

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
*[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC]*  
Constitutional Petition No. 36 of 2018

**BETWEEN**

Francis Tumwesige Ateenyi=====Petitioner

**AND**

Attorney General=====Respondent

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC**

**Introduction**

- [1] The Petitioner brings this action seeking a declaration that the provisions of section 168 (1) (c) and (d) of the Penal Code Act are unconstitutional in so far as they contravene articles 20 (1) & (2); 21 (2); 23 (1) (c); 28 (3) (a) & (12) and 29 (2) (a) of the Constitution of Uganda.
- [2] The petitioner contends that section 168 (1) (c) of the Penal Code Act provides that any suspected person or reputed thief who had no visible means of subsistence shall be deemed a rogue and vagabond, and commits an offence punishable with imprisonment.
- [3] It is the contention for the petitioner that this offence is not sufficiently defined contrary to article 28 (12) which requires every offence to be defined in law. The petitioner further contends that this offence is vague and permits the police to arbitrarily arrest and detain any person in the absence of reasonable suspicion and on the assumption of an illegal and disorderly purpose contravening article 21 (1) of the Constitution that guarantees equality before the law and article 28(3) (a) which assure presumption of innocence for anyone charged with a criminal offence. It is further contended that this offence contravenes article 21 (2) for criminalising being a reputed thief

simply on account of social status. It is further contended that in the absence of any criminal conduct or reasonable suspicion that criminal conduct having been committed or was about to be committed the impugned section contravenes the right to personal liberty guaranteed in article 23 (1) (c) and 23(4) (b) of the Constitution. The petitioner also contends that section 168 (1) (d) of the Penal Code Act, provides that any person who cannot give a good account of himself or herself, found wandering in or upon any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose commits an offence that is punishable by imprisonment.

- [4] The petitioner assails the impugned provision for being contrary to articles 29(2) (a) that provides for freedom of movement; articles 21 (1) & (2) that provide for equal protection of law and prohibits discrimination; and article 20 (1) & (2) that provides for the inherence of fundamental rights and freedoms that must be protected by the state.
- [5] The petition was supported by an affidavit sworn by the Petitioner.
- [6] The respondent opposes this petition and in its response to the petition contended that this petition did not raise any questions for constitutional interpretation. Secondly the respondent contended that none of the impugned provisions contravenes any provisions of the Constitution. Thirdly that the power granted to the Police to arrest one upon a reasonable suspicion that the person is likely to commit an offence is provided for under the Constitution. The respondent contended that the petitioner is not entitled to any of the declarations sought and should be dismissed with costs.
- [7] The answer to the petition was supported by an affidavit sworn by Sam Tusubira, State Attorney, in the Department of Civil Litigation of the respondent.

## Legal Representation

- [8] At the hearing Dr Adrian Jjuko, Mr Francis Tumwesigye and Ms Stella Nakamya appeared for the petitioner while Mr Mark Muwonge, State Attorney, appeared for the respondent. Both parties filed written submissions.

## Analysis

- [9] I will start by setting out the principles that have been accepted in this jurisdiction as the guiding principles when a court is seized with constitutional interpretation. They have been summarised by Mwendha, JSC, in *David Tusingwire v Attorney General*, [2017] UGSC 11, as follows:

‘(i) The constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency (see Article 2 (2) of the Constitution. Also see **Presidential Election Petition No. 2 of the 2006 (SC) Rtd Dr. Col. Kiiza Besigye v. Y. K. Museveni**,

(ii) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either unconstitutional purpose or unconstitutional effect animated by the object the legislation intends to achieve. See **Attorney General v. Salvatori Abuki Constitutional Appeal No. 1 of 1988 (SC)**.

(iii) The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness (see **P. K. Ssemwogere and Another v. Attorney General Constitution Appeal No I of 2002 (SC) and the Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13**.

