

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*

 (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*
85 *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.*

 (2) *Notwithstanding any rule of law or practice to the contrary, in any*
90 *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;

(b) shows that any announcement has been made, whether by the person
95 *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.

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.

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.

The Petitioner stood as Presidential candidate in the general elections held in 2016 and lost to President Yoweri Museveni for the 4th 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;-

"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.

"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 12th 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 1st 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 18th February, 2016. On 20th February, 2016 Yoweri Kaguta Museveni was declared winner of those elections. The Supreme Court delivered its decision and issued the above orders on 31st 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 12th May, 2016.

The petitioner on 11th 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 12th November 2019.

150 *“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.

155 *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.*

160 *“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 27th 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.

220 *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.

Article 3 of the Constitution, which the Petitioner has invoked and contends, is now
230 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.*

(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.

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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.

 (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
250 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
255 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
260 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.

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
265 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.

270 Once *Article 3* of the Constitution is invoked, which the Petitioner has done, then any 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.

275 The petitioner can only bring and maintain an action against the Attorney General 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.

285 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 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.”

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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 1st 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
360 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 12th day of Dec 2019.



KENNETH KAKURU
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
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CONSTITUTIONAL PETITION NO. 33 OF 2011

5 **COL. (RTD) DR. KIIZA BESIGYE ::::::::::::::::::::::::::::::::::: PETITIONER**
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HON. JUSTICE CHEBORION BARISHAKI, JCC
HON. JUSTICE STEPHEN MUSOTA, JCC

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

Introduction

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
20 seeking declarations and other reliefs and redress as will be laid down
herein.

Background

The Petitioner is a retired Colonel in the Uganda People's Defence
Forces (UPDF), a medical doctor and a businessman who was a
25 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.

(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 1st 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 2nd 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.

Article 43 of the Constitution illustrates that there are general
10 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**
25 **Constitutional Appeal No. 03 of 2006) (SC).**

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 other civic organizations.

20 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 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.

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.

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.

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 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.

Dated this 12th day of Dec. 2019



Hon. Justice Stephen Musota, JA/JCC

THE REUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CONSTITUTIONAL PETITION NO.33 OF 2011

COL (RTD) DR. KIIZA BESIGYE:.....PETITIONER

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

CORAM: HON.MR.JUSTICE KENNETH KAKURU,JCC

HON.MR.JUSTICE GEOFFREY KIRYABWIRE,JCC

HON.LADY JUSTICE ELIZABETH MUSOKE,JCC

HON.MR.JUSTICE CHEBORION BARISHAKI,JCC

HON.MR.JUSTICE STEPHEN MUSOTA,JCC

JUDGEMENT OF JUSTICE GEOFFREY KIRYABWIRE

I have had the benefit of reading in draft the Judgment of my Brother Hon. Mr. Justice Stephen Musota, JCC. I agree with his analysis, findings and the orders he has proposed.

Dated at Kampala this 12th day Dec 2019.


Geoffrey Kiryabwire

Justice of Appeal /Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Kakuru, Kiryabwire, Musoke, Cheborion, Musota, JJA)
CONSTITUTIONAL PETITION NO. 0033 OF 2011

COL. (RTD) DR. KIIZA BESIGYE ::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL ::::::::::::::: RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA/JCC

I have had the benefit of reading in draft the lead judgment of my learned brother, Musota, JA/JCC. I concur that the petition has no merit and should be dismissed for the reasons given in his judgment.

I, also agree that each party should bear its own costs as the resolution of the petition concerns issues of public importance.

Dated at Kampala this12th..... day ofDec.....2019



ELIZABETH MUSOKE
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

other people and in so doing cannot be inconsistent with the listed articles of the Constitution.

The Petition fails and since it was brought in public interest, each party should meet its own costs.

Dated at Kampala this12th..... Day ofDec..... 2019



Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT