THE ROLE OF THE JUDICIARY IN THE EMANCIPATION OF WOMEN

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DECLARATION

I KAAHWA MOSES BAMWANGA, do hereby declare that to the best of my knowledge and belief, this is my original piece of work and that it has never been submitted for the award of any credentials in any university or college or published as a whole or part.

Signed..... DATE.16/09/2011

KAAHWA MOSES BAMWANGA

APPROVAL

This report is submitted with the approval of my supervisor.

Signed…….. Date……..

DUNCAN ONDIMU

TABLE OF NATIONAL AND INTERNATIONAL STATUTES

NATIONAL STATUTES

Constitution of the Republic of Uganda 1995

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ACRONYMS

UN	United Nations
UNC	United Nations Conventions
CEDAW	Convention, Elimination and Discrimination against Women
FIDA	Federation of Women Lawyers

CHAPTER ONE

1.1. BACKGROUND OF THE STUDY

Article 22 of the Uganda Constitution protects every one's right to life, everyone's threat to his or her life is a violation of such a right. A woman's right to life is hardly respected basing on the fact that much goes in private against a woman's life but little is brought into public hearing. Her husband, her unfeeling in-laws and her unrespecting workmates always threatened a woman's right to life.

Many people believe that sexual harassment, marital rape and other violations are private matters and should be treated as such. They believe that such matters do not call for public attention or resolution, they should be left for the husband and his wife to solve privately regardless of the harm they cause. Traditionally, the institution of marriage has been protected and most of the family laws, have aimed at its preservation which has caused pain to women who are sometimes forced to remain in marriage that threatens their existence.

The central focus of human right campaigns has been mostly on public right violations, which calls for public attention and reaction. Little if any effort has been directed to the so-called private right which mostly affect women's status. The state's policy and attention have been focused on issues, genocide, mob justice, corruption and this is reflected in the fact that the judiciary has been faced with faces seeking to resolve public related matters treating those related to marriage and family as private.

The government has been very slow in the enforcement and making of the draft domestic relations bill into law. This is a draft that entails most of the amendments in family law and if made into law. Mostly unjust laws will be redressed. The courts therefore still follow the old statutes which were inherited from the colonial era such laws are divorced from ordinary persons since they were made to protect the colonial masters, lack of legal aid to

women who are unable to pay for legal services is also one of those hinderances that stand in the way of women's emancipation.

The above considerations have formed a background to my study. The study is intended to propose a plan for a new world where the judiciary is active and plays his judicial advisory roles.

Judges, magistrates and lawyers have the ability through preservation and strong judicial decisions to change the world, to change what is negative, positive, thus making a change in those areas of the law where women are still vulnerable to circumstances. The judiciary has a strong role to play in spearheading the struggle against all sorts of discrimination against human rights through strong enforcement of the law through persuasion for charges when necessary and also by being exemplary.

1.2. STATEMENT OF THE PROBLEM

Despite the existence of the judiciary and its powers established in the constitution of the Republic of Uganda, women have not felt the effect of the judiciary in their emancipation. According to Carl Smart (1989) the conditions in which judges live are the overall determining factors in reaching judicial decisions just like "other men" judges are biased according to their cultural beliefs as well as traditional practices[1].

Women emancipation has caused debate and has been advocated for by different state organs and non governmental organizations, the judiciary however, has shown little interest in the matter. It is upon their background that I have found it crucial to scrutinize the judiciary's contribution towards ensuring the enforcement of women's human rights.

1.3. SCOPE OF THE PROBLEM

This study is intended to cover the role of the judges and lawyers in the emancipation of women in Uganda judicial decisions on matters of controversy call for much public

[1] Carl Smart (1989) pg. 102

attention and such decision always play a persuasive role to the legislative, the executive and the courts of law that are bound by the decision of that particular court.

The study focuses on the character of judges and lawyers in the courtroom while attending to cases involving women and how women themselves behave in the courtroom.

This study will also include analysis of existing laws that either affect women positively or negatively and how laws can be used to promote women emancipation. It also includes the purpose of international law as a measure to redress the injustices that exists in domestic or municipal law.

1.4. OBJECTIVES OF THE STUDY

OVERALL OBJECTIVE

To access the role of the judiciary in the emancipation of women.

SPECIFIC AIMS

- To produce a legal written account of the abuse of women's human rights in the courtroom.
- To view the judiciary as a spearheading organ in the struggle to emancipate women.
- To make judges realize that traditional and cultural beliefs are outgrown and therefore they should not stand in the way of justice for women.
- To make and call upon judges to be more sensitive to cases that come before them involving women.
- To call judges for their help in the struggle to emancipate women.
- To realize the role of international law and conventions in the emancipation of women.
- To suggest possible solutions and recommendations where necessary.

1.5. HYPOTHESIS

The judiciary has not yet been sensitized about the role it can play to emancipate women in Uganda and its role has not been felt by women.

Judges are still influenced by culture in decision making in courtrooms.

The Uganda judiciary is rigid and its interpretation of the law does not consider women's interests.

Some men in the judiciary are anti-women and are stambling blocks to the struggle of emancipation of women.

Customary law exists and is applicable in Uganda, but this, instead of working justice it promotes injustice.

Though judges do not make law, they can be of very much importance in influencing the law makers to either amend or repeal bad laws.

The Uganda judiciary is corrupt and this has affected the performance and delivery of justice to the people.

The public lacks confidence, in the judicial system of Uganda, which makes them to resent to extra legal measures.