(iv) A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic,

progressive liberal and flexible interpretation keeping in view the ideals of the people , their social economic and political cultural values so as to extend the benefit of the same to the maximum possible. See **Okello Okello John Livingstone and 6 others v. The Attorney General and Another Constitutional Petition No I of 2005, South Dokata v. South Carolina 192, USA 268. 1940.**

(v) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

(vi) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it. (See **Attorney General v Major David Tinyefunza Constitutional Appeal No. I of 1997 (SC).**

(vii) The history of the country and the legislative history of the Constitution is also relevant and useful guide to Constitutional Interpretation see (**Okello John Livingstone and 6 others v. Attorney General and Another** (Supra)).

(viii) The National objectives and Directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives.’

[10] Secondly the burden of proof rests with the petitioner to raise a *prima facie* case that a fundamental right or freedom has been contravened. Once this is established the burden shifts to the state or respondent to rebut or justify the limitation. See Charles Onyango Obbo and Anor v Attorney General, [2004] UGSC 81.

[11] Thirdly where article 43 of the Constitution is called in aid to allow the limitation to the fundamental right the court must engage in a limitation analysis starting with the criteria laid down therein. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms



of other person or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution? Mulenga JSC, (RIP) in Charles Onyango Obbo and Anor v Attorney General (supra) formulated the limitation analysis in the following words,

‘Similarly, under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another vs. Minister of Home Affairs & Another, [S.C. 36/2000: Civil Application No. 156/99], the Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights-

- *‘the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;*
- *the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
- *the means used to impair the right or freedom must be no more than necessary to accomplish the objective.’*

[12] Any limitation analysis that I may have to engage in shall be guided by the foregoing principles which I am obliged to follow.

### **Issues for Consideration**

[13] Counsel in their written submissions somewhat formulated varied issues which I will harmonise by formulating the issues below as the issues to be considered by this court. Firstly, whether or not there are constitutional questions for interpretation by this court. Secondly whether or not section 168 (1) (c) and (d) of the Penal Code Act contravenes articles 28 (12), 21 (1) & (2), 28 (3) (a), 23 (1) (c), and 23 (4) (b) of the Constitution. Thirdly whether or not section 168 (1) (c) & (d) of the Penal Code Act contravene the articles

29 (2) (a) and 20 (1) & (2) Constitution. Fourthly the remedies available to the parties.

### **Issue 1: Are there any questions for constitutional interpretation?**

[14] It was the contention for the respondent in their answer to the petition that there was no question for constitutional interpretation and that the matters complained of by the petitioner are matters that could be taken care of by actions for enforcement of fundamental rights and freedoms.

[15] Counsel for the petitioner submitted that this court was seized with jurisdiction to entertain this matter under article 137 (3) (a) of the Constitution. They further relied on Centre for Health, Human Rights and Development & 3 Others v Attorney General, [2015] UGSC 69.

[16] I shall set out in *extensio* the answer by the respondent in this regard.

‘2. The respondent shall aver and content that:

(a) that this petition does not raise any questions for Constitutional Interpretation.

(b) That this petition is therefore misconceived, prolix, frivolous, devoid of any merit and an abuse of process.’

[17] I must start by observing from the previous answers of the respondent to many previous petitions filed in this court that this has become a template from which they do not depart regardless of the merits or demerits of the petitions. They must always first attack or defend on this ground. It is unfortunate that this is the case. Even when there are obviously questions raised for constitutional interpretation, regardless of the merits of such question, as in the instant case, this line of attack is maintained by the respondent.

[18] In the matter before us clearly the questions presented by the petitioner that particular sections of the Penal Code Act contravene particular articles of the Constitution fall squarely within the ambit of article 137 (3) (a) of the

Constitution which sets out the jurisdiction of this court in such matters. I would answer issue no.1 in the affirmative. There are questions as to interpretation of the Constitution in this matter.

- [19] Before I take leave of this point I must state that the approach taken by the respondent in this matter brings to mind the words of Lord Templeman in Ashmore v Corporation of Llyod's [1992] 2 All ER 486 at page 493,

‘The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.’

