IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA

(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, Fakihi A. Jundu, JJ)

REFERENCE NO. 2 OF 2011

BETWEEN

EAST AFRICA LAW SOCIETY.. APPLICANT

AND

THE ATTORNEY GENERAL OF THE
REPUBLIC OF UGANDA...1ST RESPONDENT

AND

SECRETARY GENERAL OF THE
EAST AFRICAN COMMUNITY..................................2ND RESPONDENT

28TH MARCH, 2018

JUDGMENT OF THE COURT

A. INTRODUCTION

1. The Reference before the Court was filed by the Applicant on 31st May, 2011. It is predicated upon the provisions of Articles 21, 22, 24 and 29 of the Constitution of the Republic of Uganda, as read together with Articles 6(d), 7(2), 27, 29, 30, 38 & 71 of the Treaty for the Establishment of the East African Community (**the Treaty**), Articles 3, 4, 5, 6, 9, 10, 11 & 28 of the African Charter on Human and Peoples Rights, Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure,2013 (**the Rules**) as well as the inherent powers of the Court.

2. By a notice of motion **Application No. 7 of 2011**, dated 23rd August, 2011 premised on the provisions of Rules 12, 21(4), 48 & 50 of the Rules, the Applicant sought to amend the Reference. The Application was predicated upon the grounds that the amendments were necessary to determine the real question in controversy between the parties, and, to correct an error in the phraseology to better bring out the issues for determination by this Court. The Court, (Busingye, PJ; Stella Arach-Amoko, DPJ; & Butasi, J) delivered its ruling on 27th September, 2011 allowing the amendments to be made.

B. PARTIES AND REPRESENTATION

3. The Applicant has described itself as the premier regional lawyers' Association in East Africa with dual membership of over 8,000 individual lawyers and 6 Law Societies. It is registered as a Company Limited by guarantee in Tanzania and as a foreign company limited by guarantee in Kenya, Uganda and Rwanda. It was, in these proceedings, variously

represented by Prof. Fredrick Ssempebwa, Alex Mogongolwa, Otiende Amolo, Richard Onsongo and Humphrey Mtuy, Advocates, and its address for service is given as Plot No.64, Haile Selassie Road, P.O. Box 6240, Arusha, Tanzania.

4. The 1st Respondent is the Chief Legal Advisor of the Government of Uganda and is sued on behalf of that Government and his address for service is Plot No.1, Parliament Avenue, P. O. Box 7183, Kampala, Uganda.

5. The 2nd Respondent is sued in his capacity as the custodian of all legal instruments of the East African Community, the principal Executive Officer thereof and Head of its Secretariat as well as Secretary of its Summit. His address for service is the EAC Building, EAC Road, P. O. BOX 1096, Arusha, Tanzania.

C. THE APPLICANT'S CASE

6. In the Amended Reference, the Applicant contends that there was violation by the 1st Respondent, of the provisions of Articles 21, 22, 24 & 29 of the Constitution of the Republic of Uganda, 1995, in circumstances to be set out shortly. It is thus averred that the actions, as reaffirmed by the Constitutional Court of Uganda in **Muwanga Kivumbi v Attorney General, Constitutional Petition No.9 of 2005**, contravened the provisions of Articles 6(d) and 7(2) of the Treaty and Articles 3,4,5,6,9,10,11 and 28 of the African Charter on Human and Peoples Rights.

7. The Applicant further contends that there was continued willful disregard of the decisions of the Constitutional Court of Uganda by the agents of

the 1st Respondent, namely the police, military and other state agencies, which actions amounted to an affront to the independence of the Judiciary and amounted to State inspired impunity for human rights violations in contravention of the Treaty.

8. The grounds upon which the alleged violations of the Constitution of Uganda and Treaty were violated are set out in the Reference as follows:

(a) On or about 11th April, 2011, various groups of Ugandan citizens decided to exercise their fundamental and constitutional rights to freedom of movement and association by walking to work in protest against the high costs of fuel, transport and living in their Country;

(b) By various public announcements, the police were also duly informed of planned peaceful and unarmed protests that the citizens intended to engage in within the City of Kampala;

(c) The police responded by declaring that the planned walk to work protests were illegal, and vowed to arrest any person who attempted to or participated in them;

(d) On or about 11th April, 2011, and on diverse dates thereafter, those that participated in the walk to work protests were violently and brutally attacked by the police and military under the direction of the 1st Respondent, allegedly resulting in hundreds being injured and the death of over ten (10) people, including two (2) children. Scores of others were also allegedly arrested and

detained for purportedly engaging in an unlawful assembly, inciting violence and disobeying lawful police orders;

(e) On 29th April, 2011, an agent of the 1st Respondent, one Gilbert Arinaitwe, armed with a pistol, teargas and pepper spray, smashed the windshield of a vehicle belonging to one of the opposition leaders in Uganda, Col. (Rtd) Dr. Kiiza Besigye, who was unarmed and being driven to work, and thereafter sprayed him with the pepper spray and deployed the teargas;

(f) Under the direction of the agents and servants of the 1st Respondent, the police continued to arrest, detain and charge innocent citizens in the guise that they had illegally and unlawfully participated in the walk to work protests. This, it was alleged, was in contravention of the Constitutional Court of Uganda decision in ***Constitutional Petition No. 9 of 2005****aforesaid that nullified the provisions of Section 32(2) of the Police Act, relied on by the police for their actions, for being unconstitutional;*

(g) The continued crackdown on unarmed peaceful protestors in Uganda by the police and military forces was unlawful, and amounted to cruel, inhuman, degrading treatment, and which allegedly occasioned the death of over ten (10) innocent civilians, caused injuries, suffering, disfigurement and loss of property to many other innocent civilians and citizens, which was a contravention of Uganda's obligations under the Treaty to uphold human rights, good governance and adhere to the rule of law;

(h) *That the violations as stated above were widely reported in both the print and electronic media all over the world and East Africa in particular, and that they became so notorious that every person, including the 2nd Respondent, had notice or must have had notice of them;*

(i) *The Applicant duly notified the 1st and 2nd Respondents that their actions amounted to a violation of fundamental human rights and were thus unconstitutional; and that the 2nd Respondent, despite being made aware of these violations, failed and/or neglected to fulfill his obligations under Articles 29(1) and 71(1)(d) of the Treaty to conduct investigations, collect information and verify facts relating to the said violations and take consequential action under the aforementioned Articles.*

9. The Reference is supported by the affidavits of Sam Mugumya and Francis Mwijukye both sworn on 27th May, 2011, Ssemujju Ibrahim Nganda (undated) and James Aggrey Mwamu sworn on 2nd April, 2012. Their contents will be discussed later in this Judgment. The Applicant also filed its submissions dated 9th May, 2012 on the same day.

