

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL REFERENCE NO. 022 OF 2020**

UGANDA:.....PROSECUTOR

VERSUS

- 1. LULE DAVID**
- 2. KATONGOLE JULIUS**
- 3. NYANZI FRED SSENTAMU**
- 4. SEBUFU EDWARD**
- 5. HON. KYAGULANYI ROBERT**

AKA BOBI WINE:.....ACCUSED

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

JUDGMENT OF ELIZABETH MUSOKE, JCC

This constitutional reference, filed under **Article 137 (5)** of the **1995 Constitution**, arises from the proceedings in the **Buganda Road Chief Magistrate's Court Criminal Case No. 0676 of 2018**.

Background

In 2018, the five accused persons were, each, charged before the Buganda Road Chief Magistrate's Court with the offence of Disobedience of Statutory Duty contrary to **Section 116** of the **Penal Code Act, Cap. 120**. They all pleaded not guilty, and their trial commenced. On 28th September, 2020, the learned trial Magistrate (HW Karungi Doreen Olga), in accordance with **Article 137 (5)** of the **1995 Constitution**, referred the following question which she considered as arising from the trial proceedings, for determination by this Court:

"Whether Sections 5 and 10 of the Public Order Management Act are in contravention or inconsistent with Article 29 (1) (a) and (d) of the 1995 Constitution."

The question on the constitutionality of Sections 5 and 10 of the Public Order Management Act, 2013 ("POMA") arises because the charges against the accused persons arose from their alleged breach of duties imposed on them under the highlighted provisions.

Representation

At the hearing, Mr. Mark Muwonge and Ms. Susan Akello, both learned State Attorneys in the Chambers of the Attorney General represented the prosecutor. Neither the accused persons, nor their counsel attended the hearing.

Written submissions were filed only for the prosecutor.

Prosecutor's submissions

Counsel for the prosecutor submitted that the right to freedom of speech and expression guaranteed under Article 29 (1) (a) of the 1995 Constitution and the right to freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition guaranteed under Article 29 (1) (d) are not absolute and may be subject to lawful limitations in accordance with Article 43. Counsel submitted that, under Article 43 (1), such derogations may be necessary to protect the rights of others or to protect the public interest.

Counsel acknowledged that Sections 5 and 10 of the POMA constitute a limitation of the rights guaranteed under Article 29 (1) (a) and (d), but submitted that the said limitation is permitted under Article 43. Counsel contended that the limitation set out in the impugned provisions is necessary for the supervision and regulation of public meetings including assemblies and demonstrations, which is aimed at maintaining order and harmony, and preventing breach of peace during those assemblies. For this submission, counsel referred to the case of **Human Rights Network Uganda and Others vs. Attorney General, Constitutional Petition No. 56 of 2013 (unreported)**.

Counsel concluded, in view of the above submissions, that Sections 5 and 9 of the POMA set out a permissible limitation and therefore do not contravene Article 29 (1) (a) and (d) of the 1995 Constitution.

Accused persons' submissions

No submissions were filed for the accused persons.

Resolution of the Reference

I have carefully studied the reference question, and considered the prosecutor's submissions and the law and authorities cited. This Court's jurisdiction in relation to reference questions is provided for under Article 137 (5) and (6) of the 1995 Constitution, which are reproduced below:

"(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—

(a) may, if it is of the opinion that the question involves a substantial question of law; and

(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.

(6) Where any question is referred to the constitutional court under clause (5) of this article, the constitutional court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision."

The reference question which is set out earlier raises the question of whether sections 5 and 9 of the POMA contravene the provisions of Article 29 (1) (a) and (d) of the 1995 Constitution. **Article 29 (1) (a) and (d)** provide:

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

(1) Every person shall have the right to—

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

...

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

Section 5 of the POMA provides:

“5. Notice of public meeting

(1) An organizer shall give notice in writing signed by the organiser or his or her agent to the authorised officer of the intention to hold a public meeting, at least three days but not more than fifteen days before the proposed date of the public meeting.