- [20] I do hope that the respondents and the advocates who act for it, and all others who fall in this category, will refrain from this approach and present conceivable positions, allowing the court to concentrate on the actual or conceivable issues between the parties.

**Issue No. 2: Whether section 168 (1) (c) and (d) of the Penal Code Act contravene articles 28 (3) (a) & (12); 21 (1) & (2); and 23 (1) (c) & 23 (4) (b) of the Constitution?**

- [21] It was submitted for the petitioner that the burden of proof was on the petitioner to establish that the state or somebody acting under the authority of any law had violated the rights and freedoms guaranteed under the Constitution upon which the burden would shift to the state or person whose acts were being complained of to justify the restrictions or the continued existence of the impugned law. In support of this proposition they referred to Charles Onyango Obbo and Anor v Attorney General 2004 UGSC 81.



- [22] It was submitted that there was sufficient evidence on the affidavits in support of the petition to prove that the impugned sections violated the Constitution and the burden had shifted to the respondent to demonstrate that the restrictions imposed by the impugned law are justifiable. Such justification must one that passes the test under article 43 of the Constitution. It must be acceptable and demonstrably justifiable in a free and democratic society.
- [23] With regard to rules of constitutional interpretation petitioner's counsel submitted that this court should be guided by the principles enunciated in P. K. Ssemwogerere & Anor v Attorney General [2004] UGSC 10 and Christopher Madrama Izama v Attorney General [2019] UGSC 1. The entire Constitution must be read together as an integral whole. Secondly the provisions must be given a progressive interpretation.
- [24] It was submitted that section 168 (1) (c) of the Penal Code Act is vague and too broad contravening the principle of legality, the presumption of innocence, the right to equality and freedom from discrimination and the right to liberty as enshrined in articles 28 (1), 28 (3) (a), 21 (1) & (2), and 23 (1) (c) & 23 (4) (b) of the Constitution. It was further submitted that the right to a fair hearing is further protected by article 44 (c) which renders it non-derogable.
- [25] The offence under the said impugned provisions, it was further contended, was not defined as one cannot be sure what 'looking like a reputed thief' actually means. Similarly, the circumstances that one can be said to be in a place for an illegal purpose are not clear. It was further submitted the said offence, under section 168 (1) (c) of the Penal Code Act displaces the presumption of innocence and requires an accused to prove his or her innocence instead, in so far as, it deems a person to be 'a rogue and vagabond for being suspected person or reputed thief who has no means of subsistence and cannot give a good account of himself or herself.
- [26] It was further contended that equally the offence under section 168 (1) (d) displaces the presumption of innocence as a person is simply deemed to be a



rogue and vagabond for wandering in or upon any or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose. Reliance was placed on *Mayeso Gwanda v The State and others*, Constitutional Cause No. 5 of 2015 (Constitutional Court of Malawi) [2017] MWHC 23. Unfortunately, counsel provided only judgment of one judge and did not provide the judgments of the other 2 judges that determined this matter. Judgment availed was not only incomplete but no citation was provided.

- [27] Counsel for the petitioner further submitted that both the impugned offenses contravene the right to personal liberty provided for under Article 23 (1) (c) and 23 (4) (b) of the Constitution in so far they lead to the arrest of person without reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda. Counsel referred *Omar Awadh Omar and 10 Others v Attorney General, Foundation for Human Rights Initiative v Attorney General* Constitutional Appeal No. 3 of 2009 (unreported) in support their arguments. They also referred to the African Commission on Human and Peoples Rights Principles on the Decriminalisation of Petty Offences in Africa.
- [28] It was contended that the impugned provisions facilitate the arbitrary arrest of mainly poor which contravenes the right to liberty protected under articles 23 (1) (c) and (4) (b) of the Constitution.
- [29] Counsel for the respondent submitted that the impugned provisions of the law pass constitutional muster. A clear reading of sections 168 (1) (c) of the Penal Code Act provides that a person must be under suspicion or should be reputed thief and unable to give account of his activities. Section 168 (1) (d) covers a person in a public space and is suspected to be there for an illegal disorderly purpose. Article 212 (c) of the Constitution mandates the Police to detect and prevent crime. They referred to *Godfrey Kazinda v Attorney General* Constitutional Petition No. 50 of 2012 (unreported).