10. The prayers sought by the Applicant for the above reasons are the following:

(a) *A declaration that the actions of the agents of the 1st Respondent and its employees, servants and of the military and the police of Uganda under the direction of the 1st Respondent are in violation of Articles 21,22,24 & 29 of the Constitution of the Republic of Uganda, and contravene Articles 6(d) & 7(2) of the Treaty for the Establishment*

of the East African Community and Articles 3,4,5,6,11 & 28 of the African Charter on Human and Peoples Rights;

(b) A declaration that the 2nd Respondent failed to fulfill his obligations under Articles 29 & 71 of the Treaty for the Establishment of the East African Community;

(c) Order that the costs of and incidental to the Reference be met by the Respondents; and That this honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.

D. THE 1ST RESPONDENT'S CASE

11. The 1st Respondent replied to the Reference by filing its response dated 25th July, 2011 and a further Amended Response dated 6th October, 2011. In both responses, the 1st Respondent denied the allegations, made by the Applicant, of violation of fundamental human rights and denied that the Reference was in any event barred in law and offends the provisions of the Treaty.

12. The 1st Respondent further contends that the issues raised are not justiciable and that the Reference invoked a jurisdiction not bestowed upon this Court and seeks declarations and orders which cannot be granted by this Court in fact and in law. That they also undermine the sovereign jurisdiction of the respective national Courts specifically those of the Republic of Uganda.

13. The 1st Respondent further states that at all times and in all instances, he acted professionally under the constitutional mandate given to him in accordance with and within the confines of the laws of Uganda, the Treaty,

the African Charter on Human and Peoples Rights and all related instruments.

14. The 1st Respondent in addition further denies that the walk to work protests were ever declared illegal, nor that any person who attempted to walk to work was arrested, tear gassed, killed nor assaulted. That in fact on the material days, his agents issued guidelines regulating the orderly movement of citizens in observance of the rule of law and in accordance with the Constitution of Uganda, laws of Uganda and related instruments. They also provided security as well as protection to all citizens and maintained law and order during the protests.

15. Furthermore, it was denied that the agents of the 1st Respondent willfully or otherwise disregarded the decisions of the Constitutional Court of Uganda or undermined the independence of the Judiciary or condoned impunity as alleged.

16. The 1st Respondent has also in addition stated that the Applicant was not entitled to the remedies claimed and that the dismissal of the Reference was proper and without prejudice. That in any event, the Reference and the accompanying affidavits were of a generalized and amorphous nature and did not specifically plead facts and grounds supporting the reference and therefore violated Rule 38 of the Rules.

17. The Response was supported *inter alia* by the affidavit of Nanding' Christine, the Acting Assistant Commissioner of Police in the Legal Department of the Uganda Police Force, sworn on 21st July, 2011 and who reiterated the issues canvassed in the Response, and further deposed that the Uganda Police Force acted in accordance with their constitutional

mandate and the laws of Uganda in dealing with volatile and escalating circumstances during the walk to work protests. And that the persons arrested at all material times were suspected of having committed criminal offences under the Penal Laws of Uganda. The Affidavits of Grace Turyagumanawe, Amos Mpungu George and Ekaju William further addressed and deponed to specific incidents during the protests which led to police intervention within their mandate to ensure law and order in Kampala. They all denied that the police fired live bullets, acted brutally, unlawfully or unprofessionally on the material dates as alleged by the Applicant.

18. The contentions by the 1st Respondent were further elaborated upon in the submissions filed on 4th June, 2012 and 2nd November, 2017, respectively.

E. 2ND RESPONDENT'S CASE

19. The 2nd Respondent filed his Response to the Reference on 8th July, 2011 and a further Response to the Amended Reference on 11th October, 2011.

20. The 2nd Respondent contends that he was not aware or had knowledge of the events described by the Applicant as alleged in the Reference, but that he had, on 30th August, 2011, written to the government of the Republic of Uganda in terms of Article 7(1)(d) of the Treaty requesting to be furnished with reports on the matters forming the subject of the Reference.

21. The 2nd Respondent further denies that he was informed or notified by the Applicant of the alleged violation of fundamental human rights, or at all, and that he did not therefore abdicate his mandate and responsibilities

under the Treaty as alleged by the Applicant. Furthermore, that he took appropriate measures to address the matters raised once they came to his knowledge by writing to the government of Uganda, through the office of the Permanent Secretary in-charge of the East African Community Affairs on 30th August, 2011, seeking information and a report on the subject matter to enable him report to the Council of Ministers.

22. Both responses were supported by the affidavits of Dr. Tangus Rotich, the then Deputy Secretary General of the East African Community, sworn on 7th July, 2011, and 11th October, 2011, respectively. The deponent reiterated the depositions made in the responses and the said Respondent further filed Submission on 23rd May, 2012.

F. APPLICANT'S REPLY TO THE 1ST RESPONDENT'S RESPONSE

23. On 25th August, 2011, the Applicant filed a Reply to the 1st Respondent's Response on the issues raised therein. The Applicant objected to the argument that the 1st Respondent's agents had acted professionally and in accordance with the law and reiterated the issue of the 1stRespondent's agents' disproportionate use of force, acting unprofessionally and outside the confines of the law, undermining the independence of the Judiciary and condoning impunity.

G. THE ISSUES FOR DETERMINATION

24. At the Scheduling Conference held on 23rd February, 2012, the following were the issues highlighted for determination:

(1) Whether the 1st Respondent and its agents committed the acts alleged in the Reference and in particular:

(a) Whether the 1st Respondent and its agents declared that the walk to work procession was illegal and prevented them from proceeding; (sic)

(b) Whether the 1st Respondent acted lawfully, proportionately and professionally in providing and working by guidelines aimed at regulating the movement of the persons and observance of the rule of law;

(2) Whether the 2nd Respondent:

(a) Had personal knowledge of the alleged facts;
(b) Took appropriate action under Articles 29(1) and 71(1)(d) of the Treaty.

(3) Whether on a proper construction of Articles 29(1) and 71(1)(d) of the Treaty, there is a cause of action disclosed against the 2nd Respondent;

(4) Whether the alleged acts or omissions of the Respondents or the 1st Respondent's agents amounted to violation of the Treaty;

(5) Whether the Applicant is entitled to bring this Reference;

(6) Whether the affidavit of James Aggrey Mwamu and the accompanying electronic evidence is admissible; and

(7) Whether the Applicant is entitled to the declarations/remedies sought.

25. We have considered the pleadings filed by the respective parties, submissions made, both oral and written, and the arguments made in open court. In that regard, Issue Nos. (5) and (6) must be determined first as

they relate to *locus standi* and admissibility of evidence. Issues Nos. (2) and (3) will then be determined together as they both relate to the question whether the 2nd Respondent was properly sued. Issues Nos. (1) and (4) will also be determined jointly as they go to the merit of the Reference before finally Issue No. (7) is determined i.e. whether the Applicant is entitled to any remedies.

