

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NO. 05 OF 2007**

10 **MOSES MWANDHA ..... PETITIONER**

**VERSUS**

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

**CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ**

**Hon. Mr. Justice Kenneth Kakuru, JA/ JCC**

15 **Hon. Mr. Justice Egonda-Ntende JA/ JCC**

**Hon. Lady Justice Hellen Obura, JA/ JCC**

**Hon. Mr. Justice Ezekiel Muhanguzi JA/ JCC**

**JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC**

20 The introduction, brief background and issues for determination in this petition have been  
ably set out in the Judgment of my learned brother the Hon. Mr. Justice Ezekiel  
Muhanguzi. I have found no reason to repeat them. The submissions of both Counsel  
have also been reproduced in his Judgement, I have also found it unnecessary to  
reproduce them.

25 I will therefore proceed to the resolution of issues raised at the hearing.

5 **Issue one**

Whether *Sections 33 and 34* of the Police Act are still law in light of the Constitutional Court decision in *Muwanga Kivumbi vs Attorney General, Constitutional Petition No.9 of 2005*.

10 Although this issue appears to have been abandoned by Counsel for the Petitioner and in the result my learned brother Justice Muhanguzi did not resolve it, I have considered it important to resolve it. This Court has powers to frame, amend or strike out issues under Order 15 rule 1 (5) and (5) of the Civil Procedure Rules. They provide as follows:-

Order 15 rule 1(5)

15 *'At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.'*

20 Order 15 rule 5

*'5. Power to amend and strike out issues.*

*(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy*  
25 *between the parties shall be so made or framed.*

*(2) The court may also at any time before passing a decree strike out any issues that appear to it to be wrongly framed or introduced.'*

Whereas an appellant may abandon or otherwise disregard a ground of appeal at the Court of Appeal, in a Constitutional Petition this Court exercises original jurisdiction and  
30 as such is enjoined to hear and determine all relevant issues raised in the pleadings. On

5 those premises I consider that issue one requires determination by this Court as it is very pertinent. It will create uncertainty in the law if it is left unanswered.

I will therefore proceed to answer it.

In *Muwanga Kivumbi (Supra)* this Court was required to pronounce itself on the Constitutionality of *Section 32* of the Police Act which provided as follows:-

10 *'Power to regulate assemblies and processions*

*(1) Any officer in charge of police may issue orders for the purpose of-*

15 *(a) regulating the extent to which music, drumming or a public address system may be used on public roads or streets or at occasion of festivals or ceremonies;*

*(b) directing the conduct of assemblies and processions on public roads or streets or at places of public resort and the route by which and the times at which any procession may pass.*

20 *(2) If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort, and the inspector general has reasonable grounds for believing that, the assembly or procession is likely to cause a breach of the peace, the inspector general may, by*  
25 *notice in writing to the person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming of the procession.*

30 *(3) The inspector general may delegate in writing to an officer in charge of police all or any of the powers conferred upon him ,or her' by subsection (2) subject to such limitations, exceptions or qualifications as the inspector general may specify.'*

35 This Court unanimously allowed the petition and declared the above law was inconsistent with and contravened *Articles 20(1) (2) and 29(1)d* of the Constitution.

All justices of this Court found that, freedom of assembly was not absolute and was subject to the limitations set out under *Article 43(2)(c)* of the Constitution, which provides that:-

10                    *'(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'*

The question this Court had to determine, therefore was whether the impugned law, imposed restrictions on the right of association and assembly set out in *Articles 29(1)d* of the Constitution which provides that:-

15                    *'29(1)(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition'*

Hon. Lady Justice C.K Byamugisha wrote the lead Judgment. At page 15 of her Judgment she found and held as follows:-

20                    *'In every society there is always tension between those who desire to be free from annoyance and disorder on one hand to those who believe to have the freedom to bring to the attention of their fellow citizens matters which they consider important.*

25                    *Peaceful assemblies and protests are a vital part of every democratic society. They can be a very powerful tool and some of the rights and freedoms that some countries enjoy today were gained because some people were to go out on the street and protest.*

30                    *The way therefore, any legal system strikes a balance between the above mentioned competing interests is an indication of the attitude of that society towards the value it attaches to different sorts of freedom. A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression, particularly political expression.*

5        *The right to peaceful protest is not absolute. The police have a wide range of powers to control and restrict the actions of protestors. These powers should not be exercised by the police in an unaccountable and discriminatory manner.*

10       *In an attempt to justify the powers given to inspector general of police to prohibit the convening of a procession or assembly, Mrs. Rwakojo availed us a copy of the United Kingdom public order Act 1986. Section 13 of the Act gave to the chief officer of police to prohibit a procession if had reasonable ground to believe that the holding of a public procession would result in public disorder.*

*The prohibition was limited to a period not exceeding three months.*

15       *It should be remembered that the United Kingdom had no written constitution. This position had changed with the enactment of the human rights Act in 1998 which domesticated the European convention on human rights.*

*With regard to political protest the convention emphasized four key areas namely:*

- *The right to peaceful assembly in article 11*
- *The right to freedom of expression in article 10*
- 20       ○ *The right to freedom of thought, conscience and religion in article 9 and*
- *The right to respect for private and family life in article 8.*

*Article 29 of our constitution is modeled along the lines of the European Convention on Human Rights*

25       *Mrs. Rwakojo also provided the First Amendment Assemblies' Act form the District of Columbia in the United States of America with regard to police powers in dealing with lawful assemblies. The right of peaceful assemblies is entranced in the United States constitution. The act gives powers to the police to arrest persons who engage in disorderly conduct, or who threaten violence etc.*

5        *It does not give powers of prohibition to the police. The reason for this is obvious. Freedom of assembly is an entrenched right in the United States constitution to restrict or prohibit it would be a violation of the rights of protestors.*

10       *In the matter now before us, there is no doubt that the power given to the Inspector General of police is prohibitive rather than regulatory. It is open ended since it has no duration. This means that rights available to those who wish to assemble and therefore protest would be violated.*

15       *The justification for freedom of assembly in countries which are considered free and democratically governed in my view is to enable citizens together and express their views without government restrictions. The government has a duty of maintaining proper channels and structures to ensure that legitimate protest whether political or otherwise can find voice. Maintaining the freedom to assemble and express dissent remains a powerful indicator of the democratic and political health of a country.*

20       *I, therefore, find that powers given to the Inspector General of Police to prohibit the convening of an assembly or procession an unjustified limitation on the enjoyment of fundamental right. Such limitation is not demonstrably justified in free and democratic country like ours.*

*The subsection is null and void. The petitioner is entitled to a declaration to that effect*

25       *The petition is allowed with costs.*

Hon. Lady Justice L.E.M Mukasa-Kikonyogo, DCJ in concurrence observed and held thus:-

*'As already pointed out the Police have powers under other provisions of the law to maintain law and order or deal with any situation for instance the one*

5 envisaged under S. 32 (2) of the Police Act. The police will not be powerless without the powers under subsection 2; they can deploy more security men. Further, they have powers to stop the breach of peace where it has occurred by taking appropriate action including arresting suspects

10 I am, therefore, in agreement with my sisters and brother on this Coram that to interpret and uphold S. 32 (2) of the Police Act as authorizing the Police to prohibit assemblies including public rallies or demonstrations would be unconstitutional. Clearly, it would be giving the Police powers to impose conditions which are inconsistent with the provisions of Article 29 (1) (d) of The Constitution which guarantee the enjoyment of the freedom to assemble and  
15 demonstrate.

As it was rightly pointed out by Byamugisha, JA, in her judgment, the powers given under s. 32 (2) of the Police Act are prohibitive and not regulatory. They cannot, therefore, be justifiable, in the circumstances of this petition.

In the premises, section 32 (2) of The Police Act would be null and void.'

20  
G.M Okello JA, on his part held as follows:-

'The background facts that led to this Petition have been ably set out in the judgment of Byamugisha, JA. I shall, therefore, not repeat them here. I should point out however, that in his submission before us, Mr. Rwakafuzi, learned  
25 counsel for the petitioner, confined his challenge to section 32(2) only. He made it a clear that he had no complaint against the other parts of the said section 32 of the Police Act.

The impugned subsection 2 of section 32 reads as follows.