- [30] Counsel further submitted that the impugned offenses are properly defined and their elements clear, pursuant to article 28 (12) of the Constitution. The elements of section 168 (1) (c) are: (i) suspected person or reputed thief; (ii) No visible means of substance (*sic: subsistence*) (iii) Cannot give an account of himself or herself. The elements of section 168 (1) (d) are: (i) A person found wandering in or upon premises or in a road; (ii) At such time and circumstances; (iii) Lead to a conclusion; (iv) That such person is there for an illegal or disorderly purpose.
- [31] With regard to the presumption of innocence, pursuant to article 28 (3) (a) of the Constitution, counsel for the respondent submitted that since the person charged under these impugned provisions is brought before a court of law the presumption of innocence is upheld.
- [32] Turning to the right to personal liberty counsel for the respondent submitted that this right is subject to certain limitations including being arrested upon reasonable suspicion of having committed an offence or about to commit an offence. The justification for this is to maintain law and order. They referred to Fernandes v Commercial Bank of Africa Ltd and Anor, [1969] EA 482.
- [33] Counsel for the respondent therefore concluded that the impugned provisions do not contravene articles 23 (1) (c) & (4) (b) of the Constitution.
- [34] It will be useful to set out the impugned provisions. I have italicized the relevant portions.

**‘168. Rogues and vagabonds**

(1)Every—

(a)person convicted of an offence under section 167 after having been previously convicted as an idle and disorderly person;

(b)person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;

*(c)suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself; and*

*(d) person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year.*

(2) Subsection (1)(b) shall not apply to collections made in any recognised building or place of religious worship.'

- [35] The Penal Code Act in force now was enacted in the laws of Uganda in 1950 long before this country had a written a Constitution. Needless to say, at the time, Uganda was a colony of the United Kingdom. It predates the 1995 Constitution by 45 years.
- [36] The elements of the impugned offences have been correctly set forth by the respondent in their submissions. The elements of section 168 (1) (c) are that firstly the accused is a suspected person or reputed thief. It is not clear what he or she would be suspected of. Neither is it clear, in case of a reputed thief, as to who would determine that he is a reputed thief, at the time of arrest and being charged. More bewildering is the second element and that he or she has no visible means of subsistence. Visible to who? What are visible means of subsistence that ought to reflect in the person at the time of his arrest and charging? The last element is that he or she cannot give a good account of himself or herself? Account about what? And to who? Is to the police officer or citizen arresting him? And what is a good account anyway? Is this not subjective, depending on whoever hears the same?
- [37] The elements for the offence under section 168 (1) (d) of the Penal Code Act are firstly that a person is found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place. Secondly that it is at such time and circumstances that would lead to conclusion that such person is there for an illegal or disorderly purpose. The



first element would appear to refer to anyone who is outside his or her home. The conclusion in the second element would appear to only be a matter of conjecture for the person making the conclusion. The time and circumstances that would lead to such a conclusion are not specified. What is a disorderly purpose? No guidance is available in the provision. And why should having such a purpose be criminalised without an element harm or prejudice to any person?

[38] Article 28 (12) of the Constitution provides,

‘Except for contempt of court, no person shall be convicted of a criminal offence **unless the offence is defined** and the penalty for it prescribed by law.’

[39] It is a constitutional imperative that a criminal offence is defined and what this means is that it must be specifically defined that it should clear to all what its elements are. The said elements or ingredients should not be ambiguous or vague or too broad as to defy specific definition.

[40] I am afraid that the elements for the impugned provisions are ambiguous, vague and too broad to amount to a precise definition of an offence which is what is required under article 28 (12) of the Constitution or what is otherwise referred to as the principle of legality.

