Proving Customary Law in Uganda: Roadmaps and Roadblocks

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by D. Brian Dennison

I. Introduction

Customary law is second-class law in Uganda. While customary law applies in many “grass root” settings, customary law struggles for legitimacy within formal legal environments. Matters of customary proof exemplify this disconnect.

Ugandan methods of customary proof are the product of British colonial precedent. Despite longstanding calls for revised approaches, little has changed since Uganda’s independence in 1962. The colonially crafted framework of customary proof devalues custom and culture.

In terms of proof, Ugandan courts treat customary law less favourably than foreign law. Judges have no duty to know customary law. Instead customary law is a fact to be proved. Judges with knowledge and expertise in customary law are not allowed to use that knowledge to pronounce customary law.

Since 2008 Ugandan appellate courts have issued two noteworthy cases concerning customary proof: 1) the Uganda Supreme Court case of Kampala District Land Board and George Mitala v. Venansio Babweyaka et al. (hereinafter “Kampala District Land Board”), and 2) the Constitutional Court of Uganda’s decision in Mifumi (U) Ltd and 12 Others v. Attorney General (hereinafter “Mifumi”). Those seeking to promote, protect and reform customary law in Uganda must understand the ramifications and implications of these decisions.

II. Approaches to Customary Proof

There are two prevalent approaches to proving customary law in Post-British Colonial Sub-Saharan Africa: 1) the traditional approach and 2) the liberal approach.

The traditional approach is the product of British colonial jurisprudence. Under the traditional approach, customary law is a fact to be proven and judges may only judicially notice aspects of customary law that are notorious or otherwise established through clear judicial precedent. The dominant means of proof under the traditional approach is expert witness testimony. Witnesses must testify about customary law as it has existed from time immemorial.

Under the liberal approach the judiciary is empowered to learn customary law on its own initiative and seek help from nonparties. Customary law is treated much like any other law in terms of judicial notice. The liberal approach promotes the use of input from cultural groups in the development of customary law and allows customary law to change.

Uganda follows the traditional approach. The case that set the post-colonial tone is Ernest Kinyanjui Kimani v. Muira Gikanga (1965) E.A. 735. Kimani was a split decision by the East African Court of Appeal concerning a Kenyan dispute. The core issue in Kimani was whether courts in Kenya could use assessors to assist them in the process of determining customary law. The majority held that customary law was for the parties to prove and the judiciary was not empowered

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2 In Uganda the Supreme Court is the highest appellate court in the land.
to determine customary law through assessors. Kenya’s laws of evidence at the time were nearly identical to Uganda’s current evidence laws. Thus *Kimani* remains a relevant precedent.

The *Kimani* case is more than a stubborn endorsement of the traditional approach. *Kimani* is also an example of judicial avoidance of customary matters. Through the onerous evidentiary requirements, the *Kimani* majority avoided grappling with substantive customary issues.

*Kimani* also included a voice for the liberal approach. In a stinging dissent, Justice Crabbe critiqued the status quo requirements for proving customary law in Commonwealth African States. Crabbe noted that the traditional approach was crafted by colonial judges who did not understand indigenous customs and culture. Crabbe asserted that the changes that had occurred as of 1965 necessitated a new approach.

**III. Challenges Presented by the Traditional Framework**

The traditional approach of proving customary law is restrictive and inadequate. It presents onerous technical and structural challenges. (Woodman 2011; Ubink 2011) Under the traditional approach, judicial notice of customary law is only permitted when custom is notorious or when custom is firmly established through precedent. Thus Ugandan judges are under no incentive to study and understand customary law. Arguably, judges are best served by knowing little about customary law to avoid improperly inserting their own knowledge of the law into their findings.

The limitation on judicial notice thrusts the responsibility of customary proof on the parties. Interested parties tend to submit offers of proof that serve their best interest. Inconsistent testimony can result in a failure to establish customary law. Unbalanced advocacy can result in distorted findings of customary law. If the customary law is not established, courts are unable to rule on the merits of customary claims.

Witness testimony is a logistically challenging way of establishing law. Because it is generated through oral testimony in the adversarial crucible of direct and cross examination, this evidence is difficult to present in a way that allows for the orderly and informed construction required for an interconnected and functional legal system.

The traditional method of proof also takes the law-making function away from the general community and places it in the possession of those who will be considered experts. Litigants tend to choose community members of a certain age and social standing in a community. Community members that do not fit the witness profile are thus excluded from the law-making process. Thus this form of proof structurally reinforces the traditional biases that have distorted customary law in the past and inhibits the law’s ability to change.

Traditional customary proof is descriptive. It does not countenance the power of a community to change customary law. The displacement of communities from the process of creating customary law raises constitutional concerns in Uganda where there is an explicit right to culture. (*Constitution of the Republic of Uganda 1995* art 37) A descriptive approach to proof also strips communities of their power to modify customary law in compliance with mandatory non-customary legal requirements such as those emanating from constitutions and international human rights instruments.

