

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTION COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NO. 33 OF 2011**

5 **COL. (RTD) DR. KIIZA BESIGYE** ..... **PETITIONER**

**VERSUS**

**ATTORNEY GENERAL** ..... **RESPONDENT**

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JCC**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC**

10 **HON. LADY JUSTICE ELIZABETH MUSOKE, JCC**

**HON. MR. JUSTICE CHEBORION BARISHAKI, JCC**

**HON. MR. JUSTICE STEPHEN MUSOTA, JCC**

**JUDGEMENT OF JUSTICE KENNETH KAKURU, JCC**

15 The Petitioner challenges the constitutionality of *Section 65 (1) and (2)* of the Penal Code Act contending that it is inconsistent with *Articles 21(1) and 27, 29 (1) (a), (b), (d) and (e) 43 (2) (a) and (e)* as well as *120 (5)* of the Constitution.

**Background**

20 The Petitioner is a medical doctor by training and a retired colonel in the Uganda Peoples' Defence Forces. He also describes himself as a businessman and farmer. But clearly, he is a politician having been in active politics since 2001, when during the general elections, he contested for the office of President in this country. He lost the election. He challenged the validity of the results in the Supreme Court where he

lost. The majority of the Justices 3 to 2 found that although there were irregularities and the constitutional principles of freedom and fairness were found to have been  
25 violated, nonetheless the violations did not affect the outcome in a substantive manner. See: *Kizza Besigye vs Kaguta Yoweri Museveni Presidential Electoral Petition No. 1 of 2001*. He remained active in politics after the decision of the Court in respect of which he stated that he would respect. Upon the advent of multiparty politics in 2005 he together with others founded a party known as Forum for Democratic  
30 Change (FDC) which he headed.

In the general elections that were held in 2006, he contested as his party's Presidential candidate and again lost. Once again he challenged the results in court. The Supreme Court found that there were a number of irregularities in the election, and the principles of freedom and fairness had not complied with in many instances.  
35 Nevertheless the Supreme Court by a majority of 4 to 3 dismissed the petition having found that the irregularities and failures to comply with constitutional principles of freedom and fairness did not affect the results of the election in a substantive manner. See: *Rt. Col. Dr. Kizza Besigye vs Yoweri Kaguta Museveni and Electoral Commission, Supreme Court Election Petition No. 1 of 2006*.

40 He remained active in politics, running again for President in the 2011 elections, in which again he lost. Following that election as his petition shows, he together with his supporters started a number of civic political activities one of which was a pressure group called Activists for Change (A4C).

The Petitioner was the obvious leader of this group that was operating outside  
45 political party structures, including the structures of his own political party Forum for Democratic Change. They started a campaign encouraging people to walk to work as a way of expressing social and political discontent against the Government of National Resistance Movement (NRM).

This nonviolent activity attracted public excitement in the city of Kampala and a few other towns, it also attracted government attention.

In respect of this activity, he states as follow in his written submission:-

1.2 As a consequence of his decision to participate in the initiative, the Petitioner was severally arrested and charged with the offence of unlawful assembly. The same was done to other opposition politicians and activists while many other people publicly participated in the same initiative without being obstructed, molested, arrested or in any way interfered with. The Petitioner was also subjected to physical harm including being shot using a rubber bullet and being brutally attacked in his vehicle where he was sprayed with noxious chemicals. He is emphatic about never having been violent or never having called upon any member of the public to be violent or breach the peace in any way. He sought only to join with other Ugandans elsewhere to exercise their fundamental rights which included expressing dissatisfaction with existing economic circumstances and calling these to be addressed by the government. The Petitioner further depones that whether he was in his vehicle or on foot, he would be blocked from moving, without any lawful reason.

1.3 The factual rendition of the above background information is not rebutted by any factual narrative by or on behalf of the Respondent. Paragraph 4 of the Respondents affidavit sworn by Odongo Susan a State Attorney in the Respondent's Chambers claims that the Petitioner continued to walk to work in defiance of lawful police orders and thus infringed on the rights of other citizens. No iota of evidence is provided to prove this claim nor is the source of information provided by Ms. Odongo. The Respondent's affidavit therefore does not counter the facts as narrated by the Petitioner.