5                   *"If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road, or street or at any place of public resort and the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of peace, the inspector general may, by notice in writing to the*  
10                   *person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming of the procession."*

*The above subsection clearly empowers the inspector general of police to prohibit the convening of an assembly or forming of a procession in any public place, on subjective reason. The right to freedom of assembly and to demonstrate together*  
15                   *with others peacefully is a fundamental right guaranteed under Article 29(1) (d) of the Constitution of this country. The above subsection therefore places a limitation on the enjoyment of that fundamental right. While I agree that such a right is not absolute, any limitation placed on the enjoyment of such a fundamental right like this one, must fall within the limit of Article 43 (2) (c) of the Constitution of this*  
20                   *Country which provides:-*

*"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."*

*The imposing question is, does the power to prohibit the convening of an assembly or forming of a procession, in a public' place, for whatever reason, fall within the*  
25                   *limit prescribed in the above Article 43(2)(c)? My humble answer is that it does not. It goes beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution. The reason is that the exercise of that power has the effect of denying the citizens enjoyment of the*  
30                   *fundamental right guaranteed under Article 29(1)(d). Application of purpose and effect principle of constitutional interpretation enunciated in the Queen VS Big*

5 *Drugmark Ltd (others intervening) 1996 LRC (Constitution) 332 and adopted in Attorney General vs Salvatori Abuki and Richard Obuga, Constitutional Appeal NO. 1 of 1998, in interpreting the impugned subsection 2 of section 32 produces that result.*

10 *It was argued for the respondent that if that subsection was nullified, the police would be powerless to maintain law and order. I do not, with respect, accept that argument because the police still have the power to arrest any person who conducts himself/herself in the assembly or procession in a manner contrary to the law or who threatens violence.*

15 *That is what is required to maintain law and order. To prohibit the convening of a lawful assembly or forming a lawful procession in any public place on subjective reasons is not regulating the assembly or procession but a denial of the enjoyment of the fundamental right in contravention of Article 29(1)(d) of the Constitution.*

20 *It is for these reasons that I support the conclusion of Byamugisha, J A that section 32(2) of the Police Act is inconsistent with Article 29(1) (d) and therefore unconstitutional and hence null and void.'*

A.E.N. Mpagi-Bahigene, JA held,

25 *'This court has on many occasions stated that the right of assembly is the aggregate of the individual liberty of the person and individual liberty of speech. The liberty to have personal opinions and the liberty to express them is one of the purposes of the right to assemble, which right or freedom constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and therefore each individual's self-fulfillment.'*

30 *Consequently, where individuals assemble, if the police entertain a "reasonable belief" that some disturbances might occur during the assembly, all that can be done is to provide security and supervision in anticipation of disturbances. It is the*

5        *paramount duty of the police to-maintain law and order but not to curtail people's enshrined freedoms and liberties on mere anticipatory grounds which might turn out to be false. Lawful assemblies should not be under any circumstances. Most importantly in such cases the conveners of the assemblies can be required to give an undertaking for good behavior and in default face the law.*

10        *I would thus hold Section 32 of the Police Act to be null and void.'*

C.N.B Kitumba, JA held:-

15        *'The powers given to the Inspector General of police by section 32(2) of the police act are in clear contravention of the constitution. Article 20(1) and (2) of the Constitution guarantees the fundamental rights and freedoms of the individual. In particular Article 20(2) states*

*"The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons".*

20        *Article 29 of the constitution provided, inter alia, protection of people's freedom of conscience, association and assembly.*

*In the instant petition the petitioner complains about section 32(2) of the police Act, which gives the police powers in the following terms:*

25        *"(2) if it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place or public resort, and the inspector general had reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace, the Inspector General may, by notice in writing to the person responsible for convening the assembly or forming the*

5                    *procession, prohibit the convening of the assembly or forming of the procession”.*

*The constitution while providing for fundamental human rights and freedoms also set standard, which can be used in limiting the same*

10                   *According to Article 43 of the constitution in the enjoyment of those rights and freedoms one must not prejudice the fundamental or other rights and freedoms of others or public interest.*

*Article 43(2) states:-*

*Public interest under this article shall not permit-*

*Political persecution*

15                   *Detention without trial*

*“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.”*

20                   *It is my considered view that section 32(2) of the Police Act gives the inspector general of police excessive powers which he may use as he wishes to curtail people’s rights and freedoms of conscience, speech, association and assembly. Those rights are very necessary especially in a multiple political system.*

25                   *In a free and democratic society the police is supposed to keep law and order. In case the inspector general of police sees any possibility of a breach of peace at any assembly, the police should provide protection. The citizens should be allowed to exercise their fundamental rights and freedoms.*

*I would declare section 32(2) of the police act as being inconsistent with the constitution and therefore, declare it null and void.’*

- 5 In view of the above decision we are now required to determine the constitutionality of Sections 33 and 34 of the Police Act which have already been reproduced.

In determining the above, I must state from the onset that under *Article 20(1)* of the Constitution, the fundamental rights enshrined in the Constitution are NOT granted by state, but they are inherent.

- 10 The state, therefore cannot take them away, but may only limit them, as provided for under *Article 43(2) (c)*.

The limitation imposed on fundamental rights must not be beyond what is demonstrably justifiable in a free and democratic society. The onus of proving that the limitation is justifiable lies with the respondent who seeks to limit it. In *Charles Oyango Obbo and*  
15 *Andrew Mwenda vs Attorney General, Supreme Court Constitutional Appeal No. 2 of 2002*, Mulenga JSC stated as follows:-

*"In the first place, the issue in this case is not whether law should be utilised to prohibit those acts. That is a given. The issue is whether the prohibition imposed by section 50 is valid under the Constitution. Where a law prohibits an act, which*  
20 *is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of Article 43."*

On standard of limitation the Supreme Court went on to find as follows:-

*"In clause (2) (c) of Article 43, the Constitution sets out an objective standard against which every limitation on the enjoyment of rights is measured for validity.*  
25 *Counsel for the respondent urged the Court to construe that standard subjectively, on the premise that what is "acceptable and justifiable" varies from one democratic society to another. I do not agree. That approach would distort the standard set out by the Constitution. The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which*  
30 *every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard. While there may be variations*

- 5        *in application, the democratic values and principles remain the same. Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to."*
- 10      In *R vs Oakes* 26 D.L.R. (4<sup>th</sup>) 200, the Supreme Court of Canada elaborated on that standard in relation to s. 1 of the Canadian Charter of Rights and Freedoms, which in similar terms as Article 43, sets out the standard of justification of limitation on the enjoyment of rights guaranteed by the said Canadian Charter. In his judgment, with which all other members of the court concurred, Dickson C.J.C. said -
- 15        *"Inclusion of these words (free and democratic society') as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to*
- 20        *name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonable and demonstrably justified*    *s.1 provides criteria*
- 25        *of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification.... The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s.1 that the limits on*
- 30        *the rights and freedoms enumerated in the Charter are exceptions to their guarantee. The presumption is that the rights and freedoms are guaranteed unless*

5            *the party invoking s.1 can bring itself within the exceptional criteria which justify their being limited."*

Sections 33 and 34 of Police Act provide as follows:-

*'33. Power to stop and to order to disperse assemblies and processions unlawfully convened.*

10           *Where an assembly is convened or procession formed in contravention of a prohibition under section 32, the inspector general or officer in charge of police may require the assembly to cease to be held or the procession to be stopped and may order the immediate dispersal of that assembly or procession.*

15           *34. Unlawful assemblies.*

*Any assembly or procession of three or more persons which neglects or refuses to obey any order for immediate dispersal given under section 33 shall be deemed to be an unlawful assembly within the meaning of section*  
20           *65 of the Penal Code Act.'*

Section 33 relates directly to the repealed *Section 32* of the Police Act. In turn *Section 34* relates to *Section 33*. I find that the three *Sections 32, 33 and 34* are intertwined and were meant to be read, construed and enforced together. *Sections 33 and 34* cannot be read in isolation of *Section 32*. I therefore find that, this Court having declared *Section 32* of the  
25           Police Act unconstitutional, *Sections 33 and 34* could no longer stand alone and I hereby declare them too unconstitutional for the same reason that this Court declared *Section 32* unconstitutional.

## **Issue 2**

Whether *Sections 35, 36 and 37 and 40* of the Police Act are inconsistent with *Articles*  
30           *29(1)(a)(d), 29(2), 38 and 212* of the Constitution.

