist approach to the Uganda's judiciary interpretation of the law. In many ways these have their basis in the 1995 Constitution provisions on the administration of justice and the role of udiciary, which are viewed progressive and as creating windows for the judiciary to play a greater role than ever before in promoting the rights of Ugandan citizens.

1.8 Hypothesis

:n view of this paper is that the true test of judicial independence comes when judges are led by :heir understanding of the law, the findings on the facts and the pull of conscience of a decision vhich is contrary to what the other branches of government or power interest in society, that is vhen judicial independence is put to test.

Γhe interference in the autonomy of the judiciary in Uganda has been due to the position which :xecutive holds.

Γhe historical perspective on the independence of judiciary in Uganda (1 900-opresent is an ıccident where the governor excised executive, legislative and judicial powers.

1.9 Literature Review

According to Kanyeihamba G.W.[9], for a society to thrive under an environment of freedom, lemocracy, justice and respect for human rights, it is important for that society to have and ɔelieve in a culture of a respected, independent, impartial and fearless judiciary. Since the advent ɔf the NRM administration, Ugandans have been preoccupied with the recognition, protection ınd advancement of the basic rights and fundamental freedoms of the individual.

Kanyeihamba considers the manifestations of an Independent judiciary. He however discusses hem in the Canadian perspective basing on the fact that he considers Canada as ones of the most lemocratic state and thus provides this study points to consider when examining whether the 'udiciary in Uganda is independent and thus, the study shall cover the applicability of the nanifestations of the independence of the judiciary in Uganda.

He goes ahead to state that in most countries, the principles of judicial Independence are ıcknowledged but substantially qualified in practice. Some ask themselves whether judicial ndependence implies that the Executive must have no voice or a muted voice in the appointment ɔr promotion of judges. Another commonly asked question is whether judicial independence mplies that neither the Executive, nor the Legislature shall be competent to remove judges.

Kanyehamba G.W.J.S.C The independence of the judicial separation of powers and the Rule of law in a ɔemocracy, the 5th Annual Judges conference, 16-20th December, Imperial Botanical Beach Hotel Entebbe.

Also, does it imply that judges should be entirely aloof from public policy and how far can the government or its unruly supporters or opponents be permitted to determine what is the public interest?'[10] They argue that the protection of judicial independence in a liberal democracy demands that it should be unconstitutional for the legislature to invade the domain of the judiciary by pronouncing judgment or reversing a judicial decision with retroactive effect, or enabling the Executive to designate which judges shall sit to heat a particular case or abolishing a judicial office while it has a substantial holder or reducing judicial salaries.[11]

It is countries where such cultures firmly held in the minds, acts and behavior of the people and their governments that guarantees for peoples liberties, rights and freedom exist in reality, implementation and enforcement. In the absence of such a culture, protection of the same rights are at best, haphazard or non-existent and, at worst, their abuse and violation do not evoke any emotion, in one way or the other, except may be, amongst the victims and those closest to them. Therefore, it is essential that concepts of judicial independence be understood and appreciated by everyone in society.[12]

Odoki on the independence of judiciary observed that, the independence of the judiciary is not only threatened by political interference, but also by financial anxiety of judges,[13] he goes further by suggesting that the general principles, judges should be entitled to salaries, all allowances and other fringe benefits commensurate with their status and the judicial functions they perform. That unless the principle is adhered to. It may be intricate for judges to maintain that impartiality and dignified image that is essential to preserve public confidence in the sway of justice to me. However, much the judges or magistrates salaries are increased but according to the judiciary due respect in terms of autonomy its powers will continue to crumbling.[14]

Hurry street and Rodney Brazier in constitutional and administrative law, they stated that justice should be dispensed even handedly in that courts and that the general public should feel confident in the integrity and impartiality of the Judiciary[15] where the government of the day has

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[10] Ibid
[11] Ibid
[12] Ibid
[13] F.E Juuko Separation of power ruling myth, p.8
[14] F.E Juuko Separation of power-reality or ruling myth, p.8
[15] Hurry street and Rodney, constitution and administrative Law 4th edition, penguin books,

nterest in the outcome of judicial proceedings, the court should not act merely as a mouth piece of the Executive. The Judiciary must therefore be secure from undue influence and autonomous within its own field. They go ahead to state that in most countries, the principles of judicial ndependence are acknowledged but substantially qualified in practice. Some ask themselves whether judicial independence implies that the executive must have no voice or a muted voice in he appointment or promotion of judges. Another common asked question is whether Judicial ndependence implies that neither the 'executive, nor the legislature shall be competent to emove judges. Also, does it imply the judges should be entitling a lot from public policy and ıow far the government or its unruly supporters or opponents be permitted to determine what is he public interest?[16] they argue that the protection of judicial independence in a liberal lemocracy demands that it should be unconstitutional for the legislature to invade the domain of he judiciary by pronouncing judgment or reversing judiciary with retroactive effect, or enabling he executive to designate which judges shall sit to hear a particular case or abolishing judicial ffice while it has a substantial holder or reducing salaries.[17]

According to Huber's laws of England[18] there are three principal organs of government the egislature, the executive and the judiciary. The functions of government are classified as egislative, executive or administrative acts entail the formulation or application of general olicy in relation to particular situations or cases or the making or execution of individual iscretionary decisions, judicial acts involve the determination of questions of law and fact or the xercise of limited discretionary power in relation to claims and controversies susceptible to esolution by reference to pre-existing legal rules at standards or the adoption of procedure nalogous to that of a court of law in the course of resolving a disputed issue, and ministerial acts onsist of the performance of a public duty in the discharge of which little or no discretion is egally permissible.[19]

