

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

5 **COL. (RTD) DR. KIIZA BESIGYE ::::::::::::::::::::::::::::::: PETITIONER**  
**VERSUS**  
**ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE KENNETH KAKURU, JCC**  
10 **HON. JUSTICE GEOFFREY KIRYABWIRE, JCC**  
**HON. JUSTICE ELIZABETH MUSOKE, JCC**  
**HON. JUSTICE CHEBORION BARISHAKI, JCC**  
**HON. JUSTICE STEPHEN MUSOTA, JCC**

15 **JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC.**

**Introduction**

20 This is a constitutional petition brought under Article 137 (3) (a) and (b) of the Constitution of the Republic of Uganda, 1995 and the Constitutional Court (Petitions and References) Rules, S.I. 91 of 2005 seeking declarations and other reliefs and redress as will be laid down herein.

**Background**

25 The Petitioner is a retired Colonel in the Uganda People's Defence Forces (UPDF), a medical doctor and a businessman who was a presidential candidate for the Forum for Democratic Change Party in the 2011 General Elections in Uganda. The petitioner lent his support to an initiative by a civic activists' pressure group called Activists for Change (A4C) for people to walk to work on two days every week and

to walk to prayers on their respective day of worship, in order to draw the Government's attention to the escalating fuel prices and the cost of living in general. As a consequence of his participation in the initiative, the petitioner was severally arrested and charged with the offence of unlawful assembly. The petitioner was allegedly subjected to physical harm including being 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 anyway. The petitioner was repeatedly obstructed, arrested and detained every time he tried to walk or even drive to work on Mondays or Thursdays before being produced in Magistrates Courts in Kasangati and Nabweru to be charged with, amongst other offences unlawful assembly contrary to sections 65 and 66 of the Penal Code Act.

It is on that basis that the petitioner alleges that the Penal Code Act not only contravenes the provisions of the constitution but the prosecutions being brought against the petitioner also violate his constitutionally guaranteed rights.

### **Declarations sought**

The petitioner sought the following declarations, that:

- a) Section 65(1) and (2) of the Penal Code Act is unconstitutional in so far as it is inconsistent with or in contravention of Articles 29(1) (a), (b), (d) and (e) and 43(2) (a) and (c) of the Constitution of the Republic of Uganda 1995;
- b) The arrest, charging and continued prosecution of the petitioner and others for unlawful assembly in alleged contravention of section 65 (1) of the Penal Code before Nabweru and Kasangati Magistrates' Courts is unconstitutional in so far as it is inconsistent with or in violation of Articles 21(1) and (2), 43(2) (a) and (c) and 120 (5) of the Constitution of the Republic of Uganda 1995;
- c) The prosecution of the petitioner for alleged offences contrary to section 65 of the Penal Code be stayed and dismissed.

## Issues

The issues framed by the parties for determination are:

- 5 1. Whether the Petition discloses any question for interpretation as provided by Article 137(3) (a) and (b) of the Constitution.
2. Whether Section 65(1) and 65(2) of the Penal Code Act, Cap 120, is inconsistent with or in contravention of Articles 21(1) and (2); 29(1) (a), (b), (d) and (e); 43(2) (a) and 120(5) of the Constitution.
- 10 3. What remedies are available to the Parties?

## Representation

At the hearing of the Petition, the Petitioner was represented by Mr. David F.K Mpanga and Mr. Ernest Kalibbala while the respondent  
15 was represented by George Kalemera, Principal State Attorney.

## Burden of proof

As is the case with all other matters brought before Court, the burden to prove each of the grounds raised in a Constitutional Petition, that  
20 an impugned provision of a statute offends some provision of the Constitution, rests on the person challenging the validity of the enactment. There is only a shift of evidential burden onto the Respondent upon the Petitioner either raising a prima facie case necessitating adverse proof by the Respondent; or where the evidence  
25 required to determine the matter before Court is either in the possession, or only within the knowledge, of the Respondent. **See Section 106 of the Evidence Act (Cap. 6)**

## Principles of constitutional interpretation

30 One of the principles in constitutional construction or interpretation is that of presumption of constitutionality. It is a well-established

rule of interpretation that the words of an Act of Parliament should be construed with reference to the context in which they are used. This means that an Act of Parliament should be considered as a whole; for the language of one provision therein may affect the construction of another in the same legislation. This presupposes that a word is used in an Act of Parliament to mean one thing; and not to mean something else.