Section 35 empowers the Minister, in his or her opinion, to determine whether or not it is desirable to limit the rights of Ugandan citizens. He is granted powers under that Section to prescribe by a statutory instrument any particular area in Uganda where citizens are prohibited from assembling. The law makes it a criminal offence for any person to  
35           assemble in such an area without a permit.

- 5 The wording of this law is prohibitive and not regulatory. The law states that, the statutory instrument may declare “*Any particular area in Uganda*’ to be gazzetted area. It provides no limits as to the extent of the area does not distinguish between private property, or public property. It does not define “what is desirable in public interest or what public tranquility is”.
- 10 In theory any area that is part of Uganda, maybe declared a gazzetted area for the purposes of Section 35 of the Police Act. Areas that are inhibited or occupied and used by the public such as markets, roads, shopping malls, University campuses could be declared gazzetted areas under this law. Likewise private property may also be gazzetted or restricted even to its owners, preventing them from holding private functions. To this
- 15 extent the law is unreasonable and the limitation it imposes on the right to assemble goes far beyond what is acceptable in a free and democratic society.

Whereas in many free and democratic societies, there are indeed limitations to right of assembly including, the requirement for organisers of matches, assemblies or demonstrations to apply for permits from the Police or other authorities, such permits are

20 only for the purposes of regulating but not prohibiting the assemblies.

The Police may not deny applicants the permit but may relocate their assembly to a different area, direct the match to go through a different route or give any other such reasonable conditions intended only to facilitate the assemblies. The Police may not limit the numbers or make other undesirable restrictions.

- 25 Section 35 of the Police Act permits the Minister to name any person to issue such permits. The law does not designate the persons who can issue permits, and it further grants such a person wide and arbitrary powers to grant or not to grant such permits.

In order to bring such law into the ambit of the Constitution, it ought to have specified the areas where public assemblies are prohibited or accessible only with permits such as

30 security institutions, specific government buildings, airports and such other places. Such places ought to have been set out clearly in the same law as an appendix for all and sundry to know.

The law ought to have restricted the Minister’s powers to specific public interest as it is provided for under Article 26 of the Constitution. The law ought to have specifically

35 stated that the limitation would only be made in public interest, in respect of only specific areas reserved for specific public use, such as defence and security, public safety, public health or any such other specified public use.

5 The law ought to have clearly excluded, private property, where the owner has granted permission.

There is no proof whatsoever provided by the respondent that the restrictions set out in Section 35 are desirable, and are not prejudicial to public interest. Every law that seeks to limit fundamental rights, must be sufficiently important. There must be an overriding mischief. I have found no ordinary mischief necessitating the enactment of the impugned law. The respondent has not provided any and has not even suggested it exists. Even if one existed the objective of law must be rationally connected to it and to its implementation ensuring that it is not arbitrary, unfair, biased or oppressive. It must be able to stand an objective test and to be applied in accordance with objective rules and principles. Section 35 as it stands is premised on subjective opinion and arbitrary decision of the Minister and his/ her unnamed delegate. It is subject to abuse and it is certainly a dangerous legal weapon waiting to be unleashed on the public.

The 1995 Constitution of Uganda, was enacted to give Ugandans and our posterity, a lasting and enduring democratic state, based on the rule of law and the protection of fundamental human rights. It was made in recognition of our past history that was characterised by political oppression, tyranny and oppression. It is a commitment by the people of Uganda to build a better society based on the principles of peace, equality, democracy, freedom, social justice, liberty and progress. This Constitution freed Ugandans, from oppression by the state and put in place provisions ensuring that the rights of the citizens are not just observed, they are protected.

In this regard, the Constitution provides under Article 1 that *“All power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.”*

It goes on to state that the people shall be governed through their will and consent. Further that all the power and authority of Government and its organs derive from the Constitution which in turn derives its authority from the people.

The people express their will and consent on who shall govern them and how they shall be governed through regular elections. Their elected representatives sit in Parliament which makes laws for the good governance of the Country.

In this regard, the people at all time reserve the power to govern and to make laws, which is periodically delegated to their representatives through regular free and fair elections.

5 It goes without saying therefore that whenever the people have any grievance they have an unfettered right to question those in power, to seek accountability, to air their grievances and to petition their representatives. They have power to make ‘noise’ over issues that concern them, which they feel, require the attention of the government.

10 The people therefore, have a right to peacefully march through the streets or to gather anywhere in Uganda to express their grievances. They may also gather, march or demonstrate in support of their government. They have a right to hold a demonstration and a rally. They have a right to present petitions to their elected leaders whether it is the President, Parliament or other elected leaders. They can do this in small numbers or large numbers.

15 The duty of the Government and its organs especially the Police is to facilitate this democratic process by providing security and issuing guidelines to the process. This duty does not extend to banning of such assemblies directly or indirectly through draconian and oppressive laws.

20 Section 35 of the Police Act has the effect of completely denying the people their right of expression and of assembly. As already stated above, the Minister may gazette all routes leading to the venues or all public places where such demonstrations or rallies may take place and after which deny the people a permit to use them.

25 The law is not regulatory or permissive. It is restrictive and the restrictions goes far beyond what is acceptable in a free and democratic society. I must emphasize here that the right to assemble, demonstrate, march through the streets, present petitions to Parliament or other elected bodies extends only to peaceful assemblies and not those involving violence. The right does not extend to riots and the two must be distinguished.

30 Peaceful assemblies and protests and other such gatherings as enumerated above are usually organised, the objectives known and are capable of being monitored by the police. Riots on the other hand are spontaneous as they erupt, without having been planned. Consequently, they cannot be regulated. Section 35 of the Police Act appears to have been intended to target only peaceful assemblies by preventing them from taking place and when they do, by clothing police with power to violently disperse them.

35 True enough that a peaceful assembly may indeed turn violent, but the duty and the obligation of the Police is to ensure that such occurrences are minimised and when they occur only reasonable force is used to contain them.

5 The Constitutional Court of South Africa while adjudicating on a similar issue in *Satawu vs Garvas 2013 (1) SA 83CC* held *inter alia*.

*'It is through the exercise of each of these rights... that civil society and other similar groups in our Country are able to influence the political process , labour or business decisions and even matter of governance and service delivery...*

10 *The right to freedom of assembly is central in our Constitutional democracy. It exists preliminary to give a voice to the voiceless.. This right will in many cases be the only mechanism available to them to express their legitimate concerns.'*

In *Mlungwana vs The State a South Africa*, (A431/15) [2018] ZAWCHC 3, Judge Ndita J stated that:- *"the right to free assembly was not only pivotal to the freedom that gave rise*  
15 *to the Constitution, it remains a vital tool to the Country's democracy."*

The learned Judge went on to note that failure to give notice of an impending assembly would not justify criminal sanctions against the organisers. Because the disastrous impact of criminal conviction and the long life impact it has on lives of those convicted of contravening such a law, criminal sanction is disproportionate to the offence of merely  
20 failing to comply with the requirement.

In this petition before us, where Section 35 requires permits to be sought in respect of public places, in reality, the effect is that every assembly or gathering of 25 people requires a permit, because the gazetted places are unknown to the public. There is no way an ordinary person even a sofiscated one would keep track of which area, which  
25 road, which town, which village is gazetted area. Worse still which of the above have ceased to be 'gazetted areas' by lapse of time and which ones are new. So to be safe every one requiring to assemble more than 25 people has as a matter of course to seek the permit.

Even after the permit has been granted the right to assemble and express grievances is not  
30 guaranteed as under Section 35(3) the assembly may be dispersed even where there is no sign of violence or any indication that the assembly may turn violent.

This provision therefore completely takes away the inherent people's freedom of assembly, expression, association, conscience and movement enshrined in *Article 29* of the Constitution.

5 Prior to the coming into force of the 1995 Constitution the citizens of Uganda enjoyed very limited right to assemble and were prevented from freely expressing their views publically, especially political views of dissent or dissatisfaction with their governments.

They could not do so under the colonial regime of the British, where spoken word was criminalised under the draconian laws of sedition and criminal libel. They could not do it  
10 under Obote's first government 1965-1971 when the whole Buganda Region was under a state of emergency and was ruled under martial law.

The citizens were denied their freedom of assembly and expression, conscience and association under the tyrannical regime of Idi Amin 1971-1979. During this time, a political dissent however expressed, actual or perceived would likely result in a death  
15 penalty without trial. See:- General Amin by David Martin Faber and Faber Ltd London 1974 and A State of Blood: by Henry Kyemba Kampala Fountain Publishers 1997.