[41] Faced with a similar question in relation to provisions that are in *pari materia* with our section 168 (1) (c) of the Penal Code Act, the Supreme Court of Ireland (Kenny J) in King v Attorney General and Another, [1981] 1 IR 245 at page 263, had this to say of the same as against the provisions of their own Constitution:

‘It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences ..... which, created by statute, are expressed without ambiguity. But what does ‘suspected person’ mean? Suspected of what? What does “reputed thief” mean? Reputed by whom? It does not mean a



person who has been convicted of theft, for then “convicted thief” would have the appropriate words. So one is driven back to the conclusion that it is impossible to ascertain the meaning of the expressions. In my opinion, both governing phrases “suspected person” and “reputed thief” are so uncertain that they cannot form the foundation of a criminal offence.’

- [42] O’Connor J., writing for the United States Supreme Court in Kolender v Lawson 461 U.S. 352 discussing a similar question as the one before this court, stated in part, at page 357,

‘As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient.....definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement .... We have noticed that the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement.’ ... Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep (that) allows policemen, prosecutors and juries to pursue their personal predilections.’

- [43] The United States Court of Appeals for the District of Columbia considered the constitutionality of the vagrancy laws enacted for the District of Columbia, including one that is in *pari materia* with our section 168 (1) (c) of the Penal Code Act in Hattie Mae Ricks v District of Columbia, 134 U.S.App. D.C. 201 and stated,

‘Reasonable precision in the definition of crime has been regarded as a desideratum by free people since the early days of the common law. That precept, virtually from the birth of the Nation, has occupied a position of honor in the scheme of constitutional values and for justifications of the highest order. Fluid language which sweeps citizens under the penumbra of penal legislation without warning is abhorrent. The imposition of criminal liability for behavior which a person could not reasonably understand to be prohibited offends the most

rudimentary considerations of fairness. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Thus 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

'Statutory vagueness has a distinctive impact, too, on human activity not essentially wicked and on the processes by which its criminality is to be appraised. 'Liberty under law extends to the full range of conduct which the individual is free to pursue.' Since most people shy away from legal violations, personal liberty is unconstitutionally dampened when one can but doubt whether he is actually free to pursue particular conduct. Moreover, definitional uncertainty is an open invitation, if indeed not inevitably an antecedent, to virtually unrestrained administration. '(A) law fails to meet the requirements of the Due Process Clause' not only 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits,' but also if it 'leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. And legislation of that character 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'

So it is that a criminal statute perishes on constitutional grounds when it leaves speculative the tests for ascertaining the line separating guilty from innocent acts. A reasonable degree of certainty is prerequisite. Fair notice to those of ordinary intelligence is necessary. It is essential that the statutory language 'conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices.'

- [44] The foregoing authorities are of a persuasive nature and I take comfort in them in the decision I arrive at today. Section 168 (1) (c) and (d) of the Penal Code Act are void for contravening article 28 (12) of the Constitution as they fail to provide a precise definition for the offences that they create.



[45] It was also contended that the impugned provisions contravene article 28 (3) (a) of the Constitution which provides for the right to presumption of innocence for anyone charged with a criminal offence. It provides,

‘Every person who is charged with a criminal offence shall—  
(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

[46] It must be noted that presumption of innocence is a constituent element of the right to a fair trial. This right is non derogable under article 44 (c) of the Constitution. It states,

‘44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

- (a)
- (b)
- (c) the right to fair hearing.’

[47] There is an absolute bar imposed by the Constitution against whittling away or diminishing the content of the right to a fair trial.

[48] Section 168 (1) (c) of the Penal Code Act imposes a reverse onus of proof on an accused to give ‘a good account’ of himself when presumably he is arrested or apprehended by either a police officer or it is a citizen’s arrest, to the citizen arresting him. Or he must give a good account of himself to the court, failing which he would commit the offence. Secondly under both impugned provisions an accused ‘shall be deemed to be a rogue and vagabond, and commits a misdemeanor and is liable for the first offence to imprisonment for six months,’

[49] Presumption of innocence imposes upon the state or the prosecution the burden of proving a criminal case against the accused beyond reasonable doubt and this burden does not shift. Neither is it derogable. It is clear that if

an accused fails to discharge the burden now imposed upon him or her by this provision he would be found guilty of an offence. Giving a good account of himself is a full element or ingredient of the offence under this provision. Secondly under both impugned provisions he is simply deemed a 'rogue and vagabond' and therefore convicted of that offence, of being a rogue and vagabond.