: goes ahead to address the separation of functions, thus, a number of constitution system ıcorporate versions of the doctrine of separation of powers. The doctrine implies that a

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Hurry street and Rodney, constitution and administrative Law

Hurry street and Rodney, constitution and administrative Law 4th edition, pen gun Books, Nairobi, p364

Lord Hollshown of st.Mnrylebone (1989), Hausbury"s law of England, volume, Butter worthy's, London, env.4

Hurry street and Rodney, constitution and administrative Law 4th edition, pen gun Books, Nairobi, p364

particular class of function ought to be confided only to the corresponding organs of the, personnel of the three main organs of government must be distance, in that for example, ministers must not be member of parliament, or that the autonomy of even branch of government must be minimum from undone encroachments from any of the others[20].

According to Grace Patrick Tumwine Mukubwa[21] objective of guaranteeing the independence of the judiciary is to ensure effective maintenance of law and order and constitutional rule so that there is no necessity or justification to result to extra judicial means in the resolution of political problems. Independence of judiciary is therefore important if the court if hold other organs bounded by the law. Common wealth African constitutions generally provide for judicial independence by regulating the appointments, removal, remuneration and security of Tenure of judges. However, some observers have been troubled by the two issues about the doctrines. The first is how the judiciary its self is to be controlled. It has been assumed that there controlled by public opinion. But this simply cannot be the case[22]- thus, **Mukubwa Examine the importance and relevance or rationale of the doctrine of judicial independence.** He also considers the disadvantage of short coming of independence of judiciary.

He however does not relate this to Uganda. The study thus shall be able to establish whether udicial independence is relevant to Uganda and whether it is advantageous or disadvantageous n Uganda situation of evils such as corruption which needs a lot of checking.

nd relevance or rationale of the doctrine of judicial independence. He also considers the lisadvantage of short coming of independence of judiciary.

[3] Lord Horsham St. maryle borne (1989) Hals burry laws of England
[4] Lord holishom of St. mythle bune (1989), Housburry's news of England volume (1) Butterworth's London, prons.
[5] Grece Patrick Mukubwa (201). Ruled from Grove; challenging at antiquated constitution in Africa-creating pportunities facing challenges, Fountain publishers Kampala pg299

CHAPTER TWO

THE CONCEPT OF INDEPENDENCE OF JUDICIARY

2.1 Introduction

Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.[23] Judicial discretion as an aspect of inherent powers, doctrine is thought to be premised on two fundamentals[24].

The first one is separation of powers, a doctrine which imposed a positive responsibility on the judiciary as one of the branches of government to perform its adjudicative functions effectively and efficiently. Inherent powers from which judicial discretion descends accordingly exist to assist the judiciary to accomplish its constitutionally established and mandated functions and to enable it to acquire the necessary support and resources to achieve these functions.

The second fundamental is in the nature of courts. All courts and those that preside over them must have, as of necessity, powers to do and determine as is reasonably necessary for the administration of justice within the scope of their jurisdiction. The concept has been articulate as follows:

> "Undoubtedly courts of justice posses powers which are not given by the legislation and which no legislation can take away. These powers spring not from legislation but from the nature and Constitution of the tribunals themselves."

Judiciary is the main legal institution in the country. It is the creation of the Uganda Constitution 1995 under chapter eight of the Constitution that provides for and guarantees the independence of the judiciary. The principle of independence of judiciary,[25] in any given state is the dedrock

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[3] Yahaya Kariisa Vs ATTORNEY General and MK Radisa SCCA Number 7 of (1997) HCB 29

[4] Judicial Discretion- Appear presented by Honorable Justice Andrew Nyirenda at the the Annual conference for he Association of the Law reform Agencies for East and south Africa (ALRAESA) at Entebbe Uganda 4-8 September 2005

[5] Article 128 of the constitution of Uganda 1995

for the democratic governance based on the rule of law. As you might be aware Judiciary is one of the three organs of the democratic government. The other two includes legislature and the executive arms of the government.

When one needs to test whether or not a country enjoys a high level or standard of democratic governance. It is through the independence of judiciary, It is therefore important to note that justice require independence of judiciary. Independence here refers to the courts and the judges are free to exercise their powers and jurisdictions and to perform their functions without fear or favor to any individual or authority.

The phrase independence of judiciary requires the courts and judges to do justice without fear or favor of any individual or authority. It also requires the judiciary to decide matters before them impartially, on the basis of the facts and in accordance with the law, without restrictions, inducements, pressure, threats or interference from any corner or any organ of the government. Judiciary determines disputes which arise between individuals, whether citizens or non- citizen, against the excess of government powers and the arbitrary actions of government officials.

The independence of the judiciary is constitutionally protected in article 128 of the Constitution which states that, "in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority". This independence of the judiciary is not a benefit conferred on judges but rather it is a right to which the people of this nation are entitled to, to be able to have access to impartial courts and therefore judges are not subject to control or direction of any person or authority save the law, with regard to the hearing and determination of cases, administration and processing of cases before them and other related matters. The people are entitled to access courts that are not victims or objects of inference by temporal bodies and authorities. This is in relation to article 12(1) which states that, "Judicial powers is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and inconformity with law and with the values, norms and aspirations of the people"[26]

[26] Article 126 (1) of the constitution Of 1995

The primary role of the judiciary is to interpret and apply the law and the Constitution and to provide independent and impartial adjudication of disputes between individuals and the state and between different levels of government within the state.