(2) The notice referred to in subsection (1) shall be in Form A in Schedule 2 and shall include—

(a) the full name and physical and postal address of the organiser of the proposed public meeting and his or her immediate contact;

(b) where applicable indication of the consent of the owner of the venue where the proposed public meeting is intended to take place;

(c) the proposed date and time of the public meeting, which shall be between 7:00 a.m. and 7:00 p. m. but this time limit shall not apply to a town hall meeting;

(d) the proposed site of the public meeting, the estimated number of persons expected, the purpose of the public meeting; and

(e) any other relevant information.

(3) In the absence of Form A referred to in subsection (2), the organizer shall give notice in writing containing the information required under Form A.

(4) The notice to be given under this section shall be in triplicate and copies shall be given to the applicant and the proprietor of the venue where the public meeting shall be held.

(5) Where a public meeting is held, each of the persons organising it commits an offence if—

(a) the requirements of this section as to notice have not been satisfied; or

(b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice.

(6) It is a defence for the accused to prove that he or she did not know, did not suspect or had no reason to suspect the failure to satisfy the requirements or the difference of date, time or route.

(7) To the extent that an alleged offence turns on a difference of date, time or route, it is a defence for the accused to prove that the difference arose from circumstances beyond his control or from something done with the agreement of an authorised officer or by his direction.

(8) An organiser or his or her agent who holds a public meeting without any reasonable excuse and fails to comply with the conditions under this Act commits an offence of disobedience of statutory duty and is liable on conviction to the penalty for that offence under section 116 of the Penal Code Act."

Section 10 of the **POMA** provides:

"10. Responsibilities of organisers and participants

(1) An organiser or his or her agent shall—

(a) be responsible for adhering to the required criteria for holding public meetings;

(b) inform all participants of the traffic or assembly plan and provide sufficient stewards proportionate to the number of participants in the public meeting who shall be clearly identified with name tags;

(c) coordinate and cooperate with the police to ensure that all participants are unarmed and peaceful;

(d) ensure that statements made to the media and public by the organiser do not conflict with any law;

(e) ensure that the public meeting is concluded peacefully by 7:00 p.m;

(f) be present at the public meeting and coordinate and corporate with the police to maintain peace and order.

(2) A person who participates in a public meeting shall act in a manner that ensures that obstruction of traffic, confusion or disorder is avoided.

(3) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding 24 currency points or imprisonment not exceeding 12 months or both.

(4) A person convicted of an offence under subsection (3) shall pay compensation to a party or person who has suffered loss or damage as a result of the conduct of the convicted person."

I note that the reference question contains allegations that the impugned provisions violate two rights namely; 1) the right to freedom of expression under Article 29 (1) (a) and 2) the right to freedom of assembly. My analysis focuses on the right to freedom of assembly which is primarily engaged by the provisions of the POMA. I note that the POMA, under Section 3, gives the Inspector General of Police or an authorized officer powers to regulate public meetings including assemblies and regulations. The POMA sets in place requirements to be met before a person can lawfully participate or organize a public meeting, including the requirement that an organizer gives notice of his or her intention to hold a public meeting, at least three days prior to the meeting (Section 5). The POMA also imposes certain requirements on organizers of public meetings under Section 10.

I will begin by setting out certain principles relating to the right to freedom of assembly. In the case of **Djavit An vs. Turkey, Application No. 20652/92**, the European Court of Human Rights held that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. The right to freedom of assembly covers meetings, demonstrations and assemblies. I also agree with the following statements contained in **General Comment No. 37** of the **UN Human Rights Committee** that:

"The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping their societies. The right of peaceful assembly is important in its own right, as it protects the ability of people to exercise individual autonomy in solidarity with others. Together with other related rights, it also constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism. Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and to establish the extent of support for or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of differences.

The right of peaceful assembly is, moreover, a valuable tool that can and has been used to recognize and realize a wide range of other rights, including economic, social and cultural rights. It is of particular

importance to marginalized individuals and groups. Failure to respect and ensure the right of peaceful assembly is typically a marker of repression."