This rule of construction applies to the Constitution as with an Act of Parliament. In interpreting or construing any provision of the Constitution, care must be taken to ensure that it is not considered in isolation from the other provisions of the Constitution. The Constitution must be considered in its entirety; taking cognizance of the fact that each provision of the Constitution is an integral part of the whole. This holistic approach to constitutional construction or interpretation avoids giving different meanings to the same word that has been used in various parts of the Constitution.

Thus, it is incumbent on this Court to apply the rule of construction and interpretation, to determine whether an Act of Parliament or an act or omission is in violation of the Constitution.

With the above legal principles in mind I shall go ahead and resolve the issues agreed upon.

### **Issue 1**

Counsel for the petitioner submitted that the petition brought before this court is under Article 137(3) (a) and (b) which permits any person alleging that any law or anything done under any law or any act or omission by any person or authority is inconsistent with or in contravention of the Constitution to petition this court for purposes of declarations and redress where appropriate. Counsel relied on **Behangana Demaro and another Vs Attorney General Constitutional Petition No. 53 of 2010** to support this argument.

### **Analysis**

The question of whether a petition raises questions for constitutional interpretation has been a subject of debate but the answer is found in the constitutional provision itself that establishes the Constitutional Court. **Article 137** provides that:

5 “(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(3) 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

10 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.

15 (4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may\_\_

a) grant an order of redress; or

b) refer the matter to the High Court to investigate and determine the appropriate redress.

20 The Supreme Court interpreted this Article in **Ismail Serugo v Kampala City Council Constitutional Appeal No. 2 of 1998** which was referred to by Odoki CJ, (as he then was) in the case of **Raphael Baku Obudra v Attorney General Constitutional Appeal No. 1 of 2003 (SC)**. While addressing the issue of what amounts to a cause of  
25 action in constitutional matters, he observed:

30 "According to the principles in *Serugo* (supra) the petitioner had to show that the provisions of the section he is complaining about violated a right guaranteed by the Constitution. The instant petition does not allege those facts, which are alleged to contravene the provisions of the Constitution or those that are inconsistent with its provisions. For those reasons we think the

petition does not disclose a cause of action. There would be nothing to interpret. The petition would be dismissed with costs.

***In Serugo vs Kampala City Council, Constitutional Appeal No.2 of 1998***, this Court pronounced itself on the meaning of a cause of action as regards Constitutional petitions. Generally, the main elements required to establish a cause of action in a plaint apply to a Constitutional petition. But specifically, I agree with the opinion of Mulenga, JSC in that case that a petition brought under Article 137 (3) of the Constitution "sufficiently disclose a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and pray for a declaration to that effect."

*In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established."* (Sic)

From the above precedent and looking at the instant Petition, the petitioner alleges that section 65(1) and (2) of the Penal Code Act which prohibits unlawful assembly and riots contravenes the constitution and this, in my view, is a matter for constitutional interpretation. I therefore answer the 1<sup>st</sup> issue in the affirmative.

## **Issue 2**

In this issue, it is sought that this court determines whether S. 65(1) and 65(2) of the Penal Code Act, Cap. 120, is inconsistent with or in contravention of Articles 21(1) and (2); 29(1) (a), (b), (d) and (e); 43(2) (a) and 120(5) of the Constitution.

Counsel for the petitioner submitted that section 65 of the Penal Code Act applies to two types of assembly. The first type of assembly applies to persons assembled with intent to commit an offence and the second type of assembly is in respect of an assembly where there is a lawful common purpose but because of the conduct of three or more persons assembled, fear is caused to persons in the neighborhood or other persons are provoked, to commit a breach of the peace. The petitioner alleges that his petition is about the second type of assembly. He argues that whereas the right to freedom of assembly is not absolute, where a provision of any law derogates from a right, it must be on the basis that the derogation is acceptable and demonstrably justifiable in a free and democratic society. By criminalizing certain types of assembly under Sections 65(1) and (2) of the Penal Code Act, it derogates from the right to freedom of assembly.