The independence of the judiciary has been a cornerstone of the English political and legal system for centuries. It was in order to permit the judges of England to apply the law relationally and evenly that the idea of judicial independence was originally conceived and protected.

In the words of political theorist John Locke, the purpose of judicial independence was to ensure that the law would not be varied in particular cases, but be the same for rich and poor, for the favorite at court and the country at plough. This principle has been faithfully upheld in Uganda for the last twelve years since the 1995 Constitution came into force. Independence of judiciary is recognized as a foundation upon which a true democracy rests.[27]

An independent judiciary is expected to render justice impartially on the basis of law, thereby also protecting the human rights and the fundamental freedoms of every individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the judiciary to carry out its function in an independent and impartial manner. Whenever this confidence begins to be eroded neither the judiciary as an institution nor individual Judges will be able to perform this important task fully, or at least will not easily be seen to do so. Independence of the judiciary does not mean of course, that the judges can decide cases on the basis of their own whims or preference, it means that they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situation where they are obliged to render judgments in difficult and sensitive. Cases if any arm of the government or institution of the state transcends its boundaries, the court of judicature are mandated under the constitution to correct them[28]. The independence of judiciary is more important in Uganda because the constitutional court and the Supreme Court interpret the written constitution and so defines the limits of the powers of each arm of government.

[7] Article 128 of the constitution Of 1995
[8] Odoki (JSC) The search for a National consensus page 323

Lord Denning, the celebrated English judge, put the matter in these terms, .with reference to the position in England as: There is no rigid separation between the legislature and the executive powers. The ministers who exercise the executive powers also direct a great deal of the legislative powers of parliament. **But they are subjected to many balances and checks**. And one of the most important checks is the independence of the judiciary and the judges in particular. And when I speak of judges, I include also all the magistrates and others who exercise judicial functions both in courts and special tribunals. No member of the government, no member of parliament and no officer of any government department has any right whatever to direct or influence or to interfere with the decisions of any of the judges or magistrates and other special tribunals. It is the sure knowledge of this that gives the people their confidence in Judges.[29]

The independence of judges therefore in Uganda is well defined by the Act of Parliament[30] to be independent of the government or any of the political parties, for instance: NRM party, UPC party, FDC party, DP party etc and that this principle should be kept in view in every legislative act regarding the bench. Independence of the judiciary has both structure and the body.

The judicial powers of Uganda shall be exercised by the courts of judicature which shall consist of:[31]

a) Supreme Court of Uganda

b) Court of Appeal of Uganda

c) High Court of Uganda

d) Such subordinate court as

Parliament may by law establish, including squalid courts for marriage divorce, inheritance of property and guardianship as may be prescribed by parliament. The Supreme Court, the Court of

[29] S.A Law Journal (1954) page 345
[30] Judicial Act cap 13
[31] Article 129 (1)

Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court.

The highest court in the land is the Supreme Court and the next in hierarchy is the Court of Appeal that handles appeals from the High Court but it also sits as the constitutional court in determining matter that require constitutional interpretation. The High Court of Uganda has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the constitution or other law. The Constitution the Parliament cannot establish a court which is superior to the three courts of records.[32] It only has powers to create subordinate courts. But however, even if it can create subordinate courts, it cannot oust the jurisdiction of the High Court in the similar matters to those courts[33]

There are however many characteristics that determines judicial independence, among others are administrative independence, financial independence, security of tenure judiciary community, judicial accountability, appointment and removal of judges. 1 propose to examine and elaborate upon the principles as set out.

2.2 Justification for judicial discretion

While every attempt is made to legislate extensively, exhaustively and accurately, and to promulgate laws that would stand the test of time it remains a fact that law cannot anticipate every eventuality. What is true is that in most instance legislations are reactionary, providing for and addressing experienced events. It's as a result of this, that judicial discretion and judicial activism, and all attribute become even more relevant.

However, what should be borne in mind is that judges are bound by judicial ethics and rules of fairness. These are bounds not seen but exist since a judge's training in the law school. Judges do not have complete freedom to do as they wish. Reynolds says.[34]

[32] Under Article 129 (2)
[33] Joseph Tumushabe Vs Attorney general constitutional petition No. 6/2004
[34] William L.Reynolds "judicial process" in a nutshell at pg158.

"Although a court of last resort may be free of effective formal checks, it does not necessarily follow that court is free to do as it chooses. The court operates within a great many institutional constraints, among them the need to engage in reasoned elaboration the need to explain a decision in public and in writing and the need generally to satisfy the hard- learned demands of the judge's craft. Thus its practice the "freedom" is limited. The path a judge must tread is carefully circumscribed, and the deviations permitted are a relatively few in number. Even when one of these is taken, the judicial profession compels the judge to explain the decision in a fashion that will satisfy the most caustic of commentators also why that was the one chosen.

The court cannot bind by a previous decision to exercise its discretion in a particular way, because it would be in effect putting an end to the discretion. Discretion necessarily involves a latitude or individual choice according to the particular circumstances and differs form a case where the decision follows ex- debtor justice once said that, the facts are known

While appellate courts would ordinarily not review the exercise of discretion by a lower court, it is well established that discretion can be reviewed on its entire merits even when there is nothing capricious or vindictive about it if the circumstances of the case call for such a course.