The “time immemorial” requirement presents special concerns. This requirement is incongruent with the ever-changing nature of customary law. (Woodman 2011) Moreover, using personal knowledge to testify about the state of law from the beginning of recorded history in African communities is increasingly difficult.
Customary law is a flexible system grounded in principles as opposed to rules. The “fluidity” of customary law was one of the reasons that colonial administrators considered customary law unfit for legal analysis. (Oba 2011) Therefore the traditional proof requirements of specificity and certainty clashes with the character of customary law.

With these challenges in mind, we turn to Kampala District Land Board and Mifumi. Both cases involve appellate courts grappling with the limitations and restrictions presented by traditional approach. The divergent opinions in these cases reveal philosophical schisms concerning customary law.

IV. The Kampala District Land Board Case

The Kampala District Land Board case arose out of a dispute over land. It has a complex procedural history that need not be recounted here. At the core of the case is the issue of land tenure. A key matter for determination is whether plaintiffs proved that certain land is held under customary tenure.

In an unanimous opinion, Chief Justice Odoki presents a succinct treatment of the legal framework and requirements applicable to customary proof in Uganda. Odoki addresses the interrelated issues of burden of proof and judicial notice. Odoki writes that it is “well established that when African Customary law is neither well known nor documented, it must be established for the Court’s guidance by the party intending to rely on it.” Odoki asserts that “(i)t is also trite law that as a matter of practice and convenience in civil cases related to customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties.”

Odoki sets forth the basic avenues of customary proof in Uganda. Odoki breezes through Ugandan statutory law framework. His statutory analysis consists of quoting Section 46 of the Evidence Act providing for the use of expert testimony to establish custom or customary law. (The Evidence Act 1909, Cap 6, Laws of Uganda, s 46)

After quoting Section 46, Odoki turns to the Kimani case. Odoki quotes from Justice Duffus:

“As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.”

Ernest Kinyanjui Kimani at 739

Odoki’s reliance on Justice Duffus’s opinion is significant. If the Kimani majority is part of the “trite law” then the British colonial approach to customary proof is well ensconced in Uganda.

In addition, there are several other lessons from the Duffus quotation worth unpacking. First, Duffus requires the “accurate” and “definite” establishment of customary law. An accuracy test requires courts to have some basis for assessing accuracy. Where this basis will come from is not
clear. The ironic result appears to be that a court can only use its knowledge of customary law to critique the proof offered by others.

Odoki walks the fine line between judicial notice and informed assessment. Odoki repeatedly calls on his own personal knowledge about the absence of customary tenure in urban areas. Arguably, this knowledge informs the judge’s assessment of customary submissions for accuracy as required under Kimani. However, restricting the use of his knowledge for purely negative purposes is a powerful structural bias against the integration of customary law into formal justice systems.

Duffus’s definiteness requirement also raises concerns. Customary law does not lend itself to certainty; it is flexible. (Woodman 2011) Within customary law, the application of principles is more prevalent than the use of formulaic approaches. The definiteness requirement proved problematic for the plaintiffs in Kampala District Land Board. Chief Justice Odoki recounts the record and points out the inconsistency in the testimony regarding the existence of customary tenure. The inconsistency in the testimony forms the basis for Odoki’s finding that customary tenure in the subject land was not established.

Ultimately, Odoki holds that the respondents simply “failed to establish that they were occupying the suit land under customary tenure.” Odoki reasons that “(t)here was no evidence to show under what kind of custom or practice they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons living in the area.”

The Kampala District Land Board case is an especially cautionary tale because the matter of proof before the court was simple: Was there customary tenure on the subject land or not? It was a “yes” or “no” proposition. In other instances the subject of customary proof is far more complex. Certainly definiteness, as an element of proof, presents litigants with a substantial challenge.

V. The Mifumi Case

A. Case Overview

The Constitutional Court of Uganda issued its ruling in Mifumi in March of 2010. Mifumi arose out of a constitutional petition3 filed by a non-governmental organization and twelve individuals seeking to end the practice of “bride price” in Uganda. The petition sought a declaration that practices of requiring “bride price” and demanding the refund of “bride price” violate certain constitutional provisions including those providing for the freedom to marry, equality of the sexes, and the prohibition of inhuman and degrading treatment. (The Constitution of the Republic of Uganda, 1995 arts 31, 21 and 24).

Like Kampala District Land Board, Mifumi includes a legal inquiry regarding the proof of customary matters. The Mifumi petitioners sought to prove “bride price” in general terms that cut across specific cultures. The petitioners did not seek to prove the specific legal marriage framework of any particular customary legal system in Uganda. Ultimately, the failure to establish specific customary practices along with the failure to causally link specific customary practices to specific instances of harm to women was the petition’s undoing.