Counsel submitted that according to the principles of constitutional interpretation, in determining the constitutionality of any legislation, its purpose and effect are relevant and linked indivisibly. He referred to **Attorney General Vs Salvatori Abuki Constitutional Appeal No. 1 of 1998** where it was held that if the purpose of the Act is inconsistent with a provision of the constitution, it shall be declared unconstitutional. In addition, a constitutional provision containing a fundamental human right must be given a dynamic progressive, liberal and flexible interpretation so as to extend the benefit of the same to the maximum possible.

Counsel also relied on **Charles Onyango Obbo and another Vs Attorney General, Constitutional Appeal No. 2 of 2002** which considered the constitutionality of section 50 of the Penal Code Act on publication of false news. The Supreme Court found that the section did not reflect the values, norms and aspirations of the people and declared it void. Counsel argued that section 65 of the Penal Code Act is not any different from section 50 which was declared void.

Under section 65, information is not readily available that would clearly articulate the mischief of the assembly. From the existing political environment at the time in 1950, natives agitating for self-

governance could have made the colonial leadership and the privileged white citizenry then in control of Uganda generally uncomfortable and fearful of any activities of the natives. This fear must have then necessitated legislation which among others, made assemblies unlawful on the flimsiest reason using a wholly subjective test.

On the 2<sup>nd</sup> type of assembly under section 65 (1) of the Penal Code Act, counsel submitted that even if lawful, it would become instantaneously criminalized if on the basis of a wholly subjective test of persons in the neighborhood reasonably fearing that there would be a breach of the peace. The test of fear and reasonableness and its subjective nature makes it one that is available to be abused especially where political dissent exists. Further, an unlawful assembly under section 65(1) can occur anywhere without any limitation both in public and in private. Three or more persons can become an unlawful assembly in their own home or in a public place. Counsel referred to the case of **Moses Mwandha Vs Attorney General Constitutional Petition No. 05 of 2007** in which it was held that *“when people have grievances against a government, they have an unfettered right to question those in power, to seek accountability, to air grievances and to petition their representatives. They also have rights to gather, march or demonstrate to express their views. In so gathering they might also make some noise”*

For the respondent, it was submitted that the impugned sections of the Penal Code Act do not contravene the cited Articles of the Constitution. Once a petitioner brings a petition to this court under Article 137 for a declaration that any law, act or omission is inconsistent with or in contravention of the constitution, there exists a burden of proving these allegations that rests on the petitioner. Counsel relied on **Philip Karugaba Vs Attorney General Constitutional Petition No. 1 of 2002** in which it was held that the petitioner had the burden to show that the rule is clearly inconsistent and incompatible with the principle laid down in the constitution.

The petitioner’s challenge on constitutionality of section 65(1) is only partial in regard to the enactment dealing with where three or more



persons assembled conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons will commit breach of peace. Counsel submitted that under the functions of the Uganda Police Force, it has a duty 'to prevent and detect crime'.

5 The state has the role of maintaining the safety of its citizens from all manner of crimes, and in doing so must prevent any person from causing harm in a timely way. This duty is also in Article 212 (c) of the Constitution.

10 Article 43 of the Constitution illustrates that there are general limitations on the fundamental and other human rights and freedoms. As such, while the petitioner is enjoying his rights under the Constitution, he should not be allowed to exercise the same in defiance of the orders of the Uganda Police Force. The petitioner's right to free speech, expression, assembly and demonstration must  
15 be conducted in accordance with the Laws of Uganda.