2.3 Administrative Independence

Administrative independence is the primary factor to judicial independence; it refers to control of judicial matters or decisions that bear directly with exercise of the judicial function. It concerns with the management of matters of assigning the judges the cases and allocation of court rooms to Judges. The courts have exclusive control over the listing of cases for hearing and the assignment of cases between judges and magistrates. No organ of the government can order that a file be removed from one judge and be placed before another judge because of political leaning. However the judiciary is hard hit by insufficient human resource at all levels leading to low output. There is alarming shortage of judges and these has undermined the proper administration of justice in the judiciary.

are protected by law and whose independence is a major source of security and well being of the state.

This method is intended to ensure judicial independence for judges and not to be threatened by any organ of the government or other authority or person in the performance of their duties. The Judicial Service Commission is empowered in term to advice the President on the appointment of all Judges and with the approval of parliament. Plainly the method of appointment and removal of judges plays a vital role in the independence of judiciary in Uganda[38].

The Chief Justice, the Deputy Chief justice, the principle judge, a justice of Supreme Court, justice of Court Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the judicial Service Commission and with the approval of parliament According to Article 142 (1) of the constitution of the republic of Uganda[39].

It is possible that in appointing members of the Judicial Service Commission as provided by article 146 of the Constitution, the President could ensure that only those who sympathies with the government's view are appointed. The Commission so appointed could also only recommend persons who are likely to be more favorable to the government but what actually matters is their status and behavior when thy have been appointed.[40]

2.6 Judicial Accountability

Judicial accountability, is the power inherent in the discharge of responsibility whenever one is entrusted with handling that which is not his or hers. This is so regardless of whether one is in public or private service. It finds expression in our constitution which states that:

i) All public offices shall be held in trust for the people.

ii) All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people whom they head.[41]

[38] Article 142 of the constitution
[39] Article 142 (1)
[40] J.B Odoki Judicial conduct and practices pg132
[41] The National objectives and directive principles of state policy and in particular No. 6 of the National policy

The judiciary is no exception to the following principles like any other institution the judiciary is also bound by the rule of law. Judicial power, exercised by the courts, in accordance with which states, Judicial powers is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people" Judicial powers is held and discharged in trust for the people and it is an inherent and necessary obligation that trustees do account to both the owners and the beneficiaries how the trust in their charge has been discharged.[42]

The judges decide cases with the evidence brought before them and the law applicable. All judgments of all trial courts and appeal courts are subjected to appeal except the decisions of the Supreme Court. This is to allow corrections or the modification of such judgments by the appellant courts. The reasoning in the judicial decisions and the conduct to the proceedings are subjected to criticism by the appellant courts.

The Judges are wielding with enormous powers and their decisions affect liberty, property, citizenship and individual reputation in particular, this is why courts held accountable for their decisions. The courts of this country have for over a century acted fairly and competently and honestly, and independently of improper influence. They do so today, they will do so in future.[43] This is not a matter for debate, it is fact. In this regard the court of no other country surpass our courts and very few and equal them.

Accountability may take different dimensions depending on the nature of the trust being discharged. For honorable members of parliament, and other elected officials, this may be exacted through regular elections, publication of voting records in parliament, or contribution made to debate in the house, among other instrument, depending on whoever is making the evaluation and the immediate purpose of such evaluation. For other servants of the people, or other organizations and individuals, it may be periodic evaluation related to their performance, productivity and contribution to the realization of the objectives of the organization.

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[42] Article 126 of the constitutio

[43] Accountability or independence assessing courts and judges performance by FMS Engender Ntenda

2.7 Judicial Immunity

Judicial immunity is one of the principles outlined for ensuring judicial independence. In Uganda like any other commonwealth countries, judge enjoys absolute immunity from both criminal and civil actions in respect of judicial decisions. Judges are not exposed to answer questions related to judicial administrative decisions made by them in the exercise of their judicial functions.

Judicial officers are protected under the Judicature Act cap 13 section 46 (1)[44] "inter alia" A judge or commission or other person acting judicially shall not be liable to be sued in any civil court for any act done or ordered to be done by that person in the discharge of his or her or it's judicial functions whether or not within the limits of his or her or its jurisdictions. Persons bound to execute orders of such a judge or other person acting judicially are similarly immune from civil proceedings which could arise out of law is equally protected

Under the Uganda Penal Code Act Cap 120, it is an offence for anyone to use any speech or writing for the purpose of misrepresenting court proceeding or influence a judicial tribunal or undermining it's reputation and authority, in a case which is prejudice. This law is intended to enable judges to administer justice without fear or public clamor, political prejudice or social or other means of propaganda.

Article 128(4) of the Constitution of the republic of uganda1995 states that:

A person exercising judicial powers shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial powers.

2.8 Conclusion

The inherent jurisdiction of the court may be defined as being the reserve fund of powers, a residential source of powers which the court may draw upon as necessary whenever it is just or equitable to do so in particular to ensure observance of due process of law, to prevent improper vexation or oppression to do justice between the parties and to secure a fair trial between them.

[44] Cap 13 section 46(1)

A definition somewhat to this effect may be found in the Civil Procedure Act, which provides:

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

It was derived form the Indian Civil Procedure Code.