After the fall of Idi Amin the same state of affairs went on and in many aspects worsened between 1979 and 1986. When National Resistance Army (NRA) /National Resistance Movement (NRM) took power in January 1986 it restored sanity, promising freedom to  
20 the citizen of this Country. This phrase led to the enactment of the 1995 Constitution.

It cannot be that, under the Constitution made by the people themselves, a law that curtails and criminalizes their freedom of expression assembly, and conscience, would be valid.

Before I leave this issue, I must emphasise that it is the duty of every government to  
25 listen to the voice of it's people and to attend to their grievances, lest this Country returns to the dark days of the past. However, the demands of the people must be lawful and or legitimate. The expression of those demands ought to always be peaceful, at least the intention ought to be.

It is counterproductive and unconstitutional in a multi-party democracy, to stifle and  
30 criminalise legitimate political dissent and or deny the citizens their right to peacefully assemble or to freely and openly express their views. I find that *Section 35* of the Police Act has the effect of criminalising political dissent, abridges or otherwise limits the freedom of assembly, expression, conscience and as such is inconsistent with *Articles 20(2), 22, 23, 24 and 29* of the Constitution. I have no hesitation therefore in finding that  
35 *Section 35* of the Police Act is unconstitutional and I hold so.

5 Section 36 of the Police Act gives power to a senior Police officer to disperse an assembly by force and “*May do all*” things necessary for dispersing the persons continuing to assemble or for apprehending them:- and shall not be liable in any criminal or civil proceedings for having by the use of force caused harm or death to any person.

10 This is nothing but a licence to shoot and kill citizens who are peacefully gathered to voice their concerns or grievances, a right guaranteed under the Constitution.

15 It invokes memories of the Sharpeville massacre in South Africa, when on 21<sup>st</sup> March, 1960 a line of 150 white policemen fired 1344 rounds of live ammunition into a peaceful gathering of black South African citizens who had assembled outside a Police station expressing their discontent against a law that restricted their freedom of movement by requiring them to hold ‘passes’ or permits to move from one place to another.

The Police gun fire that day left 69 people dead most of whom were women and children. Medical reports indicated that most of the dead had been shot in the back. Confirming that they were fleeing and posed no threat whatsoever to Police when they were shot.

20 On June 16<sup>th</sup> 1976 students at Orlando West Junior School in Soweto South Africa and from other schools demonstrated peacefully against a decree that forced all black schools to adopt Afrikaans as a language of instruction. Twenty four students were shot dead by Police on that day. The Police was acting on laws similar to the impugned Sections of the Police Act.

25 A law such as *Section 36* of the Police Act , which permits the Police to do all things necessary to disperse a crowd that is not rioting , violent or armed goes beyond the powers of Parliament to enact.

30 The same law goes on to give immunity to the police who kill citizens of this Country. Under this law Police Officers cannot be prosecuted or held in any other way accountable. The victims cannot get redress through civil suits instituted against individual Police officers or their supervisors. The law as it is permits the Police to torture, maim, harm, injure and extra-judicial execute Ugandans without any retribution whatsoever. This law does not just condone, but it authorises and legitimises Police brutality.

35 The brutality of the Police against innocent citizens of this Country requires judicial notice. On Friday 15<sup>th</sup> July 2016 the Uganda Human Rights Commission issued a report on Police brutality. It in part reads as follows:-

5        *“Uganda Human Rights Commission (UHRC) whose mandate is to protect and promote human rights and freedoms in the country is deeply concerned by the recent incidents of police brutality against un-armed civilians. On Tuesday 12th July 2016, people who lined up along Gayaza road as Col Kizza Besigye was on the way to his home after his release from prison were beaten with sticks and*  
10        *cable-like instruments by policemen riding on police patrol vehicles. Again on the following day on Wednesday 13th July 2016 at the Busabala Road junction, crowds especially boda boda riders following Col Kizza Besigye on his way to the FDC party headquarters were beaten by stick wielding civilians and policemen. The sight of civilians scampering for safety from the police which is not only*  
15        *mandated but obliged to protect them was a sad and regrettable moment for the country, which we do not wish to see repeated.*

*Uganda Human Rights Commission strongly condemns these actions of errant police officers which are a blatant violation of the rights and freedoms of the victims of both incidents and calls for the urgent prosecution of the errant police*  
20        *officers and civilians involved in these incidents under The Prevention and Prohibition of Torture Law of 2012 which provides for individual liability. Uganda Human Rights Commission is on record for condemning such acts involving the use of excessive force by the police over the years. The Commission has also variously raised concern over the presence of civilians working along the*  
25        *police to disperse crowds and the need for the police to explain their presence.*

*Uganda Human Rights Commission is concerned with the use of brutal force by the Police and notes that such acts violate Article 24 of the Constitution which guarantees the respect of human dignity and protection from cruel, inhuman or degrading treatment, as well as Article 44 of the Constitution which totally*  
30        *prohibits the violation of the right to freedom from torture and ill treatment, which is a non-derogable right. Other Constitutional provisions violated by such violent acts include Article 20 and Article 221, which require that all organs and agencies of Government including security organisations and all persons must observe, uphold and respect human rights and freedoms in the performance of their*  
35        *functions. The Commission therefore reiterates its earlier calls to the Uganda Police Force to always exercise restraint and apply only reasonable and necessary force, in the course of carrying out its work.”*

In August 2018 Uganda law Society published a statement on Police brutality- It reads in part as follows:-

40        *ULS PRESS STATEMENT ON THE UNLAWFUL DETENTION, BRUTALITY AND USE OF EXCESSIVE FORCE BY THE UGANDA POLICE AND ARMY IN ARUA*

5 *Uganda Law Society is gravely concerned about media reports and footage which showed the Uganda Police Force and the Uganda Peoples Defence Forces("the Security Forces")using excessive force against supporters of Opposition candidates as well as journalists in the hotly contested Arua Municipality by-elections.*

10 *The reports and footage that have been broadcast on national television, radio as well as print media showed the Security Forces beating up journalists, confiscating their equipment and carrying out arrests without lawful cause. It has also been reported that supporters of some opposition candidates were equally beaten up, arrested and have since been unlawfully detained in various unknown*  
15 *locations. Of particular concern is the reported death of one Yasin Kawooya, a driver to the Kyadondo East MP Robert Kyagulanyi who succumbed to bullet wounds following scuffles between Opposition supporters and the Security Forces.*

*The Uganda Law Society considers such conduct by the Security Forces whose mandate is to serve, defend and protect all Ugandans regardless of political*  
20 *affiliation to be unlawful, unprofessional, unfortunate and unacceptable. Such behavior goes against the dictates of our Constitution particularly Articles 24 and 29(1) of the Republic of Uganda which guarantee the freedom of every Ugandan citizen from torture, cruel, inhuman or degrading treatment and provide for the freedom of speech and expression which includes freedom of press and other*  
25 *media.*

Amnesty International on 2015/2016 reported as follows:-

*"The year was dominated politically by preparations for the national elections, scheduled for early 2016. High-level splits within the ruling National Resistance Movement (NRM) resulted in former Prime Minister Amama Mbabazi announcing*  
30 *his intention to run for presidential office as an independent candidate. Police brutality, arbitrary arrests, torture and the unlawful disruption of numerous public assemblies all subsequently increased. Opposition political parties and their supporters were harassed, arrested and detained."*

The government has admitted Police brutality with a person no less than His Excellency  
35 President Yoweri Museveni castigating Police for brutalising civilians and issuing 'guidelines for arrest and detention of people arrested'. The guidelines were issued on 28<sup>th</sup> October 2018. Earlier in May 2018, the government spokesman had issued a

5 statement conceding that there has been wide spread cases of Police brutality against civilians and journalist in particular. It reads in part as follows:-

10 *'Government has come under serious scrutiny and criticism in the way it has handled the media in the course of their [media] work. As the Executive, this is very regrettable and we do undertake to review and ensure the perpetrators are brought to book,'*

Recent research carried out by Human Rights and Peace Centre (HURIPEC) School of Law, Makerere University titled *'The Abuse of Civil and Political Rights in the Era of Kisanja Hakuna Mchezo'* makes a number of observations and findings. I have taken liberty to reproduce just a few that relate to the freedom of Assembly and Association.