1.6. METHODOLOGY

Library research: This aimed at examining the already existing laws their imbalances and how they have affected women in real life situations. Will help me discover new laws that advocate for women emancipation and how they have been implemented so far. For example; women's rights in international law.

Newspaper reviews: Newspapers have helped me find current domestic violence cases indicating that the practice still exists in our society.

Observation: This involved going to the courtroom and observed the reaction of judges towards women in particular cases.
The behaviour of women too in the courtroom was also observed.

Interviews: This was a face to face interview with different judges and lawyers which helped me get their views about women emancipation and how culture as an obstacle to their "would be fair decisions".

1.7. LITERATURE REVIEW

This is mostly concerned with enforcement of women's rights as human rights. This inclusion or treatment of women's human rights as a special set of right calling for more concentrated attention will lead to achieving the aims and objectives of those who advocate for women's human rights.

Julia and Carlo Smart (1988)[2] believe that judiciary has much to do for enforcement of women's human rights that even when a law is enacted such a law can not be recognized and its beneficiaries can not enjoy the fruits. It then upon the judges and lawyers to experiment a given law showing its applicability, strength weaknesses its practicability and enforceability.

The author's comment on the law making process, the law made reflect the gender biased legislation and some of them come out in the court rooms to make decision on matters governed by those laws that they participate in the making.
The elimination of gender-biased legislation among individuals should begin from the law making level.

[2] Carlo Smart (1988) pg. 67

On the other hand, **Jeniffer Okum Wengi (1992)** appreciated the fact that in Uganda men are fewer than women but occupy most of those influential positions making them privileged in decision making which decisions effect the whole population. She advocates for women's rights and believes in a system where women are given an opportunity to become part of the law makers and law enforcers in the ceaseless process of making laws that affect the lives of different interest groups.

She however, disregards the idea of equality and its characterization as a comparative concept. The condition which might only be attached or discerned by comparison with the condition of others in the social political setting in which they live. Equality to her should involve the basic accommodation of differences since different treatments can result into inequality and gender mental laws and practices have proved to be.

Toke Starp (1987) On the other hand characterized positive discrimination as recognition of differences rather pretending that they do not exist. She therefore advocated for discrimination based on sex which favour women[3].

According to Charlotte and Samantha (1989)[4]. The emancipation of women and the set of practices that accompany it are the continuous evolving products of and international movement aiming at improving the status of women world-wide.

That it has been the aim of United Nations Assembly since 1948 to put into practice laws that protect fundamental human right of all people in relation to security of person....torture and to eliminate all kinds of discrimination.

It is especially clear that women's right and their application should be just and universal where they exist where fundamental human rights are not respected, women are affected, and most times more than men.

[3] Toke Starp (1987) pg. 17
[4] Charlotte and Samantha (1989) pg. 89

However, much government may advocate for human rights but ignoring the rights of women, such a government is undemocratic just like other governments that may not mind about the existence of human right at all. The only difference is that the extent of advocacy will matter.

Helcomb Deevy (1994) says that the areas of concern should be women and social economic development; women and education, women and reproductive rights, women and the environment, human rights and the law; women and disabilities which all lead to a strong desire, for empowerment of women through legal literacy programmes. The courts of law should be reality available to accommodate all issues and complaints relating to women rights violations[5].

In a bid to improve the performances of the courts, Rwenzaira Bathey (1987) suggest that they should be guided by the United Nations Conventions which lay out rights that apply to all human beings by reason of being human beings[6]. The beginning of democracy should be in the home, which is the smallest unit in a political society.

The causes of these inequalities according to Shimon Shetret (1995) are rooted in history and even among the legal profession itself women have been considered fit only to domestic work[7]. Men's attitudes towards women as being private instruments has not changed, even after experiencing regimes where a number of women have ably done their public responsibilities successfully. Men in the western countries where most of us are made to believe that civilization and democracy was born, still treat women not to the best of humanity.

[5] Helcomb Deevy (1994) pg. 123
[6] Rwenzaira Bathey (1987) pg. 29
[7] Shimon Shetret (1995) pg. 149

David Matchella (1986) on his part presupposes that where there exists a conflict between individuals and public right. It is for the courts of law to resolve that conflict[8]. It is the duty of the courts in such cases, where constitutional and legal rights conflict to find the appropriate balance.

The causes of mistreatment to particular groups of people are decisions by man himself. According to MacDonald (1980) the world is grouped by two Slavaries[9].

One is superiority of men against women; the failure by men to accept the fact that man and women are meant to be equal. As a result such a conflict adversely affects the existence of women along with their offsprings that the men who only mind about their selfish interests and existence as superiors has caused endless suffering to the other groups of humans.

Eugene and Abel (1995) in their Article "The role of judiciary and protection of human rights" hold that vein that since the world is witnessing a new era[10]. An era that requires states to respect human rights as a basic requirement for a peaceful co-habitation throughout the international community, enforcement of human rights, it is upon the developing countries to fight for enforcement of such human rights since it is the major route through which development and democracy are reached.

Furthermore, Christopher Modrama (1994)[11] on his article on marital rape, comments on the judicial and legislature weaknesses as far as the law on marital rape is concerned in Uganda that the judiciary has not taken trouble to use English precedents for instance the case of R V R (1991) ALLER 481 where court was of the view that a man can be held liable of raping his wife. The offence has however not been recognized in Uganda but to Christopher courts can use the decision in **R V R** as a persuasive authority in cases that may raise the issue of marital rape. He is of the view that since the **Penal Code Cap 120**

[8] David Matchella (1986)
[9] MacDonald (1980)
[10] Eugene and Abel (1995)
[11] Christopher Modrama (1994)

gives provisions for the offence of rape, the courts while interpreting that provision should include circumstances where husbands rape wives.