It may be observed that this view of the nature of the inherent jurisdiction of the court postulates the existence of amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent.

CHAPTER THREE

THE INDEPENDENCE OF JUDICIARY IN UGANDA IS AMYTH?

3.1 Introduction

This notice examine show the principle of the independence of the judiciary has been addressed in Uganda over the years. It gives a historical perspective on the Ugandan judiciary beginning with colonial times, through to post independence Uganda and various governments which ruled Uganda.

The origins of the principle of the independence of the judiciary comes from the doctrine of Separation of powers, which basically states that the three arms of government, that is the executive, legislature and the judiciary, must be independent of each other and separate from one another. This doctrine was most famously expanded by Montesquieu, a French jurist. The primary meaning of his doctrine is that every thing must be done according to the laws.

A Historical perspective on the independence of the judiciary in Uganda (1900- present)

The legal framework under which the colonial government exercised its powers over the people of Uganda was contained in the (Buganda) Uganda agreement of 1900 and the 1902 order in council. The major aim was to maintain law and order and ensure the smooth running of the colonial administration machinery. Maintaining law and order was paramount and not subject to judicial consideration or appeal.

The protectorate was headed by governor who exercised executive, legislative and judicial powers. For example, under section 2 of the deportation ordinance 1908, the governor could order the deportation of any person whom they suspected to be dangerous to the peace and security.

In any state, there is always an institution responsible for the making and enforcing of the laws and this is the government.[45] A state without government is a state in chaos. When studied well

[15] Article 79(2) of the constitution of 1995

the powers of the government are traditionally divided into three branches. This includes the executive legislature and the judiciary. The three branches of the government work together hand by hand and that without one of them two cannot effectively work well.

4.1 Judiciary

The judiciary plays a leading role as the custodian of the Constitution, guardian of the basic human rights and freedom, and promoter of the rule of law. The judiciary can only achieve this role through its machinery by just settlement of disputes between citizens and between the state and its citizens. In order for judiciary to succeed in dispensing justice impartially, it must be accorded judicial independence from interference by any authority or person in the exercise of its judicial functions. This is to enable courts to be impartial and unbiased in judging cases so that they administer justice without fear or favor according to Article 128 (2) of the constitution of the republic of Uganda 1995.[46].

Judiciary is the judicial department which consists of the courts, the judicial officers and the supporting staff. The head of administration in judiciary is the chief justice however, the chief registrar of the courts of judicature is responsible for the administration of the courts.

In the appointments of judicial officers, it is done by an independent judicial service commission which is established by the law, "There shall be a Judicial Service Commission" it has a chairperson and eight members on its board. The chairperson and deputy chairperson are qualified persons to be appointed justices of the Supreme Court. It should be noted that chief Justice, Deputy Chief Justice and Principal Judge are not allowed to be members of Judicial Service Commission. The other members includes the Attorney General, a Judge of the Supreme Court representing Judges, two Advocates representing Uganda Law Society, two lay more persons and one member representing the Public Service Commission. All this shows how the commission is constituted to man its duties and to promote the independence of the judiciary in Uganda.

[16] Article 128(2) of the constitution of 1995

The main role for the commission is recommending judges to the President who heads the executive for appointment with approval of parliament and advising on the terms and conditions of judicial officers. It also organizes judicial and public education, receives public complainants about the administration of justice and advises executive on the administration of justice.

Due to this openness in the appointment of the judges, judiciary is independent respected, fearless and impartial. The organs which are entrusted with the interpretation of the laws and its application by rules or discretion of facts of the particular cases, are the courts of law or the courts of justice or simply the judiciary[47].

Judiciary is also charged with the responsibility of determining legality of the different kinds of behavior in society. Courts hear both matters of civil and criminal that may raise

Appropriately in a court with jurisdiction on the subject at hand. The courts are duty bound to reach decisions and justice demands that they do so expeditiously[48]

Courts are duty bound by the statutory provisions except where such provisions are inconsistent with the constitution[49]. Though there are some statutes which give room to judicial discretion. The court then applies the principles and rules of the common law, equity, custom and international law. Equity here is when the principle of the natural justice, fairness and special circumstance of the particular cases come into play.

4.2 The Legislature

This body is known by sever1 names, It is known as Parliament, National Assembly or as we had it in 1986 to 1994 as National Resistance Council.

The legislature is a law making body in any country and it is the supreme organ of the state because it consists of the member directly elected as their representatives. This means that what those people do they reflect the people who voted them.

[47] Article 146 of 1995 constitution
[48] Uganda Law Living Journal 2000
[49] Article 2(2) of the constitution

Parliament is constitutionally recognized as the legislative organ under the chapter six of the Constitution of the republic of Uganda 1995 Article 77(1)[50] as There shall be a Parliament of Uganda." Among other functions of parliament as legislature is to have an oversight over the functions of the executive. Protect the constitution and to promote democracy.,

As indicated above the main function of parliament is to make laws on any matter for the peace, order development and good governance of Uganda. but it has many others according to article 79 (2) of the constitution of the republic of Uganda 1995[51]

These includes, the approval of Presidential appointments, the approval of a state of emergency and declaration of wars the determination of emoluments of political leaders and specified constitutional offices, the discussion or initiation of bills and the assessment and evaluation of activities of government and other bodies, and the censoring of ministers for misconduct or non performance of their duties.