The petitioner now challenges the constitutionality of *Section 61(1) and (2)* of the Penal Code Act under which the Police curbed down this activity detaining and charging the petitioner and others under that law.

*Section 61(1) and (2)* stipulates as follows:-

80           “61. *Miscellaneous provisions relating to unlawful societies*

85           (1) *A prosecution for an offence under section 57, 58 or 59 shall not be instituted except with the consent of the Director of Public Prosecutions; except that a person charged with such an offence may be arrested, or a warrant for his or her arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Director of Public Prosecutions to the institution of a prosecution for the offence has not been obtained; but no further or other proceedings shall be taken until that consent has been obtained.*

90           (2) *Notwithstanding any rule of law or practice to the contrary, in any prosecution for an offence mentioned in subsection (1), for the purpose of establishing the existence of a society, evidence may be adduced and shall be admitted which—*

          (a) *shows that any person is reputed to be a member of such society;*

95           (b) *shows that any announcement has been made, whether by the person charged or by any other person, by any means, that the society has been formed or is in existence; or*

          (c) *shows that by repute such society is in existence.”*

We are now required to interpret its constitutionality.

100 My learned brother, Justice Musota, JA has set out in detail the principles of constitutional interpretation and all the other facts relating to this petition. I will not repeat them here.

105 With regard to issue one, I find that, this petition raises issues for constitutional interpretation. "Whether the impugned sections of the Penal Code are inconsistent with the named articles of the constitution and or whether the acts of the police complained of in this petition are unconstitutional."

I find myself unable to answer the second issue in this petition for the reasons below.

110 The Petitioner stood as Presidential candidate in the general elections held in 2016 and lost to President Yoweri Museveni for the 4<sup>th</sup> time. As already stated above, he challenged the results of the election twice. In 2001 and 2006 and lost both court battles too. In 2011 he did not go to court contending that it was a waste of time. Following the 2011 elections the press reported as follows;-

115 *"With nearly all the ballots counted, Museveni had 68% of the vote, according to the country's electoral commission. His nearest challenger, Kizza Besigye, won 26%.*

*Besigye immediately rejected the results, accusing Museveni of spending huge amounts of taxpayers' money on his campaign and bribing voters, candidates and electoral officials.*

120 *"An election conducted in this environment cannot reflect the will of the people. We therefore ... reject the outcome of the election and reject the leadership of Mr Yoweri Museveni," he told a news conference in the capital, Kampala.*

*Instead, he said it would be up to his supporters to mount street demonstrations, although there have been no signs of this happening yet.*

125 *Museveni has warned that anti-government protests will not be tolerated, and there is a heavy police presence in Kampala."*

See: *www.the guardian.com/international accessed on 12<sup>th</sup> November 2019.*

In 2016, he again lost to President Museveni, he did not challenge the election. However, another Presidential candidate in the 2016 Elections did, Hon. Amama Mbabazi. The Supreme Court unanimously dismissed the petition and confirmed  
130 the results of that election. See: *Amama Mbabazi vs Yoweri Kaguta Museveni, Attorney General & Electoral Commission, Supreme Court Election Petition No. 1 of 2016.* The Supreme Court while dismissing the petition made the following orders-

135 *"1) We hereby declare that the 1<sup>st</sup> respondent was validly elected as President in accordance with Article 104 of the Constitution and Section 59 of the Presidential Elections Act. (Emphasis added)*

*2) ...."*

The Petitioner chose to reject the results of that election and thereby also rejected the decision of the Supreme Court.

140 He publicly declared and has done so ever since 2016, that the election of that year was a sham and that it did not reflect the will of the people of Uganda. That he won that election and he is the legitimate President of this country. The election was held on 18<sup>th</sup> February, 2016. On 20<sup>th</sup> February, 2016 Yoweri Kaguta Museveni was declared winner of those elections. The Supreme Court delivered its decision and issued the above orders on 31<sup>st</sup> March, 2016.

145 The President elect Yoweri Kaguta Museveni was slated to be sworn in by the Chief Justice for another 5 years term in office on 12<sup>th</sup> May, 2016.