3 Article 137 of The Constitution of the Republic of Uganda, 1995 provides in part that:
“a person who alleges that—
(a) an Act of Parliament or any other law or anything in or done under the authority
of any law; or
(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this
Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.”
On the surface, the decisions of the five justices in *Mifumi* appear relatively consistent. Four of the five justices ruled that the petition should be dismissed and that no costs should be awarded. However, an inspection of the opinions reveals strongly divergent approaches to the proof of custom and customary law.

B. The Opinions of the Court

The following are overviews of the five written opinions issued by the *Mifumi* Court. The opinions are discussed in the order they appear in the Constitutional Court’s judgment.

1. The Opinion of Deputy Chief Justice L.E.M. Mukasa-Kikonyogo

Deputy Chief Justice Mukasa-Kikonyogo writes the first opinion in *Mifumi*. She holds that the court is barred from considering the petitioners' claims on the merits due to the petitioners’ evidentiary failure to establish the specific customary practices they challenge. Thus, the issue of customary proof is a key element in the Deputy Chief Justice’s analysis.

Mukasa-Kikonyogo’s approach to customary proof is traditional. She writes:

“In the instant petition, it was incumbent upon the petitioners to establish the practice of bride price payment on marriage by, in the first instance, call witnesses or documentary evidence or any other satisfactory evidence to prove the practice. Although the court has got a wide discretion on this matter, the onus is on the party seeking to rely on the custom. Although many affidavits were filed alleging the suffering that might be caused or due to the practice of customary bride price, there was not a single affidavit to prove the custom. In the circumstances, I am unable to hold that the practice is so notorious that it should be judicially noticed by the court.”

Mukasa-Kikonyogo acknowledges the limitations on judicial notice of custom in Uganda. She notes that she is only able to judicially notice customary practices that are notorious.\(^4\) She finds that specific customs pertaining to bride price in Uganda are not notorious enough to allow for judicial notice.

While the above analysis appears straightforward, there are a few wrinkles in Mukasa-Kikonyogo’s approach to customary proof. The initial issue for determination in Mukasa-Kikonyogo’s opinion concerns the terminology “bride price” and “dowry.” Mukasa-Kikonyogo distinguishes bride price from dowry through her knowledge of wider cultural practices. Her preliminary treatment of “bride price” and “dowry” is more about sensitizing the reading audience than proving the customary law. Thus her personal knowledge does not establish specific customary law.

Nonetheless, her personal knowledge informs her appreciation about bride price and this appreciation makes her less willing to allow a generalized attack on bride price. She writes:

“Before I take leave of this judgment, I wish to comment further on the difference between ‘bride price’ and ‘dowry’. In certain African societies, the custom of presenting a gift to the bride’s family is practiced as a token of gratitude. This gratitude is for the part the bride’s family has played in taking care of the potential bride. Under this view, the gift or gifts are, under no circumstances, to be considered payment. The groom’s family is not the only

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\(^4\) Uganda case law offers scant guidance on what amounts to “notorious.”
one giving gifts; the bride’s family may give gifts as well. This practice arises out of the value society attaches to virginity as the fountain of life that is valued as the proper form for any marriageable woman to be in. A woman is endowed with the spring of life, and the gifts in dowry sometimes express gratitude for preservation of this spring of life without using the spring wastefully.”

One particularly eye-catching item in Mukasa-Kikonyogo’s opinion is her use of a Wikipedia entry to define “bride price.” Thus a Ugandan judge who cannot judicially notice indigenous customary law cites an open-source Internet website for the definition of bride price. Irony aside, the use of Wikipedia is indicative of a generous judicial approach to reference and textual materials as evidence.

In terms of the substantive claims, Mukasa-Kikonyogo imposes a “back to the drawing board” directive on the petitioners. Those that seek to rely on custom must prove the specifics of their custom. Mukasa-Kikonyogo also recommends that those that are treated poorly as a result of custom would be better served by bringing an action under Article 50 of the Uganda Constitution asserting actual discrimination as opposed to more general attacks on cultural practices through an Article 137 petition. Thus Mukasa-Kikonyogo avoids consideration of petitioners’ claims on the merits. The traditional approach to proving custom facilitates her reserving judgment on the substantive issues.

One could look to the result and consider Mukasa-Kikonyogo’s opinion to be pro-custom. However, the inability of the petitioners to prove such a basic aspect of custom demonstrates the weighty challenge of proving customary law. While this holding in Mifumi might offer temporary shelter for customary practices from substantive judicial review, Mukasa-Kikonyogo’s approach does not bode well for the proof and use of customary law within formal legal settings.

2. Justice E.N. Mpage-Bahigeine, J.A.

In many ways Justice Mpage-Bahigeine’s approach to customary proof mirrors Mukasa-Kikonyogo. However, her opinion is distinctive due to her passionate representation of the right to culture and her willingness to challenge an aspect of the traditional legal framework regarding custom and customary proof.