Parliament has the powers for from standing and session committees. These standing committees have the powers to call any minister or any person to appear and give evidence. They have the powers of the High Court to enforce attendance of witnesses and production of documents. The constitution made a major shift to make checks and the balance of the power between the executive and the legislature in favor of the latter as the most representative democratic institution in the country[52].

4.3 The Executives

This is another arm of government as it is pointed out in chapter seven of the Constitution of the republic of Uganda 1995.[53] It consists of the President or head of state, cabinet ministers and other government officials. The executive is responsible for initiating policies which can be translated into laws by the legislature. The ministers are Head of Government departments

[50] 1995 constitution.
[51] Article 79(2)
[52] Article 90(30)
[53] Chapter 7 of the 1995 constitution

responsible for the supervision and monitoring of government policies in their respective ministries.

Executive is headed by the President who is democratically elected president. The President is the fountain of honor, represents all Ugandans and is accountable to them. His election can be only challenged in the Supreme Court[54]. The term of office for ministers is five years, limited to the president is now open so long as the people vote him into office.

The president is not a member of parliament but has power to Veto legislation, which can then be overridden by parliament. The President has the power to veto legislation or not In case when the president does not veto legislation can be taken back to the parliament to make same revisions on them. However, this can be overridden by the parliament in case where the president refuses to sign.[55]

The presidential appointment includes ministers, judges, ambassadors and other officials of the executives which need approval of parliament.

However in Ugandan parliament the ministers remains Member of Parliament if they are elected members of parliament and those who are not elected members becomes ex-officio Member of Parliament without voting rights. The reason for this was to enable the president to choose those members who he found suitable and capable.

4.4 Relationship among Organs of Government.

The judiciary is regarded as the third arm of government, following parliament which is the legislature and the executive. However, in terms of its powers to make decisions and adjudicate finally on matter affecting persons, institution and governments, the judiciary is preeminent.[56] In the making and unmaking of laws, parliament may be said to be sovereign, in the execution of policies, the executive is all powerful, but in determining constitutionally and legality of those

[54] Dr. Kiiza Besigye Vs Yoweri Kaguta Museveni Election petitions No 1/206 Article 104 of the constitution.
[55] Article 9(3) of 1995 constitution
[56] Constitution and political history of Uganda by justice Kanyehamba (JSC) 289

Laws and policies and in determining the legal propriety of every act or behavior of anyone including members of parliament, the judiciary is supreme.

For the independence of the judiciary, the constitution of the republic of Uganda 1995 established and protects the independence judiciary and judicial officers. In order to acknowledge the exercise of judicial powers, the courts shall be independent and shall not be subject to the control or direction of any person or authority. No person or authority shall interfere with the courts or judicial functions. All organs and agencies of the government shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. A person exercise judicial powers shall not be liable to any person or action or suit for any act or omission by that person.[57]

In the exercise of judicial powers, there is relationship between the three organs of government under the doctrine of checks and balances, the operation of these organs is under the consent and co-operation of the two organs. This means that there are consultations of all organs around during the normal business. If the Executive wishes to adopt a certain policy it must first publish it so that it is in the open and subject to comment and debate. The policy must be considered, discussed encompassed into law by the legislature. Any individual aggrieved by the policy either as proposed by the executive or passed by the legislature should have access to courts for the purpose of determining the validity, legitimacy and constitutionality or legality of the policy or laws passed to implement it.[58]

As you may be aware, the president is the head of the executive arm of the government[59] but at the same time, for bills to become laws the president must veto on them. Among others the presidential appointments includes judges with the help of the judicial service commission and approved by the parliament. This shows the closed relationship between the judiciary and the executive in the areas of appointments.

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[57] Article 128 (4) of the constitution

[58] The search for a N national consensus (the making of the 195 Uganda constitution) by Benjamin Odoki (JSC) 2005 publication pg 31

[59] Article 99 (1)

CHAPTER FOUR

THE RELATIONSHIP BETWEEN JUDICIARY AND OTHER ORGANS OF GOVERNMENT

4.0 Introduction

Judiciary criticism by the government normally interferes with the principle of the doctrine of independence of judiciary. Chief Justice, Benjamin Odoki said that the opposition and the government only see justice on their side when they win cases and they insult the court when they lose Sunday Vision February 18 2007 pg 5[60] from recent press reports one- gets the impression that anybody can tell the courts what to do. This is not true. Our constitution spell out clearly the functions and of each arm of government.

There are at times or on several occasions when judiciary is used by political parties to fight political battles. This comes when the President of FDC called courts as being "impotent." This was made after the Principle Judge words constitutional application No. 1/1997[61]

"Interference as well as ignoring and disrespecting court orders. Some of the cases which made love-hate relationship between litigants (oppositions and government) and judiciary."

In **Tinyefuza vs. Attorney General case of 1997**[62] when he petition the constitutional court for a declaration that he was no longer a member of the UPDF and therefore was not bound by the army code. Tinyefuza petition was successful but later on appeal in the Supreme Court was overturned. The opposition accused the judges of the Supreme Court as being compromised to overturn the Constitutional Court ruling.