Proponents to women's right argue that enforceability of a law relating to such rights should be universally applied.

Thomas (1990) says that whatever, a group of people whose rights are being practically denied will opt for extra legal measures or rebellion using force against the oppressor[12].

A woman's option however, is not to use force instead she will use persuasion levying or diplomacy to get what belongs to her. She can not acquire ammunition to fight the "whole world of disorganized men" her enemies surround her from all corners of her surrounding world so that when she uses force. She will suffer more abuse. Thomas believes in the capacity and ability of governments to organize themselves and serve humanity with equality.

In his book "Attacks on justice", Thona .A. Rechmawi (1986) says that it is independent judges and courageous lawyers who can effectively force governments to respect individual's human rights and freedoms[13].
While making decisions judges should have a clear mind, they should neither be influenced by traditional, cultural nor political aspects. It is them that contains human rights protection into reality.

A report on Kenya human rights provides that violence against women take various forms, it includes sexually related violence, domestic violence and rape among others. Many women have died in the hands of men in homes, work places, colleges and refugee camps.

[12] Thomas (1990) pg. 57
[13] Thona .A. Rechmawi (1986) pg. 229

In a country report of human rights in Uganda (1999) it appreciates the constitutional provisions on empowerment of women but goes further to say that the whole process seems theoretical since the government has taken such provisions for granted.
That the government only demonstrates its interests to women in the public arena for instance by improving their political status which does not benefit the grass-root women who constitute the majority of women population. The reporter comments that the judiciary has hardly made a contribution to punish offenders of spousal abuse within a monogamous marriage; domestic violence is not expressed and courts hardly get involved.

The report calls for a fundamental change in this area since the state (And all its organs) has the duty to implement or provide measures for the enforcement of its policies among which the affirmative action lies. The courts on the other hand should strive to enforce those laws that are made for justice's sake.

The literature I have reviewed may not be directly concerned with role of the judiciary in women emancipation since its divergent roles are spelt out to other human rights concerns. The role which the judiciary plays in enforcing other human rights should be applied to the same end towards the enforcement of women's human rights.

CHAPTER TWO

WHAT JUDGES CAN DO TO EMANCIPATE WOMEN

The reaction of the judges to women in the courtroom differs depending on a particular judge percepting of who a woman is and what a particular judge is brought up to believe in judges are not borne but are made and for that matter every judge acts in a way he has been trained to act and eventually his mind is made to react to his actions make his actions recurrent (regardless of whether such acts are wrong or right).

Article 21(1) of the constitution is to the effect that:

> *"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".*

In addition to the above, Article 28(1) of the constitution goes on to say that;

> *"In determination of civil rights and obligations or any criminal charge a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal establishment by law".*

While there is the above quotation from the constitution of the Republic of Uganda a question comes up as to whether judges in Uganda have reacted to the needs of women in the most desirable manner.

As a matter of practice, in Uganda regardless of age, employment, or civil status, women remain as minor under the guardship of husband, fathers, brothers and any other male in society.

The reaction of judges to women in the courtroom in Uganda has been determined by different circumstances dictated by the presence of different personalities in the court at a time.

The judiciary includes both men and women some of whom are sensitive to the cause of women while others are completely sensitive of such a just case.

According to Lady Justice Amoko Arach Stella of the High Court of Uganda discrimination against women occurs even among women themselves[15]. Some women judges are totally against the so-called judges are totally while to some men in gladly welcomed.

To her, discrimination occurs even outside the courtroom while judges relate to their workers, clerks and secretaries women are made more subordinate and humbled by circumstances. This kind of treatment demonstrates the fact of humanity in that a judge who mistreats women outside the courtroom may be found doing the same even in the court and as well as in decision making.

The reaction of judges to female litigants witness and other female parties to particular suits always determine the final verdict. Where it is a domestic or family matter, different judges will take sides depending on their interests. Though this may be expressed or his or her face or outward look. According to Lady Justice Bossa Solome of the high court of Uganda. She comments on the matter.

> *"Among ourselves we can tell that John falls on this side of the case and his reasons though not told may either be genuine or biased so we can know who is who in our camp".*

However, she states where this has been known before hand such judges will not be accepted or allowed to preside over that particular case because his or her biases have been foreseen.
If a judge is genuine enough he or she will step down by himself giving reasons.

The reasons for such withdrawals are to prevent divergent reactions from particular judges to cases, or parties hereto and eventually this leads to justice being done.

[15] Lady Justice Amoko Arach Stella

The reaction of judges in the courtrooms is dependent on factors of culture, and tradition judges have grown up in a male dominated society in that have become part of it as human beings, departing from it is departing from reality and denying their own existence.

Such reactions are inborn, men grow up with them and merely seeing a woman advancing will call for negative reactions for both jealousy, envy and sometimes revenge. Judges are no different from such other men; the only difference is that they have more knowledge about the law and they make decisions that affect the human society.

Though Uganda has been informed about the evils that have existed against women from the time of creation; most male members of society irrespective of who is educated and who is not are still tied down by their traditions and cultures and sometimes a judge will pronounce "my hands are tied" where he or she feels unfreeze to either go against the law or a particular cultural belief.

Article 26 of the constitution relates to the right to own property, it prohibits compulsory deprivation of property but provides also for the right to access a court of law by any person who has an interest or right over the property. Unfortunately the law relating to ownership of property by divorced women or widows is still unclear and controversial.