H. DETERMINATION OF ISSUES NOS. 5 AND 6

26. With regards to the issue of *locus standi* and whether the Applicant was entitled to file the Reference (Issue no.5), the Applicant submitted on the import of Article 30 of the Treaty as well as the case of ***East Africa Law Society & 4 others v The Attorney General of Uganda & Others*, EACJ Reference No.2 of 2007**. At Article 30(1) of the Treaty, it is provided that;

> ***(1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this treaty.*** (Emphasis added).

27. Further, in ***East Africa Law Society & 4 Others v The Attorney General of Uganda & Others*** (supra), it was held at para 16 thus:

> ***"The Applicants herein are bar associations in their respective partner states and have a duty to promote adherence to the rule of law. We are therefore satisfied that***

the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents. We therefore hold that the Applicants have locus standi to make this application."

28. In consideration of the provisions of Article 30(1) of the Treaty therefore and guided by the holding in ***East Africa Law Society & 4 Others v The Attorney General of Uganda & Others*** (supra), we have no hesitation in holding that the Applicant, which is the same entity that has previously instituted many cases before this Court, as a legal entity and person within the meaning of Article 30(1) aforesaid has the *locus standi* to institute these proceedings alleging violations of the Treaty and we do not understand the basis for the objection raised in that regard.

29. Having determined that the Applicants had *locus standi* to institute these proceedings, the next issue for determination would be as to whether the affidavit of James Aggrey Mwamu and the accompanying electronic evidence is admissible. (Issue No.6). This issue requires deep examination as it formed the basis for the delay in finalizing the Reference with applications and appeals taking the better part of the six years between the filing of the Reference and the conclusion of the hearing.

30. On that issue, we note that the question of the production of the video evidence attached to Mr. Mwamu's Affidavit had been considered by the Court in ***Application No. 12 of 2012*** dated 2nd September, 2012 filed by the Applicant pursuant to Rule 46(1) of the Rules of Procedure, where it sought leave to produce additional evidence in the form of documentation and electronic format after the close of pleadings. In its determination of

the application on 13th February, 2013, the Court allowed the application and the Applicant was granted leave to produce the additional evidence.

31. Being aggrieved by the decision of the Court, to grant leave aforesaid, the 1st Respondent filed an Appeal to the Appellate Division of this Court, being ***Appeal No. 1 of 2013*** (Tunoi, VP, Ogoola & Nkurunziza, JJA). The Court in dismissing the appeal and referring the matter back to this Division for determination stated as follows:

> ***"The First Instance Division exercised its discretion properly, within the principles enunciated by our law- including the series of well-known and well accepted case law of our jurisprudence. We believe the new evidence sought to be produced is relevant to the issues at hand; is substantive and substantial; and is likely to influence resolution of the issues before the Court by adding value to the deliberation and resolution of those issues. The new evidence does not constitute a new cause of action; as it merely reflects one of the series of events which occurred in the same transaction. The new evidence will not occasion the Appellant any prejudice, as he is well afforded all reasonable time and opportunity to reply and to rebut that evidence. In the interests of justice, we order that the proposed evidence be allowed to be adduced- notwithstanding any points of legal technicality that may otherwise arise."***

32. In consideration of the ruling and orders of the Appellate Division, the Applicant was thus allowed by this Court to adduce additional evidence in the form of an affidavit and electronic evidence. The 1st Respondent was

still not satisfied and filed **Application No. 17 of 2014** brought under the provisions of Rules 1(2) & 21(1) of the Rules of Procedure challenging the admissibility of the evidence produced by the Applicant. In its determination of the said application, this Court stated inter *alia*:

> ***"In light of the foregoing and given the nature of the case before us, we find that the test for admissibility of the electronic DVD evidence cannot conclusively be conducted at this stage of the proceedings. We are of the view that this matter should properly be revisited during hearing of the main reference itself when the Court deals with the totality of the evidence adduced by the parties before it, rather than taking a piecemeal approach by singling out one piece of evidence and determining its probative value in an evidential vacuum where all other evidence presented by all parties is not before the Court."***

33. The above cited determination was made following a successful appeal by the 1st Respondent in ***Appeal No. 5 of 2014*** (Ugirashebuja, P; Nkurunziza, VP; Ogoola, Rutakangwa & Ringera, JJA) where the Appellate Division on 15th April, 2015 stated *inter alia* that:

> ***"In view of all the above, we find that the First Instance Division erred in striking out Application No. 17 of 2014 without first entertaining the merits of that application. In the result, this instant appeal is granted. Accordingly, we make the following orders;***

(i) The order of the First Instance Division striking out Application No. 17 of 2014 is set aside;

(ii) Application No. 17 of 2014 is hereby restored;

(iii) The above application is hereby remitted to the First Division for hearing and determination on the merits; in accordance with the directions contained in the judgment of this Appellate Division [in Appeal] No. 1 of 2013 namely;

(iv) That the additional electronic DVD evidence has been permitted to be adduced; and

(v) That the Attorney General of Uganda is at liberty to challenge the relevance, accuracy, authenticity, credibility and evidential value of that additional evidence as specified in inter alia paragraphs 58,59 & 97 of our judgment in Appeal No. 1 of 2013." (Emphasis added).

34. At the hearing of the Reference, the 1st Respondent argued further to what has already been stated above that the production of the new evidence by the Applicant was untenable as the evidence was presented after the close of pleadings. It was also argued that the evidence could not be taken in isolation without verifying documentation otherwise the Court would be taking the initiative of, more or less on its own, reviewing evidence without the support of a witness testifying in that regard.

35. It was further argued that the standard for authenticating electronic evidence takes the form of testimony by someone with direct knowledge

that the produced evidence is what it purports to be. Reliance in that regard was placed on the case of ***US v Briscoe 896 F.2d 1476 (7th Circuit 1990)*** where it was held that a proper foundation of computer records was generally established if the party presenting the computer records, provides sufficient facts to warrant a finding that the records are trustworthy and the opposing party is afforded an opportunity to inquire into the accuracy thereof and testify as to how the records were maintained and produced.

36. In countermanding the arguments raised by the 1st Respondent, the Applicant in its submissions dated 14th November, 2017 submitted that by dint of Section 5 of the Electronic Transactions Act of Uganda, read together with Sections 7(1) and (2) as well as 8(1),(2),(4),(5) and (6) of the Act, Sections 58,64(1)(c), 68(1)(a)(ii) & 113 of the Evidence Act Cap 6 of the Laws of Uganda and Section 106(B) of the Evidence Act Cap 80 of the Laws of Kenya, the electronic evidence produced before the Court was admissible and tenable in the circumstances, and as such, the Court should allow it to be admitted as credible evidence of the events it was intended to show and authenticate.