15 At page 79 the research narrates and observes as follows:-

*'In some instances police was informed in time about the planned assembly, but would not respond. However, they were very quick at dispersing the gatherings. It was further established that police intimidated and threatened people not to attend political assemblies organised by other political parties other than the NRM*

20 At page 80 the book sets out the restriction imposed on the people of Apaa, by the Police in Adjumani District following land disputes with their neighbours.

25 *'In Apaa Parish in Amurul Adjumani, the locals were prohibited from holding any meeting whatsoever in the parish. Police working with the Army and UWA rangers did not allow them to hold clan or village meetings. One of the area local leader said:*

*"We are not allowed to hold meetings here and no one is even allowed to drive in. Our area leaders are being stopped from coming to talk to us although the government permits meetings to be held in other sub counties."*

5 The following observation was made in respect of freedom of assembly in Masindi District at page 81.

10 *“The fear to assemble or hold meetings freely was also detected in Masindi District, according to a journalist who said the methods police used in managing assemblies which most of the time led to death, left many injured or arrested, had forced people to shun assemblies in fear of the consequences.”*

In respect of Mbale District the research makes the following observations at page 81.

*‘Similar fears were expressed in Mbale District where locals shun rallies as a political commentator noted:*

15 *“We don't engage in rallies because we realized that when you get in trouble no one comes to your rescue. That is why we fear. If I land in trouble who will come to my rescue? People fear”.*

The research cites other incidents which were not related to Constitutional amendment bill of 2017 as follows at page 83;-

20 *‘Other incidents cited which were not related to the constitutional amendment bill included a peaceful protest against give-away of a forest; another protest against eviction; as well as intimidation of candidates and voters during by-elections. Hoima police was accused of unduly blocking a Bugoma forest protest on 11 July 2016, organised by the Association for the conservation of Bugoma forest in*

25 *partnership with Uganda Wildlife Society, the Uganda Society, Destination Jungle Ltd and Uganda lodge td. They were peacefully protesting the proposed give away of part of Bugoma forest for sugarcane growing. The peaceful protesters who were scheduled to start marching from Nsozi forest station to Kisaaru Trading*

30 *Centre were barred by security personnel from accessing the venue. In December 2016, Police dispersed protestors demonstrating against an impending eviction*

5           *from Namanve forest reserve in Wakiso and Mukono District arguing that they had not been compensated by government. The group that first matched to police headquarters in Naguru were dispersed on their way to parliament.'*

10       From the above excerpts and many other sources not cited here, Human Rights Organisation, it can be determined that Police brutality against peacefully assembled citizens of Uganda is not on the decline but rather on the increase. If the purpose of *Section 36* of the Police Act was to protect the rights of Ugandans and facilitate their enjoyment of the freedom of assembly and association then it has ended up doing just the reverse.

15       The government cannot complain against acts of Police brutalising the people with impunity as long as *Section 36* of the Police Act remain on our statute books. Even if the Government and the Police leadership intended to punish an errant officer, such an officer would seek refuge and protection under the impugned law.

20       I find that *Section 36* of the Police Act is unconstitutional as it is inconsistent with and in contravention of *Articles 20(2), 22, 23, 24 and 29* of the Constitution.

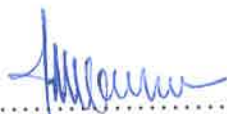
For the reasons I have already set out above, I find also that *Sections 37 and 40* of the Police Act are inconsistent with *Articles 20(2), 22, 23, 24 and 29* of the Constitution.

I agree with my brother Justice Muhanguzi's reasoning and conclusions made in respect of issues 4, 5 and 6 of this petition.

25       In respect of issue number 7, I agree with the decision of Justice Muhanguzi, to the extent that restrictions may apply only to the Constitutional Square in Kampala provided it is clearly set out in the law as a gazetted and restricted area. The law ought to provide that persons who may be denied a permit to assemble at that Square or any other gazetted place shall be facilitated by the Police to hold the assembly at another place within a  
30       reasonable distance from the place in respect of which permission was denied on the same day, date and time they had intended to hold that assembly or demonstration in order for such a law to be Constitutional.

I would make no orders as to costs this being a Public Interest Petition.

5 **Dated at Kampala** this .....<sup>30<sup>th</sup></sup>.....day of .....<sup>May</sup>.....2019.



10  
**Kenneth Kakuru**  
**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION No. 05 OF 2007**

*Coram: Owiny - Dollo, D.C.J.; Kakuru, Egonda-Ntende, Obura, & Muhanguzi (JJ.A./JJ.CC)*

5  
MOSES MWANDHA } ..... PETITIONER

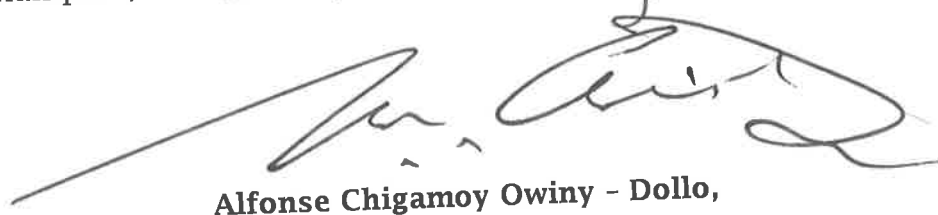
**VERSUS**

10 ATTORNEY GENERAL } ..... RESPONDENT

**JUDGMENT OF OWINY - DOLLO, D.C.J.**

15 I have had the benefit of perusing, in draft, the judgment of my learned brother Kakuru JA/JCC. I am in full agreement with the findings therein, and the conclusions he has reached. Since Egonda-Ntende, Obura, and Muhanguzi JJA/JJCC are equally in agreement, orders are hereby made in the terms proposed in the judgment of Kakuru JA/JCC.

Dated at Kampala; this 30<sup>th</sup> day of May 2019

20  


**Alfonse Chigamoy Owiny - Dollo,**  
**DEPUTY CHIEF JUSTICE/HEAD OF CONSTITUTIONAL COURT**

**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

(Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Obura & Muhanguzi, JJA)

**CONSTITUTIONAL PETITION NO. 05 OF 2007**

**BETWEEN**

**MOSES MWANDHA..... PETITIONER**

**AND**

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

**JUDGMENT OF HELLEN OBURA, JA**

I have read in draft the judgment of my learned brother Kakuru, JA/JCC and I agree with his findings and conclusions with nothing useful to add.

Dated at Kampala this 30<sup>th</sup> day of May, 2019.



Hellen Obura

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA**

*(Coram: Owiny-Dollo, DCJ., Kakuru, Egonda-Ntende, Obura & Muhanguzi,  
JJCC / JJA)*

Constitutional Petition No. 05 of 2007

**BETWEEN**

MOSES MWANDHA=====PETITIONER

**AND**

ATTORNEY GENERAL=====RESPONDENT

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

I have had the benefit of reading in draft the judgment of my brother, Kakuru, JCC / JA. I agree with it. I have nothing useful to add.

Signed, dated and delivered at Kampala this 30<sup>th</sup> day of May, 2019



Fredrick Egonda-Ntende

**Justice of the Constitutional Court / Justice of Appeal**

**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

**CONSTITUTIONAL PETITION NO. 05 OF 2007**

**MOSES MWANDHA.....PETITIONER**

**VERSUS**

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

**CORAM:**       Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ  
                   Hon. Mr. Justice Kenneth Kakukru, JA/JCC  
                   Hon. Mr. Justice F. M. S. Egonda Ntende, JA/JCC  
**15**               Hon. Lady. Justice Hellen Obura, JA/JCC  
                   Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC

**JUDGMENT OF EZEKIEL MUHANGUZI, JA/JCC**

**20 Introduction**

This petition was brought under Article 137 of the Constitution and under the Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions SI 13-15, challenging the validity of some Sections in the Police Act Cap 303. It sought for  
**25** declarations among others, that the impugned Sections are inconsistent with and contravene Articles 24, 27(2), 28, 29(2), 38, 42, 171, 172(1), 211(3) and 212 of the Constitution.

The petition is supported by six affidavits including that of the petitioner. The respondent filed an answer to the petition in which she avers that  
**30** the impugned sections are not inconsistent with and do not contravene the constitution.

- 5 The answer to the petition is supported by a sworn affidavit by Ms. Susan Odongo, a State Attorney in the Attorney General's Chambers.

### **Brief background**

10 On 11<sup>th</sup> September, 2006, the members of the Busoga Pressure Group for Development for which the petitioner is the coordinator applied to the inspector general of police, Kampala for permission for a peaceful demonstration against the failure of the Uganda Investment Authority to equitably distribute investment opportunities between the capital and Jinja.