It will be shown that even where the law is adequate, its implementation is hindered by customary practices, societal attitudes and feeble economic capacity of most Ugandan women.

The judges reaction to women who come to them claiming their rights to property is of mixed feelings, it is mostly side weighted to favour men who believe traditionally to be absolute owners of land chattle and fixtures. The fact was illustrated in the case of **Lastor Okoth vs Cissy Nakaggwa and others, H.C.C.S. NO. 201 of 2001** (unreported). A

business in form of partnership existed between five women (defendants) and two men for five years[16].

On its resolution it came out that most of the property belonged to the defendant who consisted of women mostly and one man.

One of the two men was a plaintiff who claimed that the property should be equally divided between the defendant and the plaintiff.
The plaintiff counsel submitted that the plaintiff was a married man with six children who demanded school fees and other money for domestic maintenance and daily necessities. (in my view the counsel's argument for the plaintiff was intended to persuade the judge to react sympathetically to the plaintiff and if possible make a decision in his favour).

The situation at the stage of cross examination becomes even more intensive where the woman has to prove the evidence she has already given. Harsh and embarrassing questions are asked moreover, the judge or magistrate presiding over such a case has nothing much to say, comment or guide the defence. The victim is made the criminal and most of the times she loses the case due to the times she loses the case due to lack of moral support and consideration from presiding justices.

Different categories of people attend court to listen to cases of personnel interests. The judges questioning and the way she or he reacts to the parties will always prompt the attendants either to laugh; react with emotion noted in approval of the judge's statement,

Different reactions of different kinds and meanings from people act as intimidation to those who appear before court.
To support this argument counsel J.M Sebugenyi cited (to me) the case of **Uganda Vs Patrick Kibinge 1999** (unreported) in which he was the Advocate representing the

[16] Lastor Okoth vs Cissy Nakaggwa and others civil case no. 201 of 2001

plaintiff who had been a victim of sexual assault by her brother in law[17]. (This case relates to the way judges react, with their minds preconceived with culture bias and sometimes hatred for women). to the advocate obvious evidence was available to make his client's case a success, but the judges type of questioning that some what based on culture and the requirement of proof of penetration were major factors that led to failure of his client's case. For there are many technicalities in the statutory laws of Uganda and most of the provisions that are anti-women. If not amended or repealed improvement of women's status in particular areas will remain a song of the public but not a practical reality. That the way judges react to particular issues largely reflect the law, which was enacted basing on the patriarchal culture. Women's lives have been negatively affected right from history and what the concerned population requires now is the action of all bodies concerned.

In this case Judge's reaction to women should be reasonable and humane considering women as human beings, much equal to men than any other living thing (because a woman's life is more in danger than a wild animal).

A member of human right tribunal Mr. Byamugisha Deus Assistant Director civil litigation from the Attorney's General's chambers gives his view the legal standing of today's women[18].

> *"Women today have the power and have been encouraged worldwide to stand against all kinds of violations. However, women lack capacity to stand by themselves since they have been incapacitated by their male counterparts. It is for a particular judge while presiding over cases involving women to provide smooth conditions for women to have say in matters affecting them. A judge's reaction to his or her litigants has much to do with what comes out of the people appearing before him or her".*

[17] Uganda Vs Patrick Kibinge 1999

[18] Mr. Byamugisha Deus Assistant Director civil litigation from the Attorney's General's chambers

The point raised clearly brings out the idea that judge's reaction to people who appear before them affect the way such people will answer questions asked to them and how they will generally proceed in court.

The way judges react to their female litigants in a way affects decision making in either negative or positive manner. It is thus such effect that I am looking forward to in the next chapter.

CHAPTER THREE

3. DECISION MAKING IN THE COURTROOM AND MATTERS AFFECTING WOMEN

3.1. ARTICLE 28 of 1995 CONSTITUTION OF UGANDA

"In the determination of civil right and obligations or any criminal charge a person will be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law".

The constitution therefore, spells out the right to a fair hearing, which belongs to all people without discrimination.

In making decisions therefore, a judge should answer the call of justice but not his personal and biased feelings.

However, though women's access to justice has been an international concern. (for almost 30 years now) different countries with their National policies have treated women differently.
The existence of inequalities within the Ugandan courts and the way justice is administered tends to diminish women's access to justice and human rights.

Women's needs have also not been addressed due to unsuitable or lack of government policies appropriate and realistic to the cause. Despite the endless demand for cognizance of women's human rights, many government and non-government organizations through their decision making have in a way failed to put into practice.

The existence of customs and tradition like polygamous marriages, bride price and widow inheritance, among others are always traced in the judge's reasoning while making decisions in matters affecting women. The above present a constraint to women in a number of ways.

Significantly, the application of traditional beliefs and customs create a situation of divergence or conflict with norms and key concepts of justice as employed in the formal law international human rights instruments and obviously this affects judges in decision making. In the process women find themselves at a point where they have no say but to live with and continue battling with the endless trend of human rights conflicts.

The role of the judiciary is to uphold justice for all people. According to Sheilla Muwanga a legal resources assistant, judges, magistrates and prosecutors are viewed as instrumental in the meaningful enforcement of human rights since they are charged with adjucation of cases.

A judge as a decision maker is faced with challenges like proper interpretation of the law; pointing out its contradictions and practical realities and benefits that can be gained from a particular law or a proposed amendment.