Like Mukasa-Kikonyogo, Justice Mpage-Bahigeine pronounces her general allegiance to the traditional approach to customary proof. She writes “(c)ustoms must be proved in the first instance by calling witnesses acquainted with them until the particular customs become so notorious that the courts take judicial notice of them, without the necessity of proof in each individual case.” She references Sarkar on Evidence for the proposition that “(j)udges must reach the decision to accept a custom on legal evidence. They cannot import knowledge from other sources.” Mpage-Bahigeine’s adoption of the traditional approach extends to judicial notice. She writes “(i)t is only by recognition of the custom by way of court decisions that entitles it to judicial notice and not otherwise.”

After issuing those firm words, Mpage-Bahigeine provides a window into customary law that appears to flow from her personal knowledge of Baganda culture. She writes:

“As to whether there can be uniformity of the custom of bride-price, it is a fact that Uganda’s diverse tribal make up has each tribe subscribing to its own culture that has been passed on from generation to another. This means therefore that there are quite a number of cultural practices concerning
marriage in Uganda. While a given practice might mean so much to a certain society it may be a violation of human rights to another. Thus, while it would be considered a denigration, an insult to the dignity and worth of a Muganda bride to leave her parents’ home for marriage without ‘a mutwalo’ (bride-price) having been paid / given to her parents, a bride from another region might herald it as the epitome of civilization and liberation, an achievement for her in that she has not been haggled over and sold into marriage like any chattel in a market place. It is vital to note that ‘mutwalo’ ‘price’ is merely symbolic. It could be in the form of rare and intrinsically valuable items like ‘a nsaamu’, which is an engraved wooden hammer for making ‘back-cloth’, a very old hoe ‘a kasimo’ or even a very old coin or such other symbolic items. Furthermore, there is no such concept as refund of ‘mutwalo’ “bride-price” in Buganda as it is in the Eastern region.”

Later she writes:

“This valued customary practice should be clearly distinguished from what is obtaining these days when prospective grooms, out of sheer egotism, are obliged to take lorryfuls of goods to their future in-laws. This is an adulteration of the time-honoured ‘kwanjula’ – payment of the bride-price which is intended to be a very private ceremony at least in Buganda. Some also tend to confuse this with the Kinyankore custom of ‘okuhingira’ where a bride is sent off properly facilitated to start a home ...”

Mpage-Bahigeine holds that Ugandan customary practices are protected from broad-brushed claims. She rules that those challenging cultural practices must accurately and definitely establish local customs that they seek declared unconstitutional or repugnant. She writes “(i)n face of the divergent cultural beliefs and practices, with different people valuing their own, courts should not be quick to extract them by slapping a blanket declaration banning them on ground of unsoundness.”

Mpage-Bahigeine presents a culturally informed view of bride price. She finds that “(b)ride-price does not mean that a bride is for sale. It is merely symbolic of the parties (sic) appreciation for the upbringing of the girl. The girl is thus not degraded nor is she rendered as a chattel. Articles 24 and 21 (1) or (2) (of the Uganda Constitution) are thus not contravened.”

Mpage-Bahigeine emphasizes the constitutional protections afforded customary practices. She writes:

“I think it should further be born in mind that cultural rights or customs being directly related to an individual’s identity are very crucial to the enjoyment of all other rights. Their promotion and protection is a vital prerequisite for the completeness and fulfillment of a human being. The National Objectives and Directive Principles of State Policy XXIV positively protect these cultural practices. Article 37 encapsulates it: “37…. Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, tradition, ….in community with others.”

When speaking of the threat that general legal declarations pose to custom, she passionately proclaims:
“This would rob the various ethnic groups of the cherished feeling of their identity, dignity and self-worth. These customs are value systems which only a particular tribe best knows. I think, therefore, that they ought to be allowed to keep what they treasure.”

Mpage-Bahigeine also offers a ray of hope for those who contend that customary law must be permitted to change. She writes “I would thus agree with the respondents that the custom of paying /giving bride-price has to be proved first since they keep on changing with the times.” This statement reflects a rejection of the time immemorial component of traditional customary proof.

3. Justice C.K. Byamugisha, JA

Justice Byamugisha’s opinion is concise and pragmatic. She largely ignores customary proof. For Byamushisha, the petitioners’ targeting of bride price is misplaced. She views greed instead of culture as causing parents to sell daughters for money before completing school. She sees violence against women as a criminal activity best addressed through criminal prosecution. She separates law from conduct. She does not believe that customary laws should be struck down when they are simply being misused or misapplied.

Justice Byamugisha reflects umbrage towards attacks on culture. She harps on the dubious colonialist origin the term “bride price.” Justice Byamugisha calls on cultural groups to take part in legal disputes concerning their cultural practices. She writes “(c)ustomary marriage and the practices which go with it are protected by the Constitution and it would be unjust to slap a constitutional declaration banning the marriage and its practices across the board without the communities concerned being afforded an opportunity of being heard.”