The petitioner on 11<sup>th</sup> May, 2016 swore himself in as president of Uganda. The incident was reported in the press as follows: See: <https://nairobinews.nation.co.ke> accessed on 12<sup>th</sup> November 2019.

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*"Kiiza Besigye has been sworn in" as the country's parallel president.*

*The "swearing in" ceremony was conducted at a public gathering and witnessed by hundreds of cheering supporters including Forum of Democratic Change (FDC) leaders, according to a four-minute video shared on social media later in the day.*

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*The clip shows a smartly dressed Besigye, clad in a fitting black suit and blue tie, arriving for the function amid cheers and ululations from his supporters, before taking the "oath of office" presided over by someone dressed in the court dress – a robe and a wig.*

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*"I Kiiza Besigye Kifefe swear in the name of the Almighty God to remain faithful to the Republic of Uganda and that I shall preserve, protect and defend the constitution of Uganda. So help me God," Besigye, swore while holding the Bible.*

*Later on, the 60-year-old opposition chief addressed his supporters saying: "What is happening today is not an ordinary swearing in ceremony. This is because our country is in a unique and unenviable place of not running according to the constitution of the republic of Uganda."*

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*Besigye has disputed the results of the 2016 general elections in which official results by the electoral commission indicate he lost to incumbent President Yoweri Museveni by about 1.5 million votes.*

170 Later on he went on to form his own government and National Assembly. This matter was reported in the Daily Monitor Newspaper as follows;-

*"The National Assembly of the People's Government of Uganda has been inaugurated in fulfilment of People's Government promise to establish a parallel People's Parliament in the aftermath of lifting the age limit from the constitution.*

175 *At the launch of the TUBALEMESE campaign after raping the constitution, President Kizza Besigye made a commitment to Ugandans to facilitate establishment of the National Assembly that would pursue political and the (sic) legislative interests of majority of Ugandans (85%) who had opposed their lifting of age limit.*

180 *Immediately, People's Government officials launched an undercover survey across the country to consult people whom they wanted (sic) to lead them. Forms with strict guidelines and qualifications were also sent across the country for People's Assembly MPs to show interest.*

185 *Those processes have led to creation of nearly 500 strong National Assembly of unpaid legislators (doing voluntary legislation) that will be crucial in fighting the Junta and ensuring the constitution of Uganda is restored.*

*The Assembly MPs elected Hon. Oduman Okello as Speaker and Cissy Sempa Nabatanzi as Deputy Speaker.*

190 *The Assembly is composed of 93 MPs that voted against lifting the age limit and representatives from constituencies of MPs that voted to rape the constitution.*

*The National Assembly will be the supreme legislative organ above other Assemblies that will be formed at the Regional, District and lower level Local Government."*

Sunday Monitor Newspaper on 27<sup>th</sup> October 2019 later again reported as follows;-



195 *“Sunday Monitor has learnt that Dr Besigye and his colleagues have spent months poring over plans to launch a new round of protests, which they are convinced is the only way they can reignite the fight against President Museveni’s government.*

200 *The new campaign already has a name – Article Three Twerwaneko. It is based on Article Three of the Constitution, which requires Ugandans to defend the Constitution and ensure that it is restored if it has been suspended, overthrown, abrogated or illegally amended. Tweraneko, the catchword of the mooted campaign, is Luganda for ‘let’s defend ourselves.’*

205 *The campaign comes about after Dr Besigye launched “Tubalemese”, or ‘let’s fail them.’*

*In stressing the urgency of the need for Ugandans to defend themselves, Dr Besigye says they face an existential threat and could get wiped out like the Aborigines who once claimed Australia and New Zealand as their lands, or the Red Indians who were the natives of North America.*

210 *If Ugandans don’t defeat President Museveni’s government, which he says is devoid of patriotism, they could be replaced by “new people” who he says are already arriving and “taking over our land.”*

215 *Dr Besigye and his colleagues in the People’s Government insist that Mr Museveni has breached the Constitution in a number of ways, including, they argue, by detaining Dr Besigye, who was a candidate before the 2016 election cycle was concluded.*

*Dr Besigye insists that he won the election by 52 per cent and was blocked from proving his victory, perhaps before courts of law, since he remained under house arrest until the time for doing so elapsed.*

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*They argue that Mr Museveni occupies State House illegally.*

*It is for this reason that Dr Besigye set up the People's Government in 2016. It was under the auspices of the People's Government that the press conference was held on Thursday, to announce a looming round of protests." See: www.Monitor.co.ug*

225 The Petitioner contends that, the constitution having been overthrown, the people of Uganda now have a duty to re-establish a constitutional order, through campaigns of civil disobedience, such as those advocated by Activists for Change, referred to above.