37. The Applicant furthermore argued that it was trite law that a party seeking the admission of video or audio recordings is not required to prove beyond doubt the accuracy of the record, rather, that enough evidence required to satisfy the inquiry has been placed before the Court and the burden thereafter shifts to the opponents to prove that the recording is unreliable or that they have evidence to the contrary. They also relied on the Ruling in ***The Attorney General of the Republic of Uganda v The East Africa Law Society & The Secretary General of the East African Community* Application No. 17 of 2014** in which the Court held that

rather than have video evidence expunged from the record, the opposing party ought to have produced its own video evidence to contradict the evidence that had been adduced earlier.

38. In addition to the above, it was also submitted that the Court should take judicial notice of the fact that the walk to work protests, which were the subject of the electronic evidence sought to be adduced by the Applicant, was a matter of public notoriety at the time, and that the events that transpired or occurred were not only covered by the local Uganda media, but also regionally and internationally by reputable media houses.

39. The Applicant thus invited the Court, in the absence of any information or fact to the contrary, to presume that the electronic evidence that had been produced before the Court was authentic, and that it was indicative of the incidences and scenes therein depicted as events that likely occurred or happened in relation to the alleged human rights abuses during the walk to work protests.

40. As regards Section 106(B) (i) of Cap 80 of the Laws of Kenya which provides that an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer shall be deemed to be a document, if it satisfies the conditions as set out in sub-section (2) of the said Section, the Applicant thus submitted that it has met those conditions. That the said provisions, as read together with sub-section (4), which provides for the production of a certification verifying the conditions as set out in sub-section (2), shall together form part of the record of what is to be produced before Court as electronic evidence, a condition it had also met.

41. For avoidance of doubt, Section 106(B)(2) reads;

(1) ....

(2) The conditions mentioned in sub-section (1), in respect of a computer output, are the following:

(a) The computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

42. In accordance with the provisions of Sections 106(B)(2) above, read together with sub-section (4) thereof, for such or any electronic evidence to be produced, it has to satisfy the conditions as set out therein and a certificate made verifying that the conditions as set out have been satisfied. These provisions are similar to those in Sections 64 & 68 of the Evidence Act, Cap 6 of the Laws of Uganda and it was the Applicant's submission that all the above principles of municipal law are relevant in determining the issue at hand.

43. Having taken into account the above submissions, on our part, we must first address the import of affidavit evidence generally and in that regard, we note that the Appellate Division of this Court in ***Appeal No. 1 of 2015 Union Trade Centre Limited (UTC) v The Attorney General of Rwanda*** stated inter *alia*;

> ***"…But the record discloses that there was no affidavit from the Appellant or anyone else with knowledge of the matter in support of any of the averments in the body of the Reference. And the annexures to the Reference, though notarized, were neither annexed to an affidavit nor produced orally at the hearing in the trial court as exhibits. We state categorically that any annexures to a document unless the document is an affidavit and they are not annexed thereto, or the same are produced at the trial as exhibits, are not evidence."*** (Emphasis added).

44. Further, at paragraph 43 of the Judgment, it was stated;

"The unfortunate consequence of the procedural failure to give directions on when the affidavit evidence would be filed was threefold; first, the Appellant did not file any affidavit; secondly, the Respondent filed together with its submissions an affidavit in purported support of the Response and annexed to the aforesaid submissions laws and documents in proof of its case; and third, and most grievously, the trial court proceeded with the trial on the basis of written submissions which were not founded in any admissible evidence." (Emphasis added).

45. At para. 45, the Court further stated;

"We have considered whether to proceed and dispose of the appeal despite the above irregularity. We have come to the conclusion that to do so would be to condone and perpetuate, nay participate, in an irregularity which has occasioned an irreparable injustice to the parties. This is not the path which a Court of Justice should tread, and we unequivocally decline to do so."

46. Taking guidance from the Appellate Division therefore, we note that the question before us is whether the video clip annexed to the Affidavit of Mr. Mwamu is admissible or not. In addressing that issue, it is uncontested (from the *voir dire* examination conducted and where Mr. Mwamu testified on how he obtained the video clip) that he, as the then President of the Applicant, was entitled to swear an Affidavit in support of the Reference but was not the maker of the electronic DVD. Further, there was the certified translation and sworn statement by Ms. Deborah Gasana, an advocate,

where she also confirmed that she too was not the maker of the electronic DVD. The producer or maker of the video that the Applicant sought to produce as evidence, one Julius Ssenkandwa, did not testify in court nor did he swear any affidavit in support of the electronic evidence that was produced before the Court, nor was he cross-examined as to the veracity of the evidence contained in the electronic DVD.

47. In that context and following the decision in ***Union Trade Centre Limited (UTC) v The Attorney General of Rwanda*** (supra), it is our understanding that evidence that is produced without adhering to procedure and whose authenticity cannot be proved, is inadmissible. Given the nature of the allegations that have been made against the Respondents, in the present Reference, therefore, it would only be prudent for the Court to admit only evidence that can be verified, or at least, whose veracity can be tested through cross examination. In that regard, we note at this stage that no cogent reason has been presented before the Court as to why the maker of the video which the Applicant sought to introduce, one Julius Ssenkandwa, did not swear an affidavit in support of his video clip nor why Deborah Gasana could not be subjected to cross-examination as James Aggrey Mwamu was. We say so, with respect, because fear of repercussions was loosely expressed as the reason why they could not do so but without the Court being asked to use its powers to compel attendance by those witnesses, the explanation is rendered unhelpful.

48. Having so stated, we have perused our Rules and as regards evidence generally, Rules 56(1) and (3) as well as Rule 63 provides as follows:

> ***"56(1) Any party in a claim or reference may obtain on application to the Court, summons to any person whose***

attendance is required either to give evidence or to produce documents.

(3) The Court may on its own motion summon any person to give evidence or to produce any document if in the opinion of the court such evidence or document is essential for the just determination of any matter before it.

and;

(63) (1) At the hearing, the party having the right to begin shall state its case and produce evidence in support of the issues which it is bound to prove. The other party shall then state its case and produce evidence, and may then address the Court generally on the case. The party beginning may reply.

(2) Where, after the party beginning has produced it evidence the other party does not produce any evidence, the party beginning shall address the Court first on the case, and the other party shall then address the Court in reply. The Court may then allow the party beginning to comment on a new point raised in the address by the other party.

(3) A party may present its legal arguments in writing."