Like Justices Mukasa-Kikonyogo and Mpage-Bahigeine before her, Justice Byamugisha addresses the problem of general attacks on customary practices. For Byamugisha the diversity of cultural practices makes overarching legal attacks both impractical and an impermissible infringement on the right to culture.

4. Justice S.B.K. Kavuma, JA

Justice Kavuma’s opinion stands out. His are not the words of an impartial observer. Kavuma’s opinion reflects an abiding interest in and passion for customary law in Africa.

Justice Kavuma’s opinion delves into the issue of customary proof. He tracks the historic trajectory of customary proof in Commonwealth Africa. He provides a comparative framework that contrasts the stagnant trajectory of the law of Uganda with pro-culture statutory developments of Kenya and Tanzania and sets out the jurisprudential taxonomy for the traditional and liberal approaches to customary proof.

Kavuma begins with a poignant salvo decrying the use of colonialist language to describe African customary practices. He writes:

“I accept the concern expressed by the second respondent that the words ‘bride price’ were coined by Europeans with a deficiency of knowledge and appreciation of African culture and Customary Law. To such people the exchange of bride wealth from the side of the bridegroom to that of the bride in a customary marriage arrangement was nothing but a payment of a ‘price’ by the bridegroom to the parents of the bride in a ‘transaction’ in which the bride is commodified or portrayed as an ‘article’ for sale to the bridegroom in
payment of the ‘purchase price’, they termed ‘bride price’. This, as I will show later in this judgment was an error. It resulted from a serious misconception of African Customary Law and practices in the area of customary marriages. Suffice it to say for now that I prefer the use of the words ‘bride wealth’ to ‘bride price’ and I will use bride wealth whenever I find it appropriate to do so.

I also prefer to refer to the act of exchanging bride wealth between the side of the bridegroom and that of the bride as ‘giving’ rather than ‘paying’. This is the essence of the use of ‘bride wealth’ in customary marriages and the definitions of the words used in relation thereto. The concerned words will be given and defined later in this judgment.”

Kavuma critiques the traditional approach for proving customary law. Kavuma catalogues the events that led to the rejection of the use of assessors to assist courts in determining customary law. He quotes prior case law to demonstrate that customary law was disfavoured because British judges did not understand it. He relates how colonial prejudices conspired against customary law. He notes customary law became a mere fact to be proved by the parties.

Remarkably, Kavuma makes no mention of the *Kampala District Land Board* case. Instead, Kavuma concentrates his outward attack against the *Kimani* case on which Odoki’s “trite” law is built. Kavuma carefully presents the majority opinions in *Kimani* as outdated and grounded in colonial prejudice. Kavuma uses this quote from Crabbe’s dissent to drive his point home:

> “Before concluding this judgment, I should like to express my own views on the general observations made by my brother Duffus that in civil claims native law and custom must be proved in a magistrate’s court or in the High Court. The rule that the customary law must be proved was stated by the Privy Council in the Ghana case of Angu V. Attah . . . But this rule which was applied only in the ‘British courts’ originated from the fact that most of the early judges in the British colonial territories in West Africa were Europeans, who were unacquainted with the various rules of the customary law. The courts therefore insisted on the proof of rules of customary law. The rule was not however always followed, for in deciding questions of native law and custom, the existence or content of any rule of customary law was in some cases determined by reference to any book or manuscript recognized as a legal authority, and the court could also call to its assistance chiefs or other persons whom the court considered to have special knowledge of native law and custom. The rule in itself is fast becoming out of date, and I think it is too late to extend its application to East Africa.”

Kavuma’s implication is clear, even the non-African Justice Crabbe knew the time for the rejection of the traditionalist approach had come in 1965. The result is a forceful, albeit stealthily diplomatic, rejection of Odoki’s decision.

For Kavuma the quotation that epitomizes the prejudicial legacy of the traditionalist approach comes from Justice Hamilton in *R v Amkeyo (1917-1918)* EAPLR 4. Hamilton wrote:

> “In my opinion the use of the word “Marriage” to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas. I know of no one word that correctly describes it; “wife-
purchase” is not altogether satisfactory, but it comes much nearer to the idea than that of “marriage” as generally understood among civilized people.”

Kavuma calls Hamilton’s assessment “a complete misconception of bride price and its role in African culture and Customary Law in the area of customary marriages.” Kavuma condemns this prejudice and calls for its exorcism from Ugandan jurisprudence.