230 Article 3 of the Constitution, which the Petitioner has invoked and contends, is now in operation stipulates as follows:-

*"3. Defence of the Constitution.*

*(1) It is prohibited for any person or group of persons to take or retain control of the Government of Uganda, except in accordance with the provisions of this Constitution.*

235 *(2) Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this Constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law.*

240 *(3) This Constitution shall not lose its force and effect even where its observance is interrupted by a government established by the force of arms; and in any case, as soon as the people recover their liberty, its observance shall be reestablished and all persons who have taken part in any rebellion or other activity which resulted in the interruption of the observance shall be tried in accordance with this Constitution and other laws consistent with it.*

245 (5) Any person or group of persons who, as required by clause (4) of this article, resists the suspension, overthrow, abrogation or amendment of this Constitution commits no offence.

250 (6) Where a person referred to in clause (5) of this article is punished for any act done under that clause, the punishment shall, on the restoration of this Constitution, be considered void from the time it was imposed, and that person shall be taken to be absolved from all liabilities arising out of the punishment.”

The question I am required to answer now is:- whether in view of all the above this court can grant the remedies sought by the Petitioner? I will proceed to do so.

⚡ Since there is no validly elected Government in power, it would follow that, there are no legally constituted courts of law. This court it follows, is illegitimate, and as such has no power to adjudicate on any dispute including the determination of this Petition. See: *Uganda vs Commissioner of Prison Ex-parte Matovu 1966 EA [P54]*.

— If indeed the President of this country was not elected by the people of Uganda, having usurped their sovereignty set out in Article 1 (a) of the Constitution, it would follow that he has no power to appoint judges. The judges and Justices appointed by him following the 2011 and 2016 elections have no judicial power, as they were appointed unconstitutionally.

265 In my view this is an open challenge to the legality, legitimacy and the constitutionality of the sitting government. It goes beyond civil activism. Such challenges go to the root of the Constitution, and all that is done under it. The protests by Activists For Change (A4C) are not about civic and or human rights. They are about the validity of the 2011 and 2016 elections and the constitutionality of the current government.

Once *Article 3* of the Constitution is invoked, which the Petitioner has done, then any  
270 act done or purported to be done under it is null and void. It would be declared as  
such once the constitutional order is re-established.

For this reason the Petitioner by requiring this court to determine this petition is  
engaging us in what is in my view is an exercise in futility.

\* The petitioner can only bring and maintain an action against the Attorney General  
275 appointed and serving in an established constitutional order having been appointed  
by a duly elected President. Most importantly the citizens of this country the  
petitioner inclusive can only hold to account a legitimate government. This is so  
because an illegitimate government is by its nature unaccountable, and cannot be  
held accountable even by Courts of law.

280 / In this petition the petitioner seeks to hold accountable a government that he  
considers illegitimate, by invoking powers of a court appointed under such a  
government. He cannot do so. It is an exercise in futility.

The decision of the Supreme Court in *Amama Mbabazi Vs Yoweri Kaguta Museveni &*  
*others (Supra)* is a judgment in *rem*. A *judgment in rem* binds all persons within the  
285 jurisdiction of the Supreme Court on the subject matter. Effectively it binds the  
whole world. See: *Blacks Law Dictionary 9th Edition pg. 864.*

By swearing himself in as President, appointing a cabinet and a national assembly  
after the above judgment and orders of the Supreme Court had been passed the  
petitioner was and is in to contempt of court.

\* 290 Every Court has a right to deny audience to any person found guilty of contempt. He  
or she may not be heard or granted any remedy until he purges himself or herself of  
that contempt. Contempt of Court is a tool of justice that requires all persons to  
honour and respect Courts and their decisions.