In order to play the role effectively these (mentioned above) have to adopt a liberal attitude, acquire knowledge or human rights and embrace modern changes that enhance effective delivery of justice.

While making decisions in matters affecting the status of women, judges should delicately handle women's special interests that need attention. Women should be treated and recognized as potential human beings with full human rights and they should be given an opportunity to live in the freedom just like men do.

It is however vital to note that decision making in the courts of law is dictated or based upon the provisions of the law and facts of a particular case. Surprisingly, even at this time

when judges and magistrates are presumed to be aware of the human rights challenges little effort has been made to protect and save the status of a woman.

The development of law and decision making in court in relation to women are areas where there is little development and therefore stagnant. The scenario below quoted and cited by Dr. Sylivia Tamale and J. Oloka Onyango show that some judges while making decisions are overridden by personal feelings, cultures and biases which are finally portrayed in their final decision or verdicts.

The case of **Uganda Vs Stephen Apai (1994)** involved an elderly woman one Awor Regina who took shelter from vain on the Veranda of the accused's hut[19]. The latter emerged from his hut and 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 Lugaizi acquitted the accused because in his view a woman's evidence was vague and meaningless.

He said "*the complainant has only herself to blame for the fact that the case collapsed. She stubbornly refused to say exactly what took place inside the accused's hut on the day in issue"*. While making the decision in court, judges should be independent physically and emotionally.

Accordingly to Moni A. Rich Mawi's book

"Attack on justice" it is independent judges and courageous lawyers who can force government to respect individual human rights and freedom[20]. While making decisions, judges should have free minds and with that human rights protection can be turned into a reality. Independence of the judiciary includes freedom from both internal and external intervention. It calls for prevention of prior biases, decisions should be made or reached with a clear mind, a mind without any kind of discrimination between sexes of the people who appear in court. According to justice Arach, it is difficult to go to court with a clear mind, the prior instead should be to outgrow all the negative feelings judges hold against

[19] Uganda Vs Stephen Apai (1994)
[20] Moni A. Rich Mawi's book

the negative feelings judges hold against women. They should prevent thinking about the biological differentiation but should consider equal abilities and opportunities that both sexes equally possess. However according to his worship Gidudu Lawrence;

> *"What mostly affect women litigants and well wishers who advocate for their human rights is lack of "locus standi" which is a common position strictly followed by the courts of law in determination of liability in Uganda".*

Locus standi was discussed in the case of **Verstappen Vs Port Edward Town Board and others,** that locus standi means having the standing, legal capability to benefit from a judicial proceeding[21].

Magid .J. says "..... it simply refers to the beneficiary of a particular, legally prescribed right which court is ready to protect if the beneficiary is aggrieved.

Locus standi therefore means having interest in a particular case in issue and because of that unique interest one can not be denied the benefit of the law and justice. This doctrine relates some how to the fact that one who is not a party to a case can not sue successfully to court. in such circumstances of doubt the court endeavours to establish the standing of the plaintiff and if otherwise the case is quashed.

The issue of locus standi relates to women's concern in a way that courts will require establishment of locus standi if a concerned party sued against a victim's (woman) husband. This would be a result of a woman's failure to sue due to cultural and traditional constraints, societal and family attitudes that may make her feel like an outcast if she sued against her own husband.

In relation to the above **His Worship Gidudu** cited the case of **Mtikula Vs Attorney General Civil Case No. 51993** which states the common law position that whatever a private individual challenges the decision or administrative body, the question that arose

[21] Verstappen Vs Port Edward Town Board and others

was whether that individual had sufficient interest in the decision to justify court's intervention[22].

The decision above would affect woman's status especially where a person brought an action against an organisation which carries out discriminatory activities. Basing on locus standi to deny a person benefit of human rights enjoyment is a denial based on an almost archaic principle of common law. Surprisingly also the case of Uganda in relation to locus standi has hardly changed though in other common wealth jurisdiction the position has changed.

The principle affects the development and enhancement of women's human right since it is likely to affect those people; persons and organisations who willingly might come up to challenge a particular treatment of either a group or women or a woman.

The unchanging Uganda position on the issue of locus standi was also illustrated in the case of **Rwanyarare and Another Vs Attorney General No. 20 Constitutional Petition No. 11 of 1997** (unreported) in which the court dismissed an argument in favour of public interest litigation and held inter alia[23].

The law is meant to protect and eventually benefit the community as a whole, the human rights in the constitution belong to all human beings without discrimination.

It is therefore, upon the courts of law to work hard for promotion of justice for all humanity. It is completely impossible to alter the law in decision making but in some circumstances they point out the obstacles and differences in law. These differences and contradictions as pointed out by judges in their decisions call for the attention for those making the law to either amend or repeal it. Otherwise the position in Uganda as it now stands is that, decisions are made basing on the existing law whether that law is genuine or

[22] Mtikula Vs Attorney General Civil Case No. 51993
[23] Rwanyarare and Another Vs Attorney General No. 20 Constitutional Petition No. 11 of 1997

not. Whether it's sensitive to the cause of justice or not the only intention and probably duty of the courts of law and decision making is to let justice prevail.

Judges' decision made on the basis of existing law irrespective of the accuracy of that law is an abuse and contradiction of what justice means.

Elsewhere in the world, it has been shown that judges can initiate changes in the law even without waiting for the parliament to make changes. In the case of India the Supreme Court "is identified by the justices as well as people as the last resort for the oppressed and be wildered".