15 On 27<sup>th</sup> September, 2006, the Inspector General of Police (IGP) informed the group that a demonstration is not necessary and he advised them to channel their grievances to their members of parliament. He consequently denied them the permission.

The petitioner felt aggrieved by the acts of the IGP hence this petition to  
20 have the impugned Sections declared unconstitutional.

At the scheduling conference, the parties agreed on the following seven issues for determination.

- 25 1. *Whether Sections 33 and 34 of the Police Act is still law in light of the Constitutional Court decision in **Muwanga Kivumbi V AG**, Constitutional Petition No 9 of 2005.*
2. *Whether the police powers under Sections 35 to 37 and 40 are inconsistent with the constitutional rights under Articles 29(1) (a), (d), 29(2), 38 and 212.*
- 30 3. *Whether the police disciplinary procedure under the Police Act contravenes Articles 42 of the Constitution.*
4. *Whether regulations 4, 5, 7, 8, 10, 14, 15(2), 18(1) and 2(e-g), 19, 27(b), 30, 31(2) of the Disciplinary Code of Conduct contravene Articles 24, 27(2), 28 and 29 of the Constitution.*

- 5        5. *Whether the act of delegating authority to the police authority police council and the IGP by the President is inconsistent with Articles 171 and 172(1) (b) of the Constitution.*
6. *Whether the appointment of Major General Kale Kayihura as IGP, yet without police training contravenes Article 211(3) of the*  
10        *Constitution.*
7. *Whether the banning of rallies, assemblies, processions and demonstrations at the constitutional square is unconstitutional.*

At the hearing of the petition, the petitioner was represented by Mr.  
15        Wandera Ogalo while the respondent was represented by Ms. Margaret Nabakooza, Senior Principal State Attorney.

The petitioner abandoned issues 1 and 3 of the petition.

As earlier noted above, six witnesses gave evidence in support of the  
20        petition and one witness gave evidence in support of the reply to the petition. All evidence was by affidavits. The petitioner, Mr. Moses Mwandha, as the chairman of Busoga Pressure Group for Development, deponed that he was affected by the IGP'S refusal to grant them permission to peacefully demonstrate. His evidence is that when he  
25        learnt about the abandonment of Jinja town by the UIA, he and others decided to take the initiative to bring it to the attention of the right authorities who in turn were of no help.

The other five witnesses are conversant with the events under which this  
30        petition was brought and they deponed the affidavits in support of the petition in that capacity.

The state attorney's affidavit in reply states her own interpretation of the impugned sections.

5 **Petitioner's submissions**

On issue No. 2, Mr. Wandera learned counsel for the petitioner, submitted that the purpose of Section 35 of the Police Act is to require any person who wishes to convene an assembly in a gazetted area to get permission if it is expected that more than 25 people will attend the  
10 assembly.

Counsel submitted that, the law gives power to the minister to appoint a person in whose discretion, he or she authorizes the holding of the assembly or issues the permit with conditions as to time and place where  
15 the assembly is to take place. He pointed out that the section is rather prohibitive in nature rather than regulatory as was observed in *Muwanga Kivumbi V AG, Constitutional Petition No. 9 of 2005*.

Counsel submitted that Sections 36 and 37 are enforcement and penal  
20 provisions. That since the two provisions arise from Section 35, they should be found unconstitutional in the same regard.

Counsel submitted that, Section 40 of the Police Act infringes freedom of speech as it requires permission to use a public address system. He  
25 pointed out that it is the easy way to reach a large crowd of people than using one's voice. Counsel further submitted that, this section should be held unconstitutional as it restricts citizens from expressing their views. Counsel relied on *Muwanga Kivumbi V AG, (Supra)* where it was held that freedom of assembly is given so as to enable citizens to gather and  
30 express their views without government restriction.

On issue No. 4 counsel argued that, regulation 4 which requires a police officer to suppress an assembly which, in his opinion is tending to riot, contravenes the Constitution as it involves use of force. Further that,

5 regulation 5 which prohibits a police officer to marry a foreign national without approval from the IGP contravenes Article 31 of the Constitution as it restricts the right to marry.

10 Counsel submitted on issue No. 5 that, the power to appoint public servants is vested into the Public Service Commission. Further that Section 13 of the Police Act that vests the power to appoint officers below the rank of head of department to the IGP, Police Authority and the Police Council contravenes Article 172(1) (b) of the Constitution. That  
15 the removal of authority from the Public Service Commission and vesting of that authority onto the IGP by virtue of delegation from the President is unconstitutional.

Counsel relied on the Report of the Uganda Constitutional Commission and submitted that, the commission recommended a police service  
20 board for recruitment of police officers, which was rejected by the constituent assembly and recommended that the Public Service Commission should continue appointing police officers below the rank of head of department. That the intention of Article 172 was that the police officers below the rank of head of department must be appointed by  
25 Public Service Commission and the act of parliament whose purpose was to end that, is unconstitutional.

On issue No. 6, counsel submitted that, the appointment of Gen. Kayihura was unconstitutional because he did not have the  
30 qualifications. That the Uganda police force shall be nationalistic, patriotic, professional, disciplined, competent and productive as provided for under Article 211(3) of the Constitution. Counsel relied on the Odoki Commission Report and submitted that, the IGP and his

5 deputy should have a working experience in police duties for at least 10 years.

On issue No. 7, Counsel adopted his arguments on issue 2 in respect of Section 35 of the Police Act and submitted that, the banning of rallies  
10 and assemblies at the Constitutional Square is unconstitutional.

### **Respondent's submissions**

Ms. Nabakooza submitted that, sections 35, 36 and 37 are in respect of gazetted areas and that **Muwanga Kivumbi, (supra)** did not address the  
15 issue of gazetted areas but prohibition of demonstrations. Further that, these Sections do not contravene any article of the constitution but rather safe guard public tranquility. She submitted that the minister's power to declare a place gazetted is not prohibitive but regulatory.

20 Counsel pointed out that the Sections have some checks in that a police officer has to satisfy a magistrate under Section 35(3) and Subsection 7 excludes religious assemblies, government assemblies, sports and games.

Counsel relied on **Dr. James Rwanyarare V AG, Constitutional Petition**  
25 **No. 7 of 2002** and submitted that, the constitution has to be read as a whole without isolation of one provision from another. Further that, the right to demonstrate is not absolute as it is within the limits of Article 43 of the Constitution and the limitation is justifiable in a free and democratic society.

30 Counsel submitted that, Section 40 of the Police Act is constitutional because as one is enjoying their rights, they need to observe the rights of others.

5 In reply to issue No. 4, counsel submitted that, the police is regulated by the Parliament of Uganda. That the members of the police force are not ordinary citizens and they have to abide by certain codes of conduct to fulfill their duties. Further that, it is the work of a police officer to suppress any assembly that is intending to riot for purposes of security.

10 Counsel submitted that regulation 4 is constitutional although the word “approval” sounds arbitrary.

On issue No. 5, counsel relied on Section 13 of the Police (Amendment) Act of 2006, and submitted that, the IGP, the Police Council and the

15 Police Authority only recommend to the Public Service Commission but do not appoint. Further that the President under Article 172(3) has the power to delegate to proper authorities as mentioned under Section 13 of the Police Act.

20 In reply to issue No. 6, counsel submitted that, it is overtaken by events but also the constitution does not make it mandatory under Article 211(3) that the IGP must have police professional knowledge. Further that Article 213(1) does not mention the qualifications of the IGP but rather mentions the appointing officer to be the President.

25 Counsel submitted that issue No. 7 is redundant as per **Muwanga Kivumbi v AG, (Supra)**. Counsel prayed that the petition be dismissed with costs.

30 **Consideration of the petition.**

The circumstances under which this petition was brought are that the petitioner and others under their group Busoga Pressure Group for Development applied for and were denied permission to demonstrate

5 for failure of the Uganda Investment Authority to develop their town,  
Jinja.

## Issue No. 2

10 It is the petitioner's argument that the powers given to a minister under  
Sections 35 and 36 of the Police Act to declare some places gazetted and  
restrict the number of people who intend to assemble in such places to  
25 are unconstitutional.