[50] These provisions, in my view, fail constitutional muster, by reversing the burden of proof, and deeming that an offence has been committed, contrary to the presumption of innocence protected under article 28 (3) (a) of the Constitution.

[51] I am aware that there are instances in which reverse onus burden of proof can be imposed on an accused in a few narrow circumstances where probably it is only the accused that might be privy to particular facts. However, in my view, this should not extend to a full element of an offence with which he is charged for in effect it would be contravening the constitutional presumption of innocence or derogating therefrom.

[52] The petitioner also complains that the impugned offences contravene article 21 (1) and (2) of the Constitution in so far as the application of the impugned provisions unfairly targets reputed thieves, and thus discriminates against them on the basis of their social status. The supporting affidavit does not back this assertion but to the contrary pursues a different line and contends that through the deponent's research the police acting under the impugned provisions the police

'arrest people who seem to be poor though going about their lawful business such as hawking, *boda boda* riding, and others especially when these people are found moving on busy streets and in exclusive elite residential areas.'

[53] The deponent further states in part:



‘5. That the police applying sections 168 (1) (c) and 168 (1) (d) has often times been treating poverty as an offence and according different treatment between haves and have nots.

6. That I have observed that persons who are on foot on various streets especially in the late evening and early morning hours are often times randomly swooped by police, arrested and detained on account of the police suspecting them of being rogues and vagabonds.

7. That my research has also shown that often times the police has no intention of taking the people it arrests in swoops to court but just to inconvenience them and make them know that they are not welcome to move on some streets.’

[54] The petitioner presents one case on the petition and another in the supporting affidavit. This is simply not acceptable. The supporting affidavit does not adduce any evidence to support the discrimination of the class of ‘reputed thieves’ that is made out on the petition. Another case is set up on the affidavit. I am inclined to find that this head of claim fails. Secondly what is set out in the affidavits as shown above are general statements which can hardly amount to proof of the matters alleged in complaining about police conduct. The affidavit is not sworn by any victim of the alleged actions complained of. No particulars are provided in terms of dates and persons involved.

[55] I would reject this head of claim and find that no case has been made out to show that the impugned provisions contravene articles 21 (1) and (2) of the Constitution.

[56] I turn to the last head under this issue which is that the impugned provisions contravene article 23 (1) (c) and (4) (b) of the Constitution. This is in relation to the fundamental right to personal liberty. Following my analysis that the impugned offences are not constitutionally permissible for being vague, ambiguous and too broad it follows that any attempt to deprive an individual of his or her personal liberty on account of these impugned offences would contravene the affected person’s right to personal liberty. For the offences in question are not sufficiently and precisely defined to warrant loss of the right to liberty.

**Issue No. 3: Whether the impugned sections violate and contravene articles 29 (2) (a) and 20 (1) & (2) of the Constitution**

[57] Following my analysis in relation to the question of legality as provided under Article 28 (12) of the Constitution it would follow that offences that do not pass constitutional muster cannot lawfully be the cause of restriction of one's fundamental right to move freely throughout Uganda. In fact, as an aggravation the impugned offences clearly contravene the right to freely move throughout Uganda and justification of such contravention as saved by article 43 of the Constitution would have to be justified by the respondent.

[58] Article 20 (1) recognises that fundamental human rights and freedoms inhere in individuals and are not a gift from the state or even this Constitution. This Constitution recognises those fundamental human rights and freedoms and others not set out in Chapter 4, as being part and parcel of any individual. Article 20 (2) compels all organs and agencies of government and all persons to respect, uphold and promote those rights and freedoms enshrined in Chapter 4 of the Constitution. The bringing of this petition, its hearing and adjudication is one way of respecting and upholding this Constitution. Nothing will turn on it though given my findings above.