However, it is now established that the right to freedom of assembly is not absolute and may be subjected to lawful limitations in accordance with Article 43 (1). These limitations may include imposing regulatory requirements for public assemblies. In **Muwanga Kivumbi vs. Attorney General, Constitutional Petition No. 9 of 2005 (unreported)** Byamugisha, JCC held that:

"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."

The power of the police to regulate assemblies was also recognized in **Human Rights Network Uganda and 4 Others vs. Attorney General, Constitutional Petition No. 56 of 2013 (unreported)**, where Cheborion, JCC commented as follows:

"The police's duty is to regulate the holding of public gatherings and ensure that there is no breach of peace."

I note however, that the **Muwanga Kivumbi and Human Rights Network Uganda cases** stress that in imposing any limitation to the right to freedom of assembly, the police must not act in an arbitrary or discriminatory manner.

Furthermore, I note that the imposition by the authorities of notification requirements prior to the holding of assemblies is recognized as a permissible limitation to the right to freedom of assembly. In **Kuznetsov vs. Russia, Application No. 10877/04**, the European Court of Human Rights held that:

"...the subjection of public assemblies to an authorisation or notification procedure does not normally encroach upon the essence of the right as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering, be it political, cultural or of another nature."

It must be stressed that the requirement for notification before conducting an assembly is only reasonable if it is imposed in good faith. In the present

case, the notice requirements under Section 5 appear reasonable, and, in my view, are intended for ensuring the smooth conduct of assemblies.

But the analysis does not end there. It is also worth pointing out that any measures taken in relation to limiting a right, must, under Article 43 (2) (c) be such as are “acceptable and demonstrably justifiable in a free and democratic society”. A measure is acceptable and demonstrably justifiable in a free and democratic society if it is proportionate, that is, it must be the least intrusive and oppressive means available for achieving the intended purpose.

In the present case, Section 5 (8) of the POMA imposes a penal sanction of up to two years imprisonment on an organizer who fails to adhere with any of the notification requirements in Section 5. The provisions of Section 10 (3) and (4) also impose a penal sanction of a fine of 24 currency points or 12 months imprisonment on a participant for failing to adhere with certain requirements set out in Section 10 relating to the orderly conduct of public meetings. In the case of **Akgol and Gol vs. Turkey, Applications Nos. 28495/06 and 28516/06**, the European Court of Human Rights held that a peaceful albeit unauthorized demonstration should not, in principle, be made subject to the threat of a penal sanction. Therefore, the fact that Sections 5 (8) and 10 (3) and (4) provide for the imposition of penal sanctions on organizers and participants in peaceful albeit unauthorized demonstrations is disproportionate for achieving the intended purpose of ensuring orderly public meetings. More proportionate measures would involve asking the organizers to disband illegal meetings, failing which the authorities would then disperse the illegal meetings. It is only in the event of actual violence that it would be necessary to impose penal sanctions against the perpetrators of the violence. I would therefore find that the imposition of a penal sanction under Section 5 (8) and Sections 10 (3) and (4) of the POMA is disproportionate for purposes of ensuring orderly meetings and constitutes limitations that are not acceptable and demonstrably justifiable in a free and democratic society and that contravene Article 29 (1) (d) of the 1995 Constitution.

I would accordingly answer the reference question as follows:

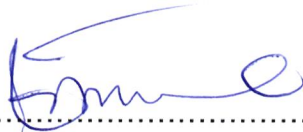
Sections 5 and 10 of the POMA, 2013, to the extent that they impose penal sanctions on organizers and participants in peaceful albeit unauthorized

public meetings, including demonstrations and assemblies, contravene Article 29 (1) (d) of the 1995 Constitution and are therefore null and void.

I would also make the following declarations and orders:

- a) I would declare that the charges against the accused persons that were based on their participation in a peaceful albeit unauthorized public meeting constituted an impermissible limitation on their right to freedom of assembly, and contravene Article 29 (1) (d) of the 1995 Constitution.
- b) I would make an order permanently staying the criminal proceedings against the accused persons vide Buganda