The impugned sections in issue No. 2 expressly provide as follows;-

### 15 **35. Gazetted areas.**

*(1) If the Minister is of the opinion that it is desirable in the interests  
of public tranquility, he or she may, by statutory instrument, declare  
that in any particular area in Uganda (hereafter referred to in this  
section as a "gazetted area") it shall be unlawful for any person or  
20 persons to convene an assembly at which it is reasonable to  
suppose that more than twenty-five persons will be present unless  
a permit has been obtained under subsection (2) by that person or  
those persons to convene the assembly, except that no instrument  
published under this subsection shall remain in force for more than  
25 one year unless it has been renewed by a further instrument; and  
where the instrument is renewed for a period exceeding one year,  
it shall be laid before Parliament for its approval by resolution.*

*(2) In every instrument published under subsection (1), the Minister  
shall name a person empowered to issue permits authorising the  
30 holding of an assembly of more than twenty-five persons within the  
discretion of that person either to withhold a permit altogether or  
to issue a permit subject to conditions as to—*

*(a) a place where the assembly may be held;*

5 (b) the number of persons who shall be permitted to attend the assembly; and

(c) the time or duration of the assembly.

10 (3) If a senior police officer satisfies a chief magistrate or a magistrate grade I that it is the intention of a person or persons to convene an assembly at which more than twenty-five persons are likely to be present, the magistrate may summon that person or those persons before him or her and after hearing that person or those persons may, if he or she thinks fit, make an order that the person or persons shall not convene or attend at any assembly in a  
15 gazetted area for a period to be named that shall not exceed one month unless a permit has been obtained under subsection (2) for convening such an assembly.

(4) If a senior police officer is of the opinion that—

20 (a) in the case of an assembly in a gazetted area for which no permit has been obtained there are more than twenty-five persons present; or

(b) in the case of an assembly in a gazetted area for which a permit has been obtained there are more persons than are permitted by the permit or any other conditions of the permit are not being  
25 complied with, he or she may order the assembly to disperse

### **36. Dispersal of assembly after it has been ordered to be terminated.**

If upon the expiration of a reasonable time after a senior police officer has ordered an assembly to disperse under section 35(4) the assembly has continued in being, any police officer, or any other  
30 person acting in aid of the police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming that resistance, and shall not be liable in any criminal

5            *or civil proceedings for having by the use of that force caused harm  
or death to any person.*

**37. Penalty for taking part in an unauthorised procession or assembly.**

*Any person who—*

- 10            *(a) neglects or refuses to obey any order issued under section 35(1);*  
*(b) knowingly convenes, directs or takes part in any assembly or*  
*procession for which a permit is required under section 35(2) and*  
*for which no permit has been issued; or*  
*(c) violates any condition of a permit issued under section 35(2),*  
15            *commits an offence and may be arrested without warrant and is*  
*liable on conviction to a fine not exceeding fifty thousand shillings*  
*or to imprisonment for a period not exceeding three months or to*  
*both.*

**40. Use of public address system.**

- 20            *(1) Except with the written permission of an officer in charge of*  
*police, no person shall, in a public place or so as to be a public*  
*nuisance, use any megaphone, loudspeaker, loud hailer, public*  
*address apparatus or any other means, whether artificial or not, for*  
*amplifying, broadcasting or reproducing any music or speech or any*  
*other sound.*

25            The above sections in my understanding, empower the IGP to gazette  
certain places for public tranquility and issue a permit with or without  
conditions to authorize assemblies in gazetted areas.

The ordinary meaning of the word tranquility is, “the state of being quiet  
and peaceful”. The literal interpretation of the above section is that, the  
30            minister may declare a certain place a gazetted area for purposes of  
public peace and quietness. The section goes on to state that if a person  
wants to convene an assembly in a gazetted area, he/she requires a  
permit from the minister who may issue the same with conditions.

5 The Articles of the Constitution in question expressly provide as follows:-  
**29 Protection of freedom of conscience, expression, movement, religion, assembly and association.**

*(1) Every person shall have the right to—*

10 *(a) freedom of speech and expression which shall include freedom of the press and other media;*

*(b).....*

*(c).....*

*(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and*

15 *(e) .....*

*(2) Every Ugandan shall have the right—*

*(a) to move freely throughout Uganda and to reside and settle in any part of Uganda;*

*(b) to enter, leave and return to, Uganda; and*

20 *(c) to a passport or other travel document.*

### **38. Civic rights and activities.**

*(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.*

25 *(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.*

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

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

30 *(a) to protect life and property;*

*(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.*

The rights and freedoms granted under Articles 29 and 38 are not, in my view, absolute because they are limited under Article 43 of the Constitution which provides as follows:-

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

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

(a) *political persecution;*

(b) *detention without trial;*

15       (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.*

20       The freedoms of assembly, association, demonstration, civic rights and activities are inherent rights enshrined under the constitution. They are not granted by the state but by the supreme law of the land. They are thus to be upheld, protected and observed by all the organs of the state including the police whose duties include among others to preserve law  
25       and order.

The petitioner and others intended to peacefully demonstrate as they asked for permission from the authorities. It was noted in **Muwanga Kivumbi v AG**, *Constitutional Petition No 9 of 2005* that “peaceful  
30       assemblies and protests are a vital part of every democratic society. The police have a wide range of powers to control and restrict the actions of protesters. These powers should not be exercised by the police in an unaccountable manner”.

5 The respondent attempted to justify the powers given by sections 35 and 36 of the Police Act and submitted that, it is for purposes of public security. Sections 35 and 36 are modeled in a way that does not make it mandatory for the minister to declare a place gazetted for his own reasons but for public peace and quietness or issue a permit with  
10 conditions/ restrictions because of use of the word “may”.

In the instant case, the powers given by the minister or an authorized police officer are, in my opinion, regulatory than prohibitory. His powers are in addition checked by approval from Parliament after a period of one year.

15

Furthermore, the Constitution of Uganda gives redress to citizens who feel that their fundamental rights were violated or threatened to apply to a competent court for enforcement. The petitioner, in my opinion, would have thus applied to court under Article 50 of the Constitution to  
20 enforce his right to assemble and demonstrate if he felt that the actions of the IGP infringed his rights.

I, therefore, find that the powers given by the minister to declare certain places gazetted and issue permits to persons who intend to assemble in  
25 such areas are acceptable and demonstrably justifiable in a free and democratic society and do not limit arbitrarily the enjoyment of fundamental rights. Therefore, I would declare the impugned Sections legal and Constitutional.

#### 30 **Issue No. 4**

Counsel for the petitioner argued only about regulations 4 and 5 of the Disciplinary Code of Conduct. Regulation 4 provides as follows;-

5 **4. Offences by police officers.**

*A police officer who—*

*(a) being cognisant of any mutiny or sedition among the force does not use his or her utmost endeavour to suppress the mutiny or sedition;*

10 *(b) being cognisant of any intended mutiny or sedition in the force does not without delay give information of that intended mutiny or sedition to his or her superior officer; or*

*(c) being present at any assemblage tending to riot does not use his or her utmost endeavour to suppress the assemblage, commits*  
15 *an offence and is liable on conviction to imprisonment for one year.*

Regulation 4, to my mind, is a preventive measure against any intending riot. It is to the effect that the police officer who is present at any assembly that is tending to riot and does not do anything to suppress it  
20 or knows of any mutiny in the force and does not suppress it commits an offence. The functions of the police among others include to prevent and detect crime. This duty requires a police officer to stop or prevent crimes. At the instance of a riot, people lose lives and property, the public's safety and peace are jeopardized.

25 Mr. Wandera argued that in the event of suppressing, force is used and this contravenes Articles 24, 27(2) and 29 of the Constitution. The Code does not define "suppress" as to whether or not it includes use of force. The ordinary meaning of the word suppress is "to put a stop to", "put  
30 dawn or prohibit", or "prevent something from being seen or heard".  
The articles in question provide as follows:-

5     **24. Respect for human dignity and protection from inhuman treatment.**

*No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.*

**27. Right to privacy of person, home and other property.**

10     (2) *No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.*

**29. Protection of freedom of conscience, expression, movement, religion, assembly and association.**

15     (1) *Every person shall have the right to—*

*(a) freedom of speech and expression which shall include freedom of the press and other media;*

*(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;*

20     *(c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;*

*(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and*

25     *(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.*

*(2) Every Ugandan shall have the right—*

30     *(a) to move freely throughout Uganda and to reside and settle in any part of Uganda;*

*(b) to enter, leave and return to, Uganda; and*

*(c) to a passport or other travel document.*

5 I, therefore note that, a riot can be suppressed without subjecting anyone to torture or inhuman treatment. However the police officer may be compelled to use force to suppress a riot in some cases. For example, where the rioters are violent or where they resist to stop the riot. The test for use of force would be, whether or not the police officer used  
10 reasonable force in suppressing the riot. In the premise, I find that the regulation is legal and constitutional. A police officer has a duty to prevent crimes as enshrined under Article 212 of the Constitution.