### **Analysis**

I reiterate that in interpreting the Constitution, the rule of harmony or completeness requires that Constitutional provisions should not be looked at in isolation. Rather, the Constitution should be looked  
20 at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution. See **(Paul Semwogerere v. Attorney General Constitutional Appeal No 3 of 2003; Attorney General v. Susan Kigula and Others Constitutional Appeal No. 03 of 2006) (SC)**.  
25

As already stated, the issue for this court to determine is the constitutionality of section 65 (1) and (2) of the Penal Code Act. The petition is seeking a declaration that the said sections 65(1) and (2) of the Penal Code Act are inconsistent with Articles 29(1) (a), (b), (d)  
30 and (e) and 43(2) (a) and (c) of the Constitution of the Republic of Uganda 1995;

For ease of reference and for completeness and context, I have set out the impugned sections of the Penal Code Act below;

*“65. Definition of unlawful assembly and riot.*

5 (1) *When three or more persons assemble with intent to commit an offence, or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.*

10 (2) *It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in the manner described in subsection (1).”*

15 It was argued for the petitioner that the impugned sections are inconsistent with the petitioner’s right to freedom of speech and expression; freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and  
20 other civic organizations.

Having considered the evidence before court and upon listening to the submissions of the counsel for both sides and the relevant provisions of the law, it is not disputed that the fundamental rights allegedly violated are not absolute. They must be enjoyed within the  
25 confines of the law under Article 43 of the Constitution which provides that:-

*43. (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest.*

30 (2) *Public interest under this article shall not permit -*

- (a) Political persecution;*
- (b) Detention without trial;*

*(c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond 'what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

5 The petitioner's challenge on the constitutionality of section 65(1) of  
the Penal Code Act is only partial regarding a gathering of three or  
more persons assembled and conducting themselves in a manner so  
as to cause persons in the neighbourhood to reasonably fear that the  
assembled persons will commit a breach of peace. As long as there is  
10 no contravention of Article 43 of the Constitution and the rights to  
freedom of speech and assembly are exercised within the confines of  
the law, there would be no justification for declaring such gatherings  
as unlawful assemblies and riot under section 65 of the Penal Code  
Act.

15 I agree with the respondent's submissions that the state has a duty  
to maintain the safety of its citizen's from all crimes and as such,  
should be in position to prevent such crimes from being committed.  
The police is empowered to regulate the conduct of all public  
meetings in accordance with **Article 212** of the Constitution which  
20 provides for the functions of the Uganda Police Force thus;

*"212. Functions of the Uganda Police Force.*

*The functions of the Uganda Police Force shall include the  
following—*

*(a) to protect life and property;*

25 *(b) to preserve law and order;*

*(c) to prevent and detect crime; and*

*(d) to cooperate with the civilian authority and other security  
organs established under this Constitution and with the  
population generally."*

30 The elements under the impugned section 65 state that prior to the  
persons being held liable for unlawful assembly, they must not

conduct themselves in a manner that causes fear that a breach of peace shall be occasioned.

5 The petitioner, together with the Activists for Change (A4C) agreed to walk to work for two days every week and walk to prayers on their respective days of worship in order to draw government's attention to the escalating fuel prices and the cost of living. It was during the 'walk to work' that the petitioner was arrested and charged with unlawful assembly under section 65. The petitioner's right to free speech, expression and demonstration must be conducted in accordance with the laws of Uganda. While the petitioner has a right to free speech and expression, the Uganda Police also has a duty to prevent and detect crime under Article 212 of the Constitution.

10 Clearly the constitution does recognize the fact that it is in the public interest for the Uganda Police to prevent crime and riot. From the foregoing, it is my considered view that section 65(1) and (2) of the Penal Code Act are not inconsistent with the Constitution.

15 In the result I would not grant the declarations sought and instead would declare that Section 65(1) and (2) of the Penal Code Act is not unconstitutional and inconsistent with or in contravention of Articles 20 29(1) (a), (b), (d) and (e) and 43(2) (a) and (c) of the Constitution.

I therefore dismiss the petition and order that each party meets its own costs of the petition.

25 Dated this 12<sup>th</sup> day of Dec 2019



**Hon. Justice Stephen Musota, JA/JCC**