49. There is as can be seen above, no specific reference to production of electronic evidence including video clip evidence hence the question, what is the criteria for admissibility of such evidence? In that regard, the Applicant has submitted to us the United Kingdom Court of Criminal Appeal

authority of ***R v Maqsud Ali & Ashiq Hussain*** (1965) 2 All ER 464 dated 9th April, 1965 where the decision of Brabin J in ***R v Bryant & Bryant Newport Assizes***, a decision made by the same Court on 27th July 1964 (unreported), was quoted with approval and where the Learned Judge stated that a tape recording of a conversation is good evidence if it is proved to have been accurately recorded.

50. In ***Maqsud*** (supra), the Court went further than that finding and held that a tape recording is admissible in evidence provided the accuracy of the recording is proved and the voices can be properly identified and further, that the evidence is relevant and otherwise admissible. The Court also issued a caveat that such evidence should be regarded with caution and assessed in the light of all the circumstances of each case.

51. Further to the above, we have perused the transcript of proceedings of 14th February 2007 in ***Prof. Anyang' Nyong'o and 5 Others v Attorney General of Kenya, Reference No.1 of 2006***.On that day, the Applicants sought to introduce a DVD regarding certain events relevant to the case before the Court. The Court admitted the DVD only when one of the Applicants, Ms. Yvonne Khamati, testified on oath as to how she had obtained it (from the Nation Media Group which is also the source of the contested video clip before us). Although the maker of the DVD was not called to give evidence, the Court admitted it after Ms. Khamati testified that she had watched NTV news on a particular day and the following day she went to Nation Media Group offices in Nairobi and obtained the news clip in the form of a DVD from its library at Ksh.5,900/- which she paid. All parties then consented to the DVD being played in Court.

52. In addition to the above, we have taken note of Section 78A of the Evidence Act, Cap.80 Laws of Kenya purely for reasons of comparison which provides as follows:

"Admissibility of electronic and digital evidence

(1)In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2)The Court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

(3)In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to: -

(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

(c) the manner in which the originator of the electronic and digital evidence was identified; and

(d) any other relevant factor.

(4)Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or

printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

53. In the above context, and noting the lacunae in our Rules as to electronic evidence, what criteria should this Court adopt in admitting electronic evidence including the video clip in contention? In addressing that question, we are alive to the fact that this Court does not have its own Evidence Act such as the Kenyan one referred to above and in ***Attorney General of Uganda v East African Law Society and Another,* Appeal No.1 of 2013** the Appellate Division of this Court stated that the Court cannot rely on the Evidence Acts of its respective Partner States but on the ***"Treaty; Protocols (if any, on this subject); its own rules of Procedures (such as Rule 46); International Conventions of a general nature (such as the Vienna Convention on the Law of Treaties) as well as the practice and jurisprudence of similar international judicial tribunals."***

54. In that context, we have taken into account persuasive approaches from outside this Court and we are aware, for example, that Rule 69(4) of the International Criminal Court (ICC) Rules of Procedure and Evidence directs Judges to admit evidence ***"taking into account, inter alia, the***

probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."

55. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), while avoiding the common law rules of evidence nonetheless have stated that for evidence to be admissible, it must satisfy ***"the minimum standards of relevance and reliability"*** (See – ***Prosecutor v Brdanin and Talic, Case No.IT 99-36-T).***

56. Specifically, on digital evidence, the ICC has developed standards specific to such evidence and electronic evidence is commonly admitted as corroborative evidence and not direct evidence it its proceedings. As to its probative value, the following criteria has been developed:

(i) Authentication – because digital evidence can be manipulated, authentication by external indicators such as expert testimony is required.

(ii) Hearsay – digital evidence may raise hearsay concerns because it is not live testimony and is removed from the originating source.

(iii) Chain of custody – it is important to determine the movement and location of the evidence as well as the history of the persons who have had it in their custody from the time it is made to the time it is presented in Court.

(iv) Presentation of the evidence – this criterion ensures that the evidence is error free and is reliable in the long-term.

57. Further to the above, the European Court of Human Rights in its ***Application No. 33394/97 Khan v the United Kingdom*** considered the admissibility of digital and electronic evidence and concluded that its admissibility would depend on:

(i) Whether there is fairness in doing so.

(ii) Whether there is an element of public interest involved.

(iii) Whether the evidence is relevant.

(iv) Whether the evidence was lawfully obtained.

58. From the above comparative jurisprudence, it can be concluded that admissibility of evidence electronically generated such as a DVD, video clip or other electronic and/or digital evidence would depend on:

(a) The manner in which the evidence was obtained, preserved and produced.

(b) The relevance of the evidence.

(c) The reliability of the evidence.

(d) Whether it would prejudice the fair hearing of the matter.

(e) Whether there is an element of public interest in it.

59. Taking all the above factors together, we have already stated that James Aggrey Mwamu was not the maker of the video clip in contention and the maker who is identified, filed no affidavit nor did he testify as to its authenticity. The transcriber on her part filed an affidavit authenticating her work but did not testify in Court as to how she came into contact with it to be cross-examined on that issue. It is in the circumstances very difficult to authenticate the video clip. While therefore, the video clip may be relevant to the matters in the Reference, its reliability is suspect and it would

certainly prejudice the fair trial of the matter. Public interest is also irrelevant in such circumstances as public interest would not be served by admitting evidence whose authenticity cannot be independently confirmed.

60. For the above reasons therefore, it is our finding that the video clip evidence annexed to the Affidavit of James Aggrey Mwamu is inadmissible and cannot be of any use to the Applicant in proof of its case before this Court. His Affidavit is however admissible and so Issue No.6 is partly answered in the affirmative.

I. DETERMINATION OF ISSUES NOS. 2 AND 3

61. On the question whether there has been established a cause of action against the 2nd Respondent and whether he had personal knowledge of the alleged acts of violation of the Treaty by the agents of the Government of Uganda and further, whether he took appropriate action under Articles 29(1) and 71(1)(d) of the Treaty, the first place to begin is the meaning of cause of action.

62. In that regard, a cause of action has been defined to mean ***"a set of facts or circumstances that in law give rise to a right to sue or to take out an action in Court for redress or remedy"*** – See ***Anyang' Nyong'o*** (supra) at page 18.

63. The above complaint against the said 2nd Respondent to the extent that the Applicant alleges a violation of the Treaty certainly creates a cause of action because as was stated by this Court in ***East African Law Society v The Attorney General of Burundi and the Secretary General of the EAC,*** **Reference No. 1 of 2014**, ***... "the Treaty provides for a number of actions that may be brought to this Court for adjudication ... Article***

30 of the Treaty, among others, virtually creates a special cause of action, which different parties may refer to this Court for adjudication" and referring **to <u>Anyang' Nyong'o</u> (supra), it further stated that *"... by the same provision (Article 30) it creates a cause of action."*** More succinctly, in **<u>Sitenda Sebalu vs Secretary General of the EAC & 3 Others, Reference No.1 of 2010</u>,** it was stated that a cause of action exists **"where it is the contention therein that the matter complained of violates the national law of a partner state or infringes the provision of the Treaty."** We accept that definition as squarely applicable to the issue under consideration.