Regulation 5 of the Code of Conduct requires a police officer to get an  
15 approval from the IGP in case he/she intends to marry a foreigner. It provides as follows:-

**5. Entering into marriage with a foreign national.**

*A police officer who enters into a marriage with a foreign national without the written approval of the inspector general commits an  
20 offence.*

Article 31 of the Constitution provides as follows:-

**31. Rights of the family.**

*(1) Men and women of the age of eighteen years and above have  
25 the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.*

This regulation does not justify why the police officer is bound to get an approval from the IGP to marry a foreigner. The word “approval” makes  
30 it mandatory in that, without the IGP’s approval, the marriage will be null and void. A question would therefore be asked as to, what happens to police officer’s marriage who had married a foreigner before joining the police force? Is the marriage deemed to have come to an end by virtue

5 of joining the police force or it bars someone from joining the police force because he/she is married to a foreigner?

A person has a right to marry as long as both have attained the majority age and have consented. This right is enjoyed by two persons who intend to marry each other without the intervention of a third party. This  
10 restricts the right to marry and is thus unconstitutional, in my opinion.

### Issue No. 5

Counsel for the petitioner argued that, the President cannot delegate what is not conferred unto him by the law. He pointed out that Article  
15 172(1) (b) vests the power to appoint officers below the rank of head of department to the Public Service Commission and not the President or the delegated authorities. The Articles in question provide as follows:-

#### 171. Establishment of offices.

*Subject to the provisions of this Constitution and any Act of  
20 Parliament, the President may, after consultation with the appropriate service commission, establish offices in the public service of the Government of Uganda.*

#### 172. Appointment of public officers.

*(1) Subject to the provisions of this Constitution—*

25 *(a) the President may, acting in accordance with the advice of the Public Service Commission, the Education Service Commission or the Health Service Commission, as the case may be, appoint persons to hold or act in any office in the public service of Uganda of the rank of head of department or above other than those  
30 referred to in article 200 of this Constitution, including confirmation of appointments, the exercise of disciplinary control over such persons and their removal from office;*

*(b) the Public Service Commission, the Education Service Commission or the Health Service Commission, as the case may be,*

5        *may appoint persons to hold or act in any office in the public service of Uganda other than those referred to in paragraph (a) of this clause and in article 200 of this Constitution, including the confirmation of their appointments and the exercise of disciplinary control over such persons and their removal from office.*

10        Section 13 of the Police Act provides as follows:-

**13. Delegation by the President of power of appointment under the Constitution.**

15        *(1) For the purposes of article 172 of the Constitution, the President may, under clause (3) of that article, delegate to authorities specified in subsection (2) of this section the powers of the President necessary to enable those authorities to exercise the powers of appointment conferred on them by this Act.*

20        *(2) The authorities referred to in subsection (1) are the following—*

- (a) the Police Authority; and*  
*(b) the Inspector General.*

25        *(3) Where the President has delegated any of his or her powers as described in subsection (1), the Public Service Commission shall have no functions in respect of the exercise by the relevant authority of the powers so delegated.*

30        The above Section refers to Article 172 of the Constitution where the President delegates power to appoint officers of a rank below the head of department to the Police Authority, and the Inspector General. The power to delegate by the President is stipulated under Article 172(3) of the constitution.

The President, in my view, is legally empowered to delegate to the authorities named in Section 13 of the Police Act to appoint officers below the rank of the head of department as per Article 172(1) (a) of the Constitution.

The Police Council, the Police Authority and the IGP do not have the powers to appoint under the Police Act but to recommend to the Public Service Commission the appointment and promotion of police officers up to the rank of Assistant Commissioner and the Inspector of Police as the case may be. I, therefore, hold that Section 13 of the Police Act is not unconstitutional. It does not take away the powers of the Public Service Commission to appoint police officers because the above authorities do not have powers to appoint but rather to recommend to the Public Service Commission.

15

### **Issue No. 6**

The petitioner pointed out that the appointment of General Kale Kayihura as the IGP was unconstitutional as he lacked the qualifications. The petitioner provided the curriculum vitae of General Kayihura to support his argument. Paragraph 11 of the affidavit of Harry Kasigwa, a member of parliament Jinja West constituency, states the qualifications of a police officer as follows:-

25

30

- a) A nine month police course training at Masindi Police College*
- b) On graduation a two year probation period where the constable is under close supervision and guidance by an officer of a higher rank.*
- c) On confirmation, depending on performance he or she may be promoted to corporal and later to sergeant.*
- d) Only a sergeant is eligible to enroll for an advanced certificate which is for a period of three months at the police training school.*
- e) A one month junior command course at the police training college is available only to those who have attained the rank of assistant inspector of police or inspector of police.*
- f) Assistant inspector of police also qualifies to enroll for a middle command course lasting a month at the police college.*

5        *g) A senior command course is available to only those who have attained the rank of superintendent or senior superintendent of police.*

This is supplemented by the affidavit of Alli Gabe Akida, an advocate of the High Court and a retired Assistant Commissioner of police.

10      The office and appointment of the Inspector General of Police is provided for under the Constitution as follows:-

**213. Command of the Uganda Police Force.**

*(1) There shall be an Inspector General of Police and a Deputy Inspector General of Police.*

15      *(2) The Inspector General and the Deputy Inspector General of Police shall be appointed by the President with the approval of Parliament.*

20      *(3) The Uganda Police Force shall be under the command of the Inspector General of Police who shall be assisted by the Deputy Inspector General of Police in the performance of his or her functions.*

25      *(4) In the performance of the functions under clause (3) of this article, the Inspector General of Police shall be subject to and act in accordance with the laws of Uganda; except that on matters of policy, the President may give directions to the Inspector General.*

*(5) The Inspector General or the Deputy Inspector General of Police may be removed from office by the President.*

The above Article does not provide for the qualifications of the Inspector General of Police.

30      Article 211 of the Constitution provides that the Uganda Police Force shall be nationalistic, patriotic, professional, disciplined, competent and productive; and its members shall be citizens of Uganda of good character. Nowhere in the Constitution are the qualifications of the Inspector General or the Deputy Inspector General, specifically stated.

5 The President is, in my view, therefore left with the power to appoint whoever he believes that will serve the office of the Inspector General of Police.

10 This issue is, incidentally, overtaken by events as submitted by counsel for the respondent because Major General Kale Kayihura is no longer the Inspector General of Police. I find therefore, that the appointment of Inspector General Kale Kayihura did not contravene Article 211 of the Constitution.

15 **Issue No. 7**

As already pointed out in issue 2, where a place is declared a gazetted area, it is restricted from assemblies and rallies without a permit from the competent authorities. The requirement of a permit in order to assemble at the Constitutional Square, in my view, does not take away  
20 the right to assemble there.

I note that the Constitutional Square is located between the Central Business District (CBD) and the High Court premises. If assemblies and rallies are allowed to take place without any steps taken to regulate them, then the activities taking place between the CBD and the High  
25 Court would be interrupted. The public peace and safety would also be at stake given the unlimited assemblies and rallies at the Constitutional Square.

The banning of assemblies, processions and rallies at the Square would be unconstitutional if the IGP declared it illegal to hold any assembly  
30 from there with or without the permit.

5 **Conclusion**

In the result, I would declare that this petition succeeds only in part. Issues 1 and 3 were abandoned by the petitioner and therefore I did not find it necessary to resolve them.

10 I declare that in respect of issue No. 4 only Regulation 5 of the Disciplinary Code of Conduct of police officers that criminalises marriage of a police officer to a foreigner without the approval of the IGP is unconstitutional.

I find that the rest of the Regulations set out in issue No. 4 are not unconstitutional.

15 This petition fails in respect of issues No. 5, 6 and 7.

I agree with the decision of my learned brother Kenneth Kakuru, JA in respect of the rest of issue No. 2.

I would make no orders as to costs.

20 Dated at Kampala this.....30<sup>th</sup>.....day of.....May.....2019.



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**EZEKIEL MUHANGUZI**  
**JUSTICE OF APPEAL/CONSTITUTIONAL COURT.**