Kavuma also appreciates the need to forge more conventional legal arguments. He walks through the Evidence Act in order to make the case for a liberal approach to customary proof. His analysis is tilted in favour of his desired ends. However, in fairness to his fellow justices that continue to adopt the traditional approach, Kavuma notes that Uganda’s Parliament has yet to amend its Evidence Act to adopt the liberal approach. Here, Uganda differs from Kenya’s and Tanzania where the national legislatures addressed the issue by modifying their Evidence Acts.5

Next Kavuma asserts that Article 126 of the 1995 Constitution transformed Uganda from a traditional jurisdiction to a liberal jurisdiction. Kavuma notes that Article 126(1) provides that “(j)udicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.” Kavuma asserts that such norms include customary practices and customary law. Article 126(2)(e) provides that “substantive justice shall be administered without undue regard to technicalities.” For Kavuma, the colonial era limitations and requirements concerning the proof of custom are the sort of technicalities that 126(2)(e) ameliorates. Justice Kavuma asserts that the Ugandan Evidence Act should be reread through the lens of Article 126. Kavuma’s analytical approach enables him to endorse the liberal approach to customary proof and obviate the Kimani precedent without engaging in outright judicial activism.

Kavuma’s adoption of the liberal method of customary proof enables him to take judicial notice of the diversity of customary practices and provisions within customary laws that guard against discrimination and abuse. The skill with which Kavuma uses his knowledge of customary law amounts to an additional ground for adopting the liberal approach of customary proof.

Despite his championing of customary law, Justice Kavuma would strike down one aspect of custom at issue in Mifumi. Kavuma finds that the practice of failing to account for the contribution of a wife to the marriage when seeking refund of bride price is unconstitutional. While this is an instance where custom is struck down, it is also serves as an object lesson in judicially navigating customary matters. Kavuma shows that customary law can be challenged and adjusted in a surgical manner. Kavuma notes that to strike down more of the customary practices than are necessary would be like “(t)hrowing the baby with the bath water.” Later on Kavuma reasons “(s)society should have the liberty to enjoy the good of the custom while discarding the bad acts and omissions resulting from negative exercise of a constitutionally guaranteed custom. Again, the baby should never be thrown with the bath water.”

Kavuma speaks of babies and bathwater to emphasize that customary practices can be preserved through modification and amendment. Customary reconstruction requires an approach to establishing customary law that is more than merely descriptive. If customary law is to be adjusted and reformed it must be capable of being established in a way other than historic rendition.

5. Justice Twinomujuni, JA

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5 An observer of the Kenyan judiciary notes a continued adherence to the limitation on judicial notice established in Kimani despite the amendment to Kenyan Evidence Act that expressly provides judges with the power to judicially notice unwritten law. (Ochich 2011).
Justice Twinomujuni offers the lone dissent in the Mifumi case. He would allow the petition to go forward and would declare the practices of demanding, paying, and requiring the return of bride price unconstitutional. Twinomujuni overcomes technical impediments in order to reach substantive issues at the heart of the case.

Twinomujuni chooses not to stand behind the diversity of customary practices in Uganda to avoid engaging with the constitutionally of bride price. Instead, he substantively considers three “elements or characteristics” associated with bride price. These are (1) the parents demand of bride price, (2) the payment of bride price by the bridegroom or the bridegroom’s family to the bride’s relatives, and (3) the requirement that bride price be refunded in the case of divorce. He chooses to rule on these characteristics thereby ruling by proxy on any particular customary system in Uganda that might happen to share in such elements or characteristics.

Although he is alone in his dissent, Twinomujuni joins Kavuma on evidentiary matters. Twinomujuni adopts a liberal approach to customary proof. He announces that he has “read a good amount of literature about the marriage practices in many African countries.” He offers examples of customary law based on his personal knowledge concerning the Bakiga of Kigezi. Twinomujuni’s working knowledge of customary law is weaved into the tenor and substance of his opinion. Twinomujuni critiques assertions about customary law based on collected personal knowledge. He notes that the Banyankole has nothing to fear because if “their customary marriage practices do not share” in the three challenged characteristics of bride price that they can “rest assured that their customary practices are not being challenged in this petition.” Twinomujuni says this “with tongue in cheek because (he is) very conversant with the tradition(al) customary marriage practices of the Banyankole which are very similar to those of (his) own Bakiga traditionalists.”

Twinomujuni notes the absurdity of traditional customary proof. He writes:

“However, this court composed of Ugandans who were borne, have lived, worked and practised law in this country during a period of over half a century, should be able to take judicial notice of a notorious fact that the practice of bride price has caused untold suffering to thousands of women throughout Uganda just like their counterparts in Eastern and North Eastern Uganda.” Referring to his fellow justices, he states “(s)ome of us have witnessed even worse experiences than the witnesses from Tororo.”

For Twinomujuni, this is not an instance where judicial notice is limited to prior court decisions.

Twinomujuni holds that bride price puts men and women on unequal footing and causes harm. He holds that “the custom of paying bride price in a customary marriage is repugnant to good conscience and contravenes article 31(3) and 33(1) of the Constitution.” Justice Twinomugani states emphatically that “(i)t is high time that the custom is abolished and the woman should be set free.”

Despite his willingness to strike down certain bride price practices in Uganda, Twinomujuni is not anti-culture. He provides avenues for the continuation of cultural practices that allow parties to the wedding to show appreciation to the family of the bride through gifts. In addition, Twinomujuni would not strike down practices of dowry that provide couples with the direct benefit of wedding gifts. Like Justice Kavuma, Justice Twinomujuni’s approach provides a means for throwing out the bathwater and saving the customary “babies.”