Another case was **Dr. Paul Ssemogerere and 0mm vs. Attorney General**[63] **in 2000**, they went to court to challenge the referendum Act. The Act was a law under which a vote on the preferred political system was to be carried out in Uganda. The petition was heard after the referendum

[60] Benjamin Odoki, Sunday vision, February 18 2007 pg 5
[61] Constitutional Application No.1/1997
[62] Constitutional Application No.1/1997
[63] Constitutional Application No.of 2001

had been held. The court dismissed the petition by three to two majorities. The President said the ruling served to usurp the powers of the people who had decided on a political system in the reference. When the state appealed to the Supreme Court which over turned the lower court's ruling, Ssemogerere and the rest of the opposition were angry and attacked the Supreme Court accusing it of making a "political judgment".

Last but not list; **Besigye Kizza vs. Yoweri Kaguta Museveni**[64] **of 2001** case seeking nullification of the result that showed Yoweri Museveni as the winner. He lost the petition and attacked the Supreme Court Judges saying that they were compromised.

The last **Besigye Kiiza vs. Yoweri Kaguta Museveni Election petition No.1/2006.**[65] Besigye against lost election petition against President Museveni for the second time. The Supreme Court Judges upheld the results by a 4-3 majority. Besigye had claimed that the election was fraught with fraud and bribery, disenfranchising of his supporters falsification of the results and breach of the electoral law.

The three judges ruled that the election should be nullified but four disagreed. Besigye and his opposition friends reacted angrily to the ruling and accused the judges of being compromised. He said his party would not be associated with or respect the decision and that it was the last petition he was lodging before court.

It is interesting to end with the drama of March 1st 2007 when the military men and women invaded court when the PRA were granted bail. There was tight security at the High Court and the suspect refused to sign bail forms fearing re- arrest. The security sealed off the court premises and arrested them.

The question was whether the judicial arm of government was overstepped on its constitutional mandate and trespassed into the constitutional jurisdiction of the executive or legislature to justify desecration of the temple of justice.

The drama of that day drew the wrath of the Judges who accused the government of invading

[64] Election petition 2001
[65] Election petition No.1/206

The temple of justice and disobeying courts orders, among others. The judiciary announced it was

Suspending work all over the country and demand the following[66]

• The issue a comprehensive statement on this atrocious incident and unprecedented event.

• To call on the Executive to apologies for these events.

• To ask the Executive to give assurances on the non-repetition of these incidents of affront to the integrity and independence of judiciary.

• To cite in contempt and or prosecute security personnel responsible for the criminal acts of violence, assault, and malicious damages to property at the High Court.

• To suspend with effect from the 5th of March 2007 all judicial business in all the courts in Uganda.

• To convene a meeting on 9th March 2007 of all judicial officers from the rank of Chief Magistrates and above it the High Court, Kampala to chart the way forward.

• These actions have been taken not for reasons of the re-arrest or re- charging of the PRA suspects, but because of:

a) The repeated violations of the sanctity of the court premises,

b) The repeated disobedience of court orders with impunity

c) The constant threats and attacks on the safety and independence of the judiciary and of individual judicial officers.

d) The savagery and violence exhibited by security personnel within the court premises.

[66] Judiciary statement on PRA saga at High court New Vision Monday 5/2007 pg6

e) The failure by all organs and agencies of the state to accord to the courts assistance as required ensuring effectiveness of the courts as provided under article 128(3) of the Constitution of the Republic of Uganda 1995.

f) The recognition that judiciary power is derived from the people, to be exercised by the courts on behalf of the people in conformity with the law, the values, norms and aspiration of the people of Uganda.

• To suspend with effect from the 5th of March 2007 all judicial business in all the courts in Uganda.

• To convene a meeting on 9th March 2007 of all judicial officers from the rank of Chief Magistrates and above at the High Court, Kampala to chart the way forward[67].

[67] Judiciary statement on PRA saga at High court New Vision Monday 5/2007 pg6

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATION

5.1 Introduction

In Uganda, this principle of independence of the judiciary is well embedded under article 128 of the Constitution which provide that the courts shall be independent and shall not be subject to the control or direction of any person or authority and no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the court. A person exercising judicial powers shall not be liable to any actions or suit for any act or omission by that person in the exercise of judicial powers.

The judiciary's budget is charged on the consolidated fund and judicial officers are entitled to salary, allowance and privileges and retirement benefit which are not to be varied to any ones advantage or disadvantage. This constitution, provision need to be upheld for the effective judicial processes and without invasion and interference by other organizations of government.

This has been an attack on the judges and judicial officers following various decisions by Supreme Court. This includes **Paul Ssemogerere and Zachary Olum vs. Attorney General**, constitutional petition[68] and Presidential Election Petition of Dr. Kiiza Besigye vs. Yoweri Kaguta Museveni[69], the attack on Judges were most deplorable, and ought not to happen again. That exhibited an inter branch conflict arising out of the inherent tension between judicial independence and accountability. The political parties should never be allowed to threaten judicial independence.

There is enervation of the new trend of judicial criticism by both the government and members of the opposition. My concern is the extent at which public should critics the Judicial decisions. This criticism of the judicial decision under minds public confidence is our judicial

[68] No 3/1999
[69] No. 1/2006

independence. This is done to a lack of understanding of the judiciary system itself. If one thinks that he/she has been robed of his justice the only alternative is to appeal to the higher court instead or criticism to the judicial officer. Disagreement with particular decision of a judge is not a proper basis for robot criticism. Judges who are threatened by such criticism on account of unproved rulings should not be deterred from exercising their independent judgment or reading decisions according to the law.