Explaining the purpose and nature of Contempt of Court Lord Salmon in Jenison vs Baker [1972] 1 ALLER 997 at page 1001 stated as follows;-

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“Contempt of court” is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of judges. Nothing could be further from the truth. The power exists to ensure that justice shall be done. And solely to this end it prohibits acts and words tending to obstruct the administration of justice. The public at large, no less than the individual litigant, have an interest, and a very real interest, in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish. Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, e.g. by disrupting the proceedings of a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt.”

310 See: *Stanbic Bank & another vs The Commissioner General Uganda Revenue Authority*, High Court Commercial Division Miscellaneous Application No.0042 of 2010.

Romer LJ retaliated the above principle in *Hadkinson vs Hadkinson [1952] ALL ER 567* as follows;-

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“A party who knows of an order, whether null or regular or irregular, cannot be permitted to disobey it... it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge or irregular. That they should come to the court and not take (it) upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and

320 who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

The same position was taken by the High Court of Kenya, in *Wildlife Lodges LTD v. Country Council of Narok* [2005] EA 344, in which Ojwang J observed that;

325 "the Judiciary can only be strengthened if parties consistently obey its orders, and that parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones to ignore."

In *Uganda Super League LTD vs Attorney General and 6 Others* Constitution Application No. 72 of 2013 Kiryabwire J (as he then was) stated the position of the law as follows:-

330 "A purpose of the Court's powers to make findings of contempt is to ensure that orders of court are obeyed. This jurisdiction is required to be co-extensive with court's jurisdiction to make orders which need the protection which the jurisdiction to make findings of contempt provides."

335 In *Housing Finance Bank Ltd & Another vs Edward Musisi*, Miscellaneous Application No. 158 of 2010 this Court held that the whole purpose of litigation as a process of judicial administration is lost if an order issued by Court through judicial process is not complied with.

The orders of the Supreme Court are clear and unambiguous. The Supreme Court found and ordered as follows:-

340 "1) We hereby declare that the 1<sup>st</sup> respondent was validly elected as President in accordance with Article 104 of the Constitution and Section 59 of the Presidential Elections Act."

The petitioner by his acts and statements some of which I have endeavored to reproduce, which are undisputed and which I take judicial Notice of is in contempt of the Supreme Court orders.

345 All other persons who have done the same as the petitioner are also in contempt of the Supreme Court orders.

I would therefore decline to grant him the remedies he seeks in the petition. May be he will have to seek audience before his own court or before the "Judge" who swore him in as President.

350 However, should he appear before this Court as a respondent, accused or defendant, the Court shall accord him all his rights but not as a petitioner seeking remedies.

Had I not found as I have, I would have allowed this petition in part. I would have found that the impugned *Sections 63 (1) and (2)* of the Penal Code Act are not inconsistent with provision of the constitution set out in this petition.

355 I would however, have found that the acts of the Uganda Police Force in continuing to criminalize citizens' rights of political expression and association as set out in this petition are unconstitutional.

Citizens of this Country are free to walk, demonstrate, shout or otherwise express their discontent with polices, actions, laws or lack of them at anytime. It does not matter that those doing so are members of the political parties in opposition or ordinary citizens under whatever name called. See: *Olara Otunnu vs Attorney General, Constitutional Court Constitutional Petition No.12 Of 2010, Muwanga Kivumbi vs Attorney General, Constitutional Court Constitutional Petition No.9 of 2005 and Moses Mwandha vs Attorney General, Constitutional Court Constitutional Petition No.*  
365 *05 of 2007.*

The rights enjoyed by members of the ruling party and its supporters are the same rights ought to be enjoyed by the rest of the population. One of the key tenets of democracy is that those with dissenting and or minority opinions must be allowed  
370 to express them within the law. Whilst doing so they commit no offence. Criminalising dissent is therefore unconstitutional.

By majority decision for reasons given in the respective judgments of Kiryabwire, Musoke, Barishaki, and Musota, JJCC this appeal is dismissed, with no order as to costs.

375 Dated at Kampala this .....12<sup>th</sup>..... day of Dec.....2019.



.....  
**KENNETH KAKURU**  
**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**