VI. Lessons for Stakeholders
According to Odoki’s opinion in Kampala District Land Board the traditional approach to customary proof prevails. However, discontent bubbles beneath this “trite law.” In Mifumi, even judges claiming to follow the traditional approach slip liberal elements into their analysis. The practical lessons of these two cases differ depending on role and constituency. The following is a breakdown of lessons for key stakeholders.

A. Lessons for Advocates

Prudent Ugandan advocates should proceed as if they will be required to prove custom in accordance with the traditional approach. This method presents logistical challenges in terms of generating “accurate” and “definite” law. Advocates must identify competent witnesses who will present customary law in a way that will be accepted by the court. This means eliciting testimony that establishes the practice of the custom in the community and evidence that the custom is considered to be authoritative. If multiple witnesses will be presented it is important that their testimony be as consistent as possible.

Advocates should expect little from judicial notice in terms of affirmative proof. Ugandan judges will likely limit judicial notice to “notorious” matters of customary law. However, advocates should be cognizant of the tendency of judges to use their own personal knowledge of custom to inform their assessment of customary proof.

Under Kimani books are a valid evidentiary source for customary law. Thus diligent efforts to find the writings that might be deemed authoritative can be rewarded. At a time where a justice of the Constitutional Court considers Wikipedia a quotable source on the issue of bride price, advocates should not shy away from presenting helpful sources in any published or quasi-published form. Advocates opposing the use of older texts should be cognizant of arguments that such renditions of custom were created with an eye towards benefiting existing power structures with discriminatory and distorted results. (Chanock 1985; Firmin-Sellers 1996)

Although liberal approaches of customary proof are not presently favoured in Uganda, advocates should be aware of these approaches and should push for their adoption and use. Advocates who want to see customary law in formal legal settings can champion reforms that will make it easier to establish customary law that complies with modern human rights requirements. Advocates answering this call must have a commitment to more than mere adversarial interests.

B. Lessons for Customary Communities

The Ugandan legal climate shows signs of a turn in favour of progressive approaches to customary law. Justice Byamugisha recognizes the need for community input in the development of customary law. Justice Mpage-Bahigeine recognizes that customary law changes and evolves. Justice Kawuma and Justice Twinomujuni appreciate that custom can and must be modified to pass constitutional muster and satisfy human rights requirements. These judicial sentiments bode well for communities seeking active and empowered engagement with their customary legal systems.

Courts calling for community involvement should be open to non-traditional methods for establishing custom. There are emerging options for increasing community involvement in customary proof. In the recent South African case of Modjadji v. Mphephu and Others, the Supreme Court of South Africa conducted a thorough community-based inquiry to establish customary marriage practices of the Xitsonga. Community-based initiatives to pronounce current rights-compliant customary principles and practices are also on the rise. (Hinz 2010) Uganda is home to four recent efforts to generate customary principles and practices pertaining to land issues. (Einos Iteso Kopiteny 2009; Ker Kwaro Acholi 2008; Lango Cultural Foundation 2009; Kuman
Elder’s Forum 2011) Such efforts could be given greater legitimacy with Court-based endorsement and direction.

C. Lessons for the Human Rights-Based Reformers

Substantive challenges to discriminatory customary practices face challenges. Matters of custom cannot be proved in general terms in Uganda. Those challenging custom must prove the custom they seek to strike down. Demanding customary proof requirements allow judges to put off rulings on substantive right-based challenges.

*Mifumi* requires groups challenging a customary law or practices to prove each challenged law or custom in a manner per the traditional approach. Given the multiplicity of customs and customary groups in Uganda, the holding in *Mifumi* makes broad-based challenges to customary laws and practices untenable. Instead, legal victories concerning specific customary laws can only be used as persuasive precedents in subsequent legal challenges concerning similar provisions from other customary legal traditions. Such victories can also be used to encourage stakeholders in other customary systems to adjust their own customary laws without legal intervention.

The opinions in *Mifumi* call for a reassessment of the litigation strategy of rights-based challenges to custom. The rise of liberal conceptions of customary law might signal a judicial willingness to empower communities to reform their customs to comply with human rights requirements. Human rights groups could change tactics and engage communities directly in the process of restating their law.

In addition rights-based reformers could advocate for a transplant of the South African approach. In South Africa the court is responsible for discerning customary law that complies with human rights standards and related constitutional requirements. This contrasts with the Ugandan approach of striking down offending provisions and leaving the resulting gaps to be filled.6 If the South African approach could find life in Uganda, rights-based reforms could sculpt customary law instead of merely filling it with potholes.