64. In that regard, therefore, we have no hesitation in finding that to the extent that a complaint regarding alleged violation of the Treaty by the 2nd Respondent or his obligations thereto have been made, then a cause of action has been established against him and we so hold. We shall now proceed to interrogate whether he had personal knowledge of the alleged acts but failed to take appropriate action under his Treaty mandate.

65. Without repeating the arguments by parties, it is beyond debate that the Applicant did not raise any of the issues now in contest with the 2nd Respondent before filing the Reference but instead pleads that the said issues were of such general public notoriety that the 2nd Respondent ought to have known of them.

66. This Court has previously been faced with the same argument and as early as 2007 in **<u>James Katabazi and 21 Others v Secretary General EAC and Another, Reference No.1 of 2007</u>**, it stated thus:

"Without knowledge, the Secretary General could not be expected to conduct investigations and come up with a Report under Article 29(1)".

67. Further, in ***East Africa Law Society v Attorney General of Burundi and Secretary General, EAC*** (supra),this Court having analyzed the actions taken by the 2nd Respondent, the Secretary General, upon a matter under the Treaty being brought to his attention, concluded that it was the 1st Respondent, the Republic of Burundi, that was hindering his investigations and directed both to operationalize a task force set up on 15th January 2015 to investigate alleged violations of Treaty obligations by the Republic of Burundi. The converse is true in the present case and to expect the Secretary General to act without a clear, concise and actionable complaint being brought to his attention is to stretch the concept of public notoriety too far.

68. We further note that in a *note verbale* dated 11th June, 2011 addressed to the President of the Republic of Uganda, the 1st Deputy Prime Minister and Minister for East African Affairs as well as the Minister for Foreign Affairs, the 2nd Respondent intimated that he had sought audience with the relevant authorities during his official tour of the country to get a report regarding the matters raised in the present Reference. This action, we have no doubt, was indicative that the 2nd Respondent had taken appropriate measures to ventilate the alleged matters with the 1stRespondent but only after the Reference had been filed.

69. In that context, Article 29(1) of the Treaty provides that:

"Where the Secretary General considers that a partner state has failed to fulfill an obligation under this Treaty or has infringed a provision of the Treaty, the Secretary General shall submit his or her findings to the partner state concerned for that partner state to submit its observations on the findings."

70. In interpreting the above provision, this Court in ***Hon. Sitenda Sebalu*** ***(supra)*** observed that:

"In almost all jurisdictions, Courts have the powers to take judicial notice of certain matters. We are not prepared to say that what is complained of here is one such matter. However, the powers that the Secretary General has under Article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the Secretary General ought to be more vigilant than what his response has portrayed him to be. In any case, it is our considered opinion that even if the 1st Respondent is taken to have been ignorant of these events, the moment this application was filed and a copy was served on him, then he became aware, and if he was mindful to the delicate responsibilities he has under Article 29, he should have taken the necessary actions under that Article. That is all that the complainants expected of him; to register with the Uganda government that what happened is detestable in the East African Community."

71. In following the above decision, it is not contested that indeed the 2nd Respondent did write a letter to the Government of Uganda after he had observed that in the Reference, allegations had been made that there were riots, demonstrations and police action to address riots and related incidences in Uganda. This was in line with the provisions of Article 29(1) of the Treaty, and on the basis of which he requested for information in that regard before submitting his report to the Council of Ministers as provided in Article 29(2).

72. This action by the 2nd Respondent was also in line with his functions as provided under Article 71(1) of the Treaty, and in particular sub-section (d) which provides that his office is obligated in;

"(a) ....

(b) the undertaking either on its own initiative or otherwise, of such investigations, collection of information or verification of matters relating to any matter affecting the Community that appears to merit examination."

73. As has been observed above therefore, the 2nd Respondent took appropriate measures in exercising his mandate and functions as provided under Articles 29(1) and 71(1)(d) by seeking to address the issues arising out of this Reference but only after the Reference was filed because there is no evidence before us that he had notice of the acts complained of prior to the filling of the Reference. Notoriety of events is not sufficient a claim in the present context without specific allegations of violation of the Treaty directly being brought to his attention.

74. In concluding on this issue, and since the 2nd Respondent had no notice of (*and knowledge on his part was casually claimed)* the alleged actions on the part of the Republic of Uganda, we are unable to find any liability on his part for alleged violation of Articles 29(1) and 71(d) of the Treaty and we so hold. Issue No.2 is consequently answered in the affirmative while Issue No.3 is answered in the negative.

J. DETERMINATION OF ISSUES NOS. 1 & 4

75. Having so held, we shall now turn to the facts laid before us *(without the video clip whose admissibility we have rejected)* and determine whether the 1st Respondent's agents committed the acts alleged in the Reference i.e. whether they declared the protests to be illegal and violently prevented them from proceeding; and whether they acted lawfully, proportionately and professionally in providing and working, by the guidelines regulating the movement of persons and observance of the rule of law. We shall also address alleged violations of the Treaty in that context.

76. In that context, in the Reference, there were allegations that there were acts or omissions committed by the 1stRespondent's agents that violated the fundamental rights and freedoms of the people of the Republic of Uganda. In the affidavits filed in support of these allegations, the deponents thus contended that the acts by the 1st Respondent through its agents amounted to gross violation, intimidation and violation of their fundamental rights and freedom to freely assemble and peacefully demonstrate. In support thereby, a number of copies of newspaper cuttings were annexed to one Affidavit and to the Reference itself.

77. On its part, the 1st Respondent contended that its agents, who included the military and the police, acted within the laws of Uganda and the Constitution of the Republic of Uganda, and that they never denied any person or group of persons the opportunity to exercise their fundamental rights and freedoms to assemble or protest. It was further argued that there were no notices given to the 1st Respondent that there were any protests or demonstrations that were to be conducted, and that in any event, the provisions of the Police Act of Uganda and the Constitution were explicit in the event that any person(s) wanted to engage in protests and demonstrations. That therefore the Reference is misguided and ought to be dismissed.

78. The straightforward issue to address here is whether the right to assemble and protest, as an aspect of human rights was violated as alleged. To put matters into context, Article 6(d) of the Treaty provides as follows:

> "***The fundamental principles that shall govern the achievement of the objectives of the Community of the Partner States shall include:***
>
> ***(a) mutual trust, political will and sovereign equality;***
>
> ***(b) peaceful co-existence and good neighbourliness;***
>
> ***(c) peaceful settlement of disputes;***
>
> ***(d) <u>good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in</u>***

accordance with the provisions of the African Charter on Human and Peoples' Rights;

(e) equitable distribution of benefits; and

(f) co-operation for mutual benefit." (Emphasis added).