5.2 Findings

The researcher while carrying out the study he realized that, The law council should develop effective mechanism for evaluating and when appropriate, promptly respond to misleading criticism of judges and judicial decisions. It should be put upon the government through the Uganda Law Society to educate the society or the public about the importance of the independence of judiciary and impartial system of equal justice. Those who value judicial independence must stand ready to protect it. It is incumbent upon the lawyers to step up and assume a leadership role in this regard of educating the public. During this time judges, legislatures, lawyers and the general public to work together actively and aggressively to address the causes of popular dissatisfaction with the courts to restore public confidence in our judicial system. This therefore preserves judicial independence as a value of all to cherish.

The judiciary's strike announced by then acting chief justice Lactitia Kikonyogo was as a result of what the judges citied as :'repeated violation of the sanctify of court, disobedience of the court orders with impunity and the constant threats and attacks on the safety and the independence of judiciary and judicial officers"

On Thursday 1 March 2007, the police and military security operative raided the High Court premises in Kampala to re-arrest six suspects who had been granted bail by the court. This was the second raid in less than two years, the first having taken place on November 15, 2005 by infamous Black Mamba military unit. In this raid the judges demanded an apology from the Executive and wanted the security personnel cited in the siege to be held in the contempt or prosecuted.

However, the President's letters as appeared in the monitor of 12th March 2007 page 4 stated that "Government assures that Judiciary and the general public that it undertakes to do all in its power to ensure that no repetition of such incidents will take place. The government reaffirms its adherence to the safety and independence of the judiciary as an institution and of individual judicial officers and to uphold the rule of law. All organs and agencies of the state will always accord to the courts such assistance as may be required to ensure the effectiveness of the courts as provided by article 128(3) of the Constitution. The judiciary objected to the manner in which the arrest of the PRA suspect was affected. It is possible the government lawyers and security officers over reacted in this process. The government will investigate the matter and determine if there were breaches of the law or procedure in the process of re-arresting these suspects and if indeed these were breach, it will take corrective measures. Legal and transparent modus operands for re-arresting suspects released by the courts will be formulated and agreed on by the agencies involved in the administration of justice.

The lawyers strike followed the Uganda Law Society (ULS) emergency meeting of March 6 2007 that concept of the court siege, calling it government, interference on judicial independence. This strike was symbolic way by the lawyers to condemn interference with the independence of the court. The Chief justice J.B. Odoki referred to the siege as a gross infringement on the independence of the judiciary by the executives (lawyer's strike gets underway) Monitor March 12/2007 page 2.

The Registrar of the court of Judicature Mr. Lawrence Gidudu by then said that, this was a good gesture that the lawyers are striking in solidarity with the judiciary which had been also on strike. This was followed by the marked of cleansing ceremony of the High Court.

The reporting of inaccurate criticism of judges, courts or our system of justice by the news media ie radio, newspapers, television etc erodes public confidence and weakens the administration of justice. It is vital that the courts, their procedure and decision are fair and impartial.

5.3 Recommendation

The independence of the Judiciary stems from the unique role of Judges and other judicial officers in society. It makes the system of impartial justice possible by enabling judges to protect and enforce the rights of the people and by allowing them without fear of reprisal to strike down actions of the legislature and executive branches of government which run a foul of the rule of law.

Impendence of the judiciary is not for the personal benefit of the judges but rather for the protection of the people whose rights only an independent judge can preserve. The impartial administration of a justice system requires that the judiciary be given a significant degree of independence from other branches of government.

The parties who have disputes which they have failed to settle between themselves go to court to ask judicial officers to decide how the law applies to their situation. Judges listen to the evidence and counselors arguments and they make a decision.

It is necessary that Judges act fairly, in good faith, without bias and in a judicial temper. An independent judiciary is the key to upholding the rule of law in a democratic society. It is also a key in the protection of human rights. Their role is independent on the guarantee that judges are free and are reasonably perceived to be free to make impartial decisions based on the facts and the law in each case and to exercise their role as protectors of the constitution without any pressure or interference from legislature and the executive organs of the government. The Judge's role in all this is to make a right decision. Forget about popular decision or the decision that other people might have wanted. Just make a right decision. Judges should refrain from going public about the decisions they have made and generally avoid commenting on legal trends or political events. It should be remembered that judges only enhance to inform all who maybe interested in why he/she came to a particular decision is to advise them to read his/her judgments. The judge never gets a second chance to explain a judgment. Such decisions are only allowed to have second chance on appeal to a different judge.

Judges ought to be strained from or keep off politics or else they are seen or perceived to have a bias that could affect impartial decision making that changes the principle of independence of the judiciary.

5.4 Conclusion

Generally it is undesirable for a judge to answer criticism of her or his own actions appearing in the news media. The risk is apparent that a response by a judge to criticism of her/his own actions may be perceived by the community as self-serving and or as a defensive position which falls for lack of credibility. Further, a judge's comment contains the potential of reflecting on pending litigation and may have undesirable effect on litigants. Therefore, cooperation of lawyers and bar associations is necessary or in accurate or unjust criticism should be answered and prevented through an organized public information program.

The appointment of Judges and Legal Judicial Officers normally appoint the individuals from the Legal Professional. These Professional should adhere to professional code of conduct.

Conclusively the judiciary is independent according to the constitutional provisions and other related laws however in practice the independence of the judiciary is a myth as ell articulated above.

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