D. Lessons for Parliament

The Ugandan Parliament faces no real political pressure on the issue of customary proof. The Ugandan Parliament is unlikely to follow in the footsteps of Kenya and Tanzania to generate direct legislative reform. Bills that concern matters of culture tend to be difficult to manage politically. The longstanding debate, controversy and delay associated with Uganda’s Marriage and Divorce Bill is a prominent example of this political phenomena. (Marriage and Divorce Bill 2009, Bill 19) Moreover, the issue of customary proof is not an issue likely to capture the attention of voters. It has been 28 years since the *Kimani* decision and there is no real concern over colonial and prejudicial aspects of the traditional approach brought out by Justice Kavuma. Imminent legislative modification to customary proof is unlikely.

E. Lessons for Trial Judges

For now most trial judges will apply the traditional approach to customary proof. Judges who adhere to this approach have little fear in terms of appellate correction. However, these judges must navigate a largely unworkable system. They are dependent on the quality of the witnesses presented by the parties to establish customary proof. They may only use their personal knowledge regarding

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6 See e.g. Law Advocacy for Women in Uganda v. Attorney Gen., Const. Petitions Nos. 13/05/ & 05/06 [2007] UGCC 1 (Uganda) (where the Constitutional Court struck down all sexually discriminatory statutory provisions challenged in the petition instead of reforming or restating them in constitutionally compliant terms)
customary law to critique and evaluate submissions of customary proof. If the requisite levels of certainty and accuracy are not met, they are unable to address the merits of customary claims.\(^7\)

Trial judges that seek to adopt the liberal approach to customary proof are likely to face challenges at the appellate level. The best option for legally bolstering the liberal approach is Justice Kavuma’s constitutional argument. Although Kavuma is the lone voice claiming that Article 126 of the Ugandan Constitution releases Uganda from *Kimani*, no other justice specifically addresses or dismisses this argument. Most notably, Chief Justice Odoki does not address it in *Kampala District Land Board*. Given that Odoki played a key part in the development of the 1995 Ugandan Constitution and that he literally “wrote the book” on the process (Odoki 2005) it is unlikely that his decision to maintain the *Kimani* precedent in Uganda was an oversight. Nonetheless, Kavuma’s reasoning opens the door for trial judges to practice the liberal approach without committing outright judicial insubordination.

There are more subtle options for integrating the liberal approach into a trial judge’s activities. Certain propositions regarding custom that are inconsistent with the traditional approach are trending at the appellate level. It is generally agreed that customary law is mutable and flexible. There is also growing consensus that it is important for cultural groups to have a role in the development of their customary law. These trends are finding their way into Ugandan jurisprudence and provide trial judges with tools to break free from the anti-custom constraints of the traditional method.

**F. Lessons for Appellate Judges**

The power to choose between the traditional and liberal approaches in Uganda lies with the appellate courts. The allegiance to one approach over the other is not rooted in statutory law. Therefore appellate courts enjoy a certain level of autonomy of choice that is only limited by adherence to precedent.

The Supreme Court of Uganda’s position on customary proof looks static. However, it may be unwise to read too much into *Kampala District Land Board*. The matter of customary proof did not receive a careful and probing treatment in that case. Perhaps Justice Kavuma’s and Justice Twinomugisha’s approaches to customary proof can act as enzymes for change with the Supreme Court. If Ugandan appellate judges failed to hear the call of Justice Crabbe perhaps they will heed the more recent calls for an ideological shift.

Legal borrowing offers additional leaven for change. South Africa jurisprudence presents a rich palate of case law applying and developing a liberal approach to custom. The recent decision in *Modjadji v. Mphephu and Others* is representative of a thoughtful judicial effort to preserve and develop customary law in a manner that is current, community-based and compliant with human rights standards.

**VII. Conclusion**

The state of customary proof in Uganda is due for change. Matters of evidence should not predominate over substance. Customary law in Uganda should be legitimized at all levels including courts of law. As noted by Justice Crabbe, the traditional approach for proving customary law was becoming “fast out of date” circa 1965. Yet this approach remains the law in 21st Century Uganda.

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\(^7\) For an example of a case issued after *Kampala Land Board* where the a Magistrate Judge was chided and overruled for failing to require a party to prove the existence of a customary land holding, see the unpublished opinion of *Lawrence Musebeni Baguma v Namugala David & Another*, In the High Court of Uganda at Kampala, Civil Appeals No. 40 & 41 of 2010 available at www.ulii.org/.../musebeni_baguma_v_namugala_docx_30023.docx
The appellate judiciary has the power and capacity to change customary proof in Uganda. A judicial revision of customary proof would not amount to judicial activism. Instead it would reflect appreciation for the right to access justice and a respect for the constitutional protections afforded culture and custom. Moreover, it would be a long overdue pronouncement of sovereignty and cultural self-awareness. Ugandan judges can look to South Africa for a progressive model of customary proof that gives judges the responsibility of establishing customary law and gives judges the power to conform custom to human rights standards as opposed to merely striking it down. The time for reform has come and the trail has been blazed.
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