The Indian position before this great revolutionary and fundamental that a spirited person can not represent any group of persons without their knowledge or consent as this would be undemocratic and could have far reaching consequences. Decisions made basing on this kind of reasoning instead of appearing just and democratic, they only lead to more human rights abuse.

This principle can simply encourage people to look on silently to those who say rights are abused but do not have the ability to initiate proceedings in court.

The requirements of consent as stated in the case above, of the abused victim are another technicality. Naturally and traditionally, a woman who is a victim of circumstances, especially violence and any other kind of abuse from her husband will fear to open to the public about what happened between her and her husband.

Her consent to a charitable group to help her proceed to court may be so hard to get unless the group goes ahead without her knowledge and later call for evidence.

However, the 1995 constitution under Article 50 and 137 has opened the gates to the courts by its provisions. The court in this relation can not be justifiably closed against those who do not want to be governed by laws not enacted in accordance to the constitution.

The constitution if interpreted in line with women emancipation, judges or magistrates for that matter should not be rigid while making decisions in issues affecting women.
The law is meant to protect and eventually benefit the community as a whole, the human rights in the constitution belong to all human beings without discrimination. It is therefore upon the courts of law to work hard for promotion of justice for all humanity.
When asked about whether while making decisions judges or magistrates can change the law Justice Arach said that;

> *"It is completely impossible to alter the law in decision making but in some circumstances they point out the obstacles and differences in the law".*

These differences and contradictions as pointed out (by judges in their decisions) call for the attention of those who make the law to either amend or repeal it. Otherwise the position in Uganda as it now stands is that, decisions are made basing on the existing law whether that law is genuine or not. Whether its sensitive to the cause or justice or not, the only intention and probably duty of the courts of law and decision making is to let justice prevail.

Judges' decision made on the basis of existing law irrespective of the accuracy of that law is an abuse and contradiction of what justice means. Elsewhere in the World, it has been shown that judges can initiate changes in the law even without waiting for he parliament to make those changes. In the case of India the Supreme Court *"is identified by the justices as well as people as the last resort for the oppressed and bewildered"*. The Indian position before this great revolutionary and fundamental change of the prestigious position of judges was for the same as that of Uganda formerly in the Indian courts people's causes appeared merely as *"issues argued accurately by lawyers and decided in the mystery and mystique of the inherited common law like the judicial process"*. The problem faced by

Ugandan judges is over reliance on the common law position moreover most of those principles have outlived their effective applicability. The world over needs change from the old kind of world where the law and its enforcers were seen as the givers of freedom and consequently life. The world is now looking for *"a new kind of lawyering and a novel kind of judging"*.

3.2. THE INFLUENCE OF TRADITION AND CULTURE TO JUDGES.

The constitution of Uganda Outlaws cultures, traditions, religious practices and other hindrances barring women from exercising their rights as enshrined therein25. In addition the constitution provides for affirmative action under Articles 32 and 33(5) aiming at enforcing the rights of groups which have been marginalized by history.

The Universal Declaration of Human Rights and the African Charter on Human and People's Rights contain explicit provisions against discrimination on grounds of sex, which has been through decades maintained by the male counterparts. The Charters provide standards that should ensure among other things the right of people including women. They accord to women protection against oppression or oppressive practices embedded in the laws and customs. They guarantee the right to fair and just judicial trials and the right to legal assistance, equal protection of the law and the right to a fair hearing (all of which have been denied to women from history).

The convention of Elimination of Discrimination against women aims at securing legal protection of women against oppressive practices. It acknowledges the right to equality of men and women in the family, the right to family planning, rights and duties towards children and equal rights in decision-making.

The influence of culture and tradition to judges has continuously existed to deny women in particular, fully enjoy their human rights. The Uganda Country Report 1992 explains that the judicial system Inherited from the colonial era is divorced from the ordinary person. It now exists as a system applicable to only to those imaginary persons who the colonialists

intended to create. The kind of law became the yardsticks for measuring validity of other laws, which has adversely affected the judicial process of Uganda.

This is because few laws have been amended and others remain just as they were during the colonial times, moreover the lifestyle of those who live then was far more controlled by culture and tradition than common law and so called principles of equity.

It was only during the colonial days where the distinction between slave and master was so vital to the colonial masters. Lack of official legal aid to women (it became normal and part of culture) who are unable to pay legal services is one of those hindrances that stand their way to emancipation. This denial was based on cultural values like those hindering women from appearing in public and with the introduction of "monied justice" women's human rights turned into dreams never realities since without payment of particular legal fees no charge can be maintained.

A report by the centre for basic Research on Human Rights (1991), of Uganda stated that about ten women charged with capital offences had been on remand for more than two years They were awaiting trial and all they needed was legal assistance Such similar cases still exist up to now and women's human rights continue to be abused for only a simple price that cannot buy life. The culture of payment affects the judges in that they can not proceed in circumstances of lack of those fees and sometimes cases are settled out of court which may not be the wish of the parties involved. In the Report on the Third Judicial officers Training Workshop, the main quotation of that report was:

> *"Courts must take judicial notice of the poor and make acts of justice available to the poor".*

The call for judicial notice of the poor aims at introducing a charitable system where even those without money enjoy the fruits of their humanity. **Mukasa Kikonyogo (1991)**[24] noted that in Uganda very few laws specifically provide for women's rights analysing the discriminatory provisions that have existed in the Uganda Laws. She says that, laws relating to marriage, divorce, and succession to property on death and on matters of

[24] Mukasa Kikonyogo

personal laws were legalized by the 1967 constitution. Even up to now laws relating to the above kinds of discrimination still exist. This means that legislation regulating these aspects of life directly limits women's formal equality and excludes their access to justice. It should be noted that those who administer the law and make decisions, base their outcomes in the existing laws, they cannot exclude the law in decisions making but such laws as seen above are composed of traditions and cultures which do not at all favour women.