**Issue No. 4: Remedies**


[59] In light of the foregoing I would issue the declaration that section 168 (1) (c) & (d) are void for being unconstitutional.

[60] With regard to the issue of costs I note that the petitioner is not individually the victim of the application of the impugned provisions. He is a good Samaritan ensuring that the law in force is in conformity with the Constitution. I take it that he has simply acted in the public interest. I would in the circumstance of this case order each party to bear its costs in this cause.

## Decision and Orders

[61] As Musoke, Madrama, Mugenyi and Gashirabake, JJCC, agree it is hereby held that sections 168 (1) (c) and (d) of the Penal Code Act are void for inconsistency with the Constitution. Each party hereto shall bear their own costs.

Dated, signed and delivered at Kampala this 2<sup>nd</sup> day of Dec 2022.

  
Fredrick Egonda-Ntende  
**Justice of Constitutional Court**

**THE REPUBLIC OF UGANDA  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
CONSTITUTIONAL PETITION NO. 036 OF 2018**

**FRANCIS TUMWESIGE ATEENYI:.....PETITIONER**

**VERSUS**

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

**CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC  
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC  
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC  
HON. LADY JUSTICE MONICA K. MUGENYI, JCC  
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC**

**JUDGMENT OF ELIZABETH MUSOKE, JCC**

I have had the advantage of reading in draft the judgment of my learned brother Egonda-Ntende, JCC. For the reasons he has given therein I agree with him that this Petition should succeed. I would make the declaration and orders that Egonda-Ntende, JCC proposes.

Dated at Kampala this .....<sup>2nd</sup>.....day of <sup>Dec</sup>..... 2022.



**Elizabeth Musoke**

Justice of the Constitutional Court



THE REPUBLIC OF UGANDA,  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI,  
GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 36 OF 2018

FRANCIS TUMWESIGE ATEENYI} ..... PETITIONER

VERSUS

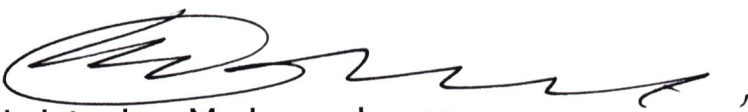
ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned brother Hon. Mr. Justice Fredrick Egonda – Ntende JCC.

I concur with the Judgment and the declaration issued and have nothing useful to add.

Dated at Kampala the 2nd day of Dec 2022

  
Christopher Madrama Izama

Justice Constitutional Court



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA  
AT KAMPALA**

*(Coram: Egonda-Ntende; Musoke, Madrama, Mugenyi & Gashirabake, JJCC)*

**CONSTITUTIONAL PETITION NO. 36 OF 2018**

**PATRICK TUMWESIGE ATEENYI ..... PETITIONER**

**VERSUS**

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

**JUDGMENT OF MONICA K. MUGENYI, JCC**

I have had the benefit of reading in draft the judgment of my brother, Hon. Justice Fredrick Egonda-Ntende, JCC. I agree with the findings therein that section 168(1)(c) and (d) of the Penal Code Act, Cap. 120 is void to the extent of its vagueness and thus unconstitutional, and would abide the orders attendant thereto.

Dated and delivered at Kampala this 2nd day of Dec, 2022.



**Monica K. Mugenyi**

**Justice of the Constitutional Court**



# THE REPUBLIC OF UGANDA

## IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, E.Musoke, C. Madrama, Monica Mugenyi, and C. Gashirabake;  
JJCC/JJCA]

### CONSTITUTIONAL PETITION NO 036 OF 2018

FRANCIS TUMWESIGE ATEENYI .....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

### JUDGMENT OF CHRISTOPHER GASHIRABAKE, JCC

I have read in draft the judgment of Hon. Justice Fredrick Egonda -  
Ntende, JCC and I concur with it.

  
Christopher Gashirabake,

Justice of the Constitutional Court.

21/12/2022