79. Article 7(2) provides as follows:

"The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights." (Emphasis added).

80. In addressing the import of these two Articles, this Court has been consistent in holding that the two provisions are justiciable and not merely aspirational. That is why in ***James Katabazi & 21 Others v Secretary General of the East African Community & Another*** (supra) the Court stated thus:

"Here at home in East Africa Justice Kanyeihamba in Kanyeihamba's Commentaries on Law, Politics and Governance at pg. 14 reiterates that essence in the following words;

"The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so called free societies to guide law makers, 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."

It is palpably clear to us, and we have no flicker of doubt in our minds, that the principle of the rule of law contained in Article 6(d) of the Treaty encapsulates the import propounded above. But how have the Courts dealt with it? In ***Republic v Gachoka & Another*** *the Court of Appeal in Kenya reiterated the notion that the rule of law entails the concept of separation of powers and its strict observance. In* ***Bennet v Horseferry Road Magistrate's Court & Another****, the House of Lords took the position that the role of the Courts is to maintain the rule of law and to take steps to do so."*

81. The same principles were discussed and applied in **Attorney General of Rwanda v. Plaxeda Rugumba, EACJ Reference No.8 of 2010 and Samuel Mukira Mohochi v Attorney General of Uganda, EACJ Reference No.5 of2011**. We adopt the reasoning in these decisions in as far as they are relevant to issue at hand. In addition to the above and as regards the rule of law and the human rights provisions of the African Charter on Human and Peoples Rights, Article 10(1) of the Charter provides thus:

"Every individual shall have the right to free association provided that he abides by the law."

82. What then are the obligations of a State in ensuring that the right to assemble and protest, which is the core issue in this Reference is

respected? In that regard, Article 29(1) of the Constitution of Uganda provides thus:

> ***"(1) Every person shall have the right to –***
>
> ***... freedom to assemble and demonstrate together with others peacefully and unarmed and to petition; and ..."***

83. Further, in ***Constitutional Petition No. 9 of 2005 Muwanga Kivumbi*** (supra)the Court, while holding that the right to peaceful protest is not absolute, set out the standards against which every limitation on the enjoyment of the said right under Article 43(2) of the Constitution of Uganda should be tested. The Court held that the standard was an objective one, and was explicitly enunciated in the case of ***Onyango-Obbo & Another v Attorney General* Appeal No. 2 of 2002** where the Court stated thus:

> ***"The right to peaceful protest is not absolute. The police have a wide range of powers to control and restrict the actions of the protestors. These powers should not be exercised by the police in an unaccountable and discriminatory manner...The Act gives powers to the police to arrest persons who engage in disorderly conduct, or who threaten violence etc."***

84. Noting the provisions of the law in Uganda as expressed above, while the right to assemble and demonstrate is not absolute (it is subject to the limitations inherent in it), Article 43 of the Ugandan Constitution also creates other limitations to wit; that in the enjoyment of any right, ***"no***

person shall prejudice the fundamental or other human rights and freedoms of others or the public interest."

85. In the context of Articles 6(d) and 7(2) as well as Article 11 of the African Charter on Human and Peoples Rights, therefore, the right to assemble is an integral part of the rule of law, good governance and any violation thereof would amount to a violation of the Treaty specifically.

86. Applying the above expectations of the law to the present circumstances, the Applicant contended that on the material dates, citizens were demonstrating peacefully after a call had been made for them to participate in the walk to work protests but were viciously attacked by agents of the 1st Respondent leading to injuries, maiming and the killing of some of the protestors. On the other hand, the 1st Respondent argued that it did not declare the protests illegal neither did the Government of Uganda arrest or threaten to arrest any person participating in them nor injure, maim or kill any person but rather that it issued guidelines regulating the orderly movement of the citizens in accordance with the Constitution and the laws of Uganda during the walk to work protests. In the affidavit of Nanding' Christine, for example, it is deponed in response to the allegations on violence and intimidation, that the Police Force only intervened and responded to situations where law, order and peaceful conduct of day to day business were either disrupted or were under immediate threat of disruption and so the police acted by guiding the movement of pedestrians and motor traffic to ensure that the rights of non-protestors were not violated.

87. Further, the 1st Respondent contended that certain arrests made against some protesters are admitted, but stated that these arrests were

made due to suspicion of committal of offences under the penal laws of Uganda, including unlawful assembly and inciting persons to riot and cause public nuisance, and that the perpetrators had for those reasons been arraigned before local Courts. We note that no evidence was adduced by the Applicants to show the contrary of that submission.

88. From the evidence before us, therefore on various dates after 11th April 2011, a number of Ugandan citizens decided to participate in what later came to be dubbed the walk to work protests. The right to do so is guaranteed by Article 29(1) of the Constitution of Uganda and affirmed by the Supreme Court of Uganda in **Muwanga Kivumbi (supra) vs. Attorney General** (supra). For avoidance of doubt, in that Judgment, the Supreme Court declared that Section 32(2) of the Police Act **"authorizing the Police to prohibit assembly including public rallies or demonstrations would be unconstitutional."** (per Hon. Lady Justice L.E. M. Mukasa – Kikonyongo, DCJ). The Learned Deputy Chief Justice further stated that **"the police will not be powerless without the powers under sub-section 2; they can deploy more security men. Further, they have powers to stop the breach of peace where it has occurred by taking appropriate action including arresting suspects."**

89. The decision above is binding on all parties to this Reference as it is a decision of the apex Court in Uganda and the 1st Respondent cannot hide behind Section 32(2) of the Police Act by stating that he received non-formal notification of the walk to work protests and so the police, if at all, were entitled to break them up violently.

90. The point of departure between the Applicant and the 1st Respondent is therefore, whether the protests were violently disrupted by the police and

military in contravention of the right to peaceful assembly and protest. As is the law, the burden in proof of that contention lies with the Applicant and the next question to address is this: What evidence has been placed before us in support of the said claim?

91. In support of the Amended Reference, the Applicant has annexed the following affidavits:

(i) That of Sam Mugumya sworn on 27th May 2011. He deponed that on a number of days in 2011, various groups of people in Uganda decided to exercise their right to freedom of association, movement and assembly, to walk to work in protest against the high cost of fuel, transport and living, generally. That he, together with Col. (Rtd) Dr. Kiiza Besigye, decided to participate in the protest by walking from Kasangati, a suburb of Kampala, towards Kampala Central Business District. He further deposed to that on one occasion, as they were walking, officers of the Uganda Police Force ordered them to stop walking because according to the Police, they were committing an offence by participating in an unauthorized assembly. He further deposed that despite it being that the protests were peaceful and they were unarmed, the Police descended on them with batons and gun butts, sprayed them with teargas and shot at them with both rubber and live bullets, injuring many people, including Dr. Besigye.

He reiterates that specifically on 28th April, 2011, Dr. Besigye was driving from Kasangati towards Kampala when at Mulango, he was stopped and ordered not to use the route he was using, but that he should instead use an alternative route. He contends that as he and Dr. Besigye protested against the interference by the Police of their

freedom of movement, an officer by the name, Gilbert Bwana Arinaitwe, armed with a pistol, teargas and pepper spray, smashed the windscreen of Dr. Besigye's car, sprayed the occupants with the teargas and pepper spray, before brutally kicking and beating them and dragged Dr. Besigye to the police truck and then drove him to Kasangati Police Station.

(ii) That of Francis Mwijukye sworn on 27th May 2011. His deposition was similar to that of Sam Mugumya, and he further deponed that he was aware through print and electronic media that many other people who had participated in the walk to work protests had been brutally beaten and injured by the Uganda Police Force in Kampala, its suburbs and other parts of the country.

(iii) That of Ssemujju Ibrahim Nganda sworn on an unclear date. He deponed that he participated in the walk to work protests and was arrested twice, on 18th April and 21st April, 2011 by the Uganda Police Force. He further deponed that the actions by the Uganda Police were illegal as he was brutally stopped from exercising his right to associate, assemble and move, and was unnecessarily detained for five (5) days.

(iv) That of James Aggrey Mwamu sworn on 2nd April 2012. We have already addressed this Affidavit in part and apart from the video clip evidence attached to it, he deponed that he stood by the pleadings and supporting affidavits filed by the Applicant, and denied all the contentions by the Respondents.

92. On their part, the 1st Respondent responded to the above depositions by filing Affidavits sworn by Nading' Christine, Grace Turyagumanane, Rulwea James Akiiki, Gumisiriza, Amos Mpungu George and Ekaju William the import of which is that the latter four having been present during the walk to work protests, deponed that the allegations by the Applicant are not true and there were no violations of Ugandan Law and its Constitution in the manner that Law enforcement agencies dealt with the walk to work protests.

93. On our part, we have weighed the evidence tendered by the Applicant who has the burden to prove its allegations on a balance of probability. Save for the bare deposition by the persons named elsewhere above, and with the video clip evidence having been rejected, nothing else of substance was placed before us to show that protestors were beaten, tear gassed, maimed or killed. The identities of the affected protestors are not given nor are the nature of the violations against them. Even in the case of Col.(Rtd) Dr. Kiiza Besigye who was named, no affidavit was filed by him and no documentary or other evidence was tendered to authenticate his alleged ordeal at the hands of agents of the 1stRespondent. In saying so, when in an affidavit, some deponent claims that people were injured, maimed and killed during a lawful protest or assembly, what better evidence is expected than the identities, medical records of injuries and death certificates of the deceased? Without such evidence, how can a court conclude that the events complained of really happened?

94. In addition to the above, while we agree that affidavits are by their very nature good evidence, it would also be expected that in a matter as contentious as the present one, more evidence than the depositions of

witnesses is expected. The 1st Respondent having produced evidence in rebuttal, we expected the Applicant to respond to the rebuttals wholly but did not do so.

95. Having so said, we also need to state that the only attachments in the Affidavit of Ssemujju Ibrahim Nganda is a copy of a newspaper cutting regarding Dr. Besigye's arrest. Copies of other newspaper cuttings are also annexed to the Reference itself which is a contravention of the decision in **UTC** (supra). None of those copies of newspaper cuttings were in any event properly tendered in evidence and with respect, we are of the view that they have no probative value as presented to this Court.

96. In the end therefore, we are of the firm view that the evidence tendered by the Applicant is weak and cannot lead us to conclude that the 1stRespondent's agents breached Uganda's Laws, its Constitution or even the Treaty let alone the African Charter on Human Peoples' Rights. Neither can we rely on alleged notoriety of the events complained of as no basis in fact or in law has been laid for us to do so. Issues Nos. 1 and 4 are therefore answered in the negative and we so hold.

K. DETERMINATION OF ISSUE NO. 7

97. Having held as above, we must now return to the prayers in the Reference which can be summarized as follows:

(i) Whether the 1st Respondent and its employees and servants, including the military and police forces of the Republic of Uganda, violated Articles 6(d) and 7(2) of the Treaty.

(ii) Whether the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71 of the Treaty.

(iii) Costs

98. In answer to both questions, we have found insufficient evidence on which to found a favourable finding in favour of the Applicant. It is not enough to allege a fact, however notorious one may consider it to be, and fail to bring forth credible, authentic, reliable and admissible evidence to support such an allegation. We found the evidence in the Reference, looked at in its totality, to be of such a caliber as not to be reliable in proof of the allegations made in the Reference and we so hold. However, this finding should not be taken to mean that in appropriate situations and with sufficient evidence, this Could would not have held the Republic of Uganda guilty of breach of the principles of the rule of law and good governance if, in violation of Article 29 of its Constitution and the decision in **Muwanga Kivumbi**, it is found that in cracking down on lawful protestors, disproportionate force is used. As was held in **Samuel Mukira Mohochi** (supra), where the Government of Uganda breached its own laws, that action is sufficient to lead to a conclusion of violation of the Treaty principles aforesaid. Let this Judgment therefore serve to reinforce this Court's consistent approach to ensure that those principles are given life in the conduct of the affairs of Partner States.

99. Regarding costs, although under Rule 111, costs ordinarily follow the event, in the instant case, we consider that the Applicant filed the Reference in the wider interests of the rule of law within the East African Community and to punish it with costs would be a fetter on the exercise of its public-spirited mandate. In the event, let each Party bear its own costs.

L. Final Orders

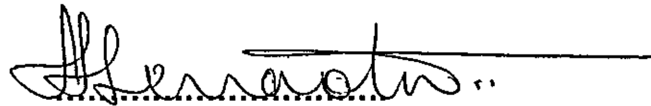
100. From the foregoing, and in light of our findings above:

(a) The present Reference is hereby dismissed.

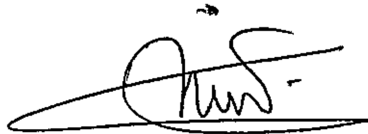
(b) Each party shall bear its own costs.

It is so ordered.

Dated, Delivered and Signed at Arusha this 28th day of March, 2018.



ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE



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FAUSTIN NTEZILYAYO
JUDGE

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FAKIHI A. JUNDU
JUDGE