It should be well known that in many parts of the world women's access to justice is severely curtailed by conservative judicial officers.

Eister (1986) quoting John Stuart Mills observed that:

> *"Only when fundamentals of the social relations are placed under the rule for equal justice can a just society be realized.... As long as one set of rules and public policy continues to be applied to one half of humanity and another sent to the other, the very foundation for the protection of human rights..., that all human being have certain in alienable rights remains totally undermined*[24]".

The difference existing in the law are the major causes of discrimination. While judges in Uganda are made to believe that where there is no law prohibiting on action and parliament has not endeavoured to either repeal or amend existing bad laws then they have no rights and duty in the matter apart from pointing out the wrongs (probably) leaving such comments on paper for parliamentarians to find while making research on which good and bad laws).

Moreover the formal equity for all before the law and its generality as perceived by judges works injustice and some times ostracises certain categories of persons. In some societies this has led to marginalized persons to seek extra legal redress though mob justice and other injustice treatments. Where the courts of law can not ensure administration of justice on the formal provision of the statutes then equity should be ready and principles of natural justice. Aristotle saw equity as a form of secondary justice because of the defect in the nature of law on account of its generality. (The generality of the law and those who enforce

[24] Eister (1986) PG. 21

it is based on the culture where men think that enforcing the rights of women may push them behind and probably make them face the same fate).

> *"equity although just and better than absolute justice. This is the essential nature of equity. It is a ratification of law in so far as law is defective on account of its generality: this in fact is also the reason why every thing is not regulated by law, it is because there are some cases that no law can be framed to cover so that they require a special ordinance ---- like the head rule of lesbian architecture ----adapted to the shape of the store --- to fit the circumstances".*

Cultures and traditions should not be the basis for discriminating against women, though this some items occurs without realization by presiding judges. Where therefore the legal rules are defective on account of their generality equity should be invoked to settle disputes that affect women. Principles of natured justice too should be invoked as they advocate for happiness and equality of all people. The generality of gender neutral laws that does not reflect their specific effect on any particular group such as women, should be revised since the equality before the law does not take into account differences that exist by virtue of culture. It only emphasizes the universal standard of equality, which is practically unachievable. It also portrays the competitive nature of human beings and even where circumstances call for special treatment of women so that to achieve their long fought for freedom, the male dominated judiciary will not give it chance. Judges should put real life experiences of women into consideration while making decisions. This will make it easy even for the lower courts to find reasons against discrimination and out date decisions making basing on the culture and traditional beliefs. Different tests should be used to gauge equality, enlighting judges of what is meant by such equality.

For example such tests like notions of equality on the basis of similar situated have .Y obscured the extremes in the economic and social realities of women's lives. The test is normative only and does not create opportunity for recognition of the existence of advantage to the group or an individual. The norm of the minority stand on the losing end, the test fails to give prominence and analytical meaning to the concept of discrimination.

Tove Stand Dahl, characterized positive discrimination as a recognition of the differences rather than pretending that they do not exist. She therefore advocates for discrimination based on sex, which is in favour of the women and she was later supported by the promises of legislation for differences. Judges in order to outgrow their cultures, they should make judgements in favour of marginalized groups where principles of natural justice and equity demand.

The Canadian case of **Andrew Vs law society of British Colombia (1989)** attempted to set a standard against which discrimination and equality may be measured[26]. This involves examining a breach of equity provisions in direct relationship to discrimination. It involves the examination of content of the law as well as the impact of such law putting an end to normative and formalist principle. The case reflected "the equal but separate principle or doctrine" and that equality does not means sameness". Since formal equality can not be concretely defined and achieved. Such a belief may easily result into culture should be criticized by judges for the sake of justice.

It is important to note that the constitution of Uganda is the supreme Law of the land and all other laws and bye laws are subject to it. Uganda is also a highly religious country and consequently many social activities in Uganda have a bearing on the religious inclinations of the different communities often with serious gender implications. The law of marriage in Uganda recognizes marriages contracted according to Christianity, Islam and Customary practices. It has therefore been by cultural and religious, beliefs that the lawmakers and those who enforce it have not properly catered for the rights of unmarried cohabiting women. What matters however, is whether there are children in that relationship and if so, such women are entitled to custody of children until they are seven years old. In the event of man's death cohabiting women do not fall in the category of beneficiaries under the law and sometimes relatives of the deceased deprive survivors of all property.

In the case of **Uganda Vs Karanimmo Oliva and Sophia W/o Opio (Ctriminal Division No. 10 1974)** The two accused were charged with adultery contrary to Section 150A(l) and

[26] Andrew Vs law society of British Colombia (1989)

150A(2) of the Penal code Act respectively[27]. For a conviction to stand under either of these sections a woman must have been married. There was evidence that the marriage was a customary one, that payment of dowry was not complete and that the marriage had not been registered with the appropriate authorities. The learned Judge referred to the case of **Wongo Vs Dominico Mana** where **Sir Andley MMC Kisaik CJ**, as he then was, held that a customary marriage is not valid until the dowry has been paid in full[28]. Since the lull dowry had not been paid, in this case court held that Sophia the second accused was legally not a married woman. The courts of Uganda still apply customary law in decision making (which is basically culture) and judges can easily be influenced by such traditions leading to denial of women of their rights. Though many of Ugandan laws affecting women have not been formally amended or repealed by parliament, judges should have the ability and willingness to call for change especially in such matters (as this) where human rights are seen to be abused. The following subchapter therefore will deal with how much change can judges bring into society.

3.3. THE INFLUENCE OF JUDGES TO SOCIETY IN SOCIO-ECONOMIC AND POLITICAL SPHERES

As already mentioned above the role of the judiciary to the society, as a whole is to bring justice to the conflicting parties. Decisions made by judges act as examples to the society in that they can be used to settle issues outside court through compromise and negotiation. Courts' decisions can also act as precedents to lower courts to which such decision bind and can act as persuasive depending on a case in issue or before which the case has appeared. Under such circumstances therefore judges can have a great influence in society. Such influence, I so believe will help in the improvement of women's human rights.

Socially human beings were or are meant to live freely the more he or she will cause havoc to destroy her or his own being, people and all his surroundings. Because of fear for destruction therefore laws are made to control activities of human beings but such law as

[27] Uganda Vs Karanimmo Oliva and Sophia W/o Opio (Ctriminal Division No. 10 1974)
[28] Wongo Vs Dominico Mana

can no4 4e efficient unless enforced by the different law enforcing bodies which include policies, the public prosecutor, the courts of law and other tribunals the role which is to up to the existing law in practice. Decisions of judges in cases that affect the society are relevant and attractive to the way people live, their decisions lead to peaceful settlement of disputes through a violent free situation. Such dispute settlements are vital because they lead to peaceful co-existence of human beings. Due to the above therefore the Uganda courts have seen a multic.ity of cases coming before them to resolve which include both civil and criminal matters and constitutional issues.

The public has been taught (it has learnt from the already decided cases) how to settle disputes by themselves but if such issues are beyond their control then they resort to court. People therefore to attain justice and enjoyment of their fundamental human rights and freedom's enshrines in the 1995 Constitution, those involved in the administration of Justice should be adequately sensitized to handle the task. The constitution of Uganda contains some of the best human rights and freedom's provisions on the African Continent' and yet for the majority of Ugandans these provisions remain on paper. It is high time therefore the courts began to deliver the promises contained in Chapter IV of the constitution through making efficient and liberal interpretations of different laws. They should also make decisions that will influence and affect not only the present but also the future generations. The laws should be sustainably developed (to borrow the environmental law term requiring sustainable development). Sustainable development of the law will mean taking into account the needs of the present as well as those of the future generations. The law that accounts for all humanity, not one group of privileged persons or a law discriminatory in practice.

Judges have the ability to change the law, and therefore it should not be considered static, it can be amended or repealed depending on the interest of a particular community. They should therefore point out the wrongs in the law, which will help Parliament o enact new laws. The pointing out of wrongs has been done formerly and even up to now but most of the time these wrongs have not been redressed since judges live them on paper for the law

makers to find them out. The problem however comes in where most of Uganda parliamentarians do not know the law, very few of them are lawyers and they can hardly pick or gather interest to read cases to find out those wrongs. It would be of great help if therefore judges and lawyers themselves forwarded the bad laws to parliament which in turn can make changes accordingly.

The participation of legally educated or elite people in the promotion of people's human rights pals an important role. Lawyers, law professors, judges and law students can easily initiate legal proceedings against violators of human rights. An example in the Indian Case of **Dr. Upendra Baxi Vs State of Ultar Padesh 3 S.C.A.L.E.** illustrates how people with knowledge about the law can initiate proceedings to fight for their rights of the population[29]. In 1980 two professors of law wrote a letter to the editor of the Indian Express describing the barbaric conditions of detention in the Agra protective home for women. The basis for a writ petition under Article 21 challenging mistreatment of the Indian people.

Another example is the case of **Kadra Pahadiya Vs State of Bihar WP 59443 of 1980.** A Lawyer and a law teacher on a social science research fellowship successfully brought to completion of the trial of four young tribals who grin a Sub jail awaiting trial[30]. Another similar case was also that of **Ghana Shyan Pardesi Vs State of Tainil Nadu WP 226 1/8** a legal correspondent of the statesman brought to notice of the court the inhumane conditions of detention of Naxalite' prisoners in the Madras jail challenging in the process of the Indian Prisons Act 1892[31]. The above Indian cases (and many unquoted) illustrate the power of people who are informed about the law judges can easily do it even in Uganda. It is such activities that will lead Uganda make reforms that benefit all human beings but not to stick on those discriminatory laws, left into existence only because of the judges cultural belief that they can not initiate changing of the law.

[29] Dr. Upendra Baxi Vs State of Ultar Padesh 3 S.C.A.L.E.
[30] Kadra Pahadiya Vs State of Bihar WP 59443 of 1980.
[31] Ghana Shyan Pardesi Vs State of Tainil Nadu WP 226 1/8

Mukyala .R. (1992). *Political Opportunity for Women's Empowerment and Emancipation.*

Musisi .N. (1991). *Women Elite 'Polygamy' and Buganda State Formation, Journal of Women in Culture and Society, Women Family and Economy in Africa*, University of Chicago.

Obbo C. (1990). *East African Women Work and the Articulation of Dominance in Tinker, Persistent Inequalities,* Oxford University Press New York.

Pizzano, R. (1960). *Communita'e Razionalizzazione,* Italy.

Synder and Taddesse (1995). *African Women and Development*, Zed London.

White .C. *The Role of Women and Interest Group in the Uganda Politics System,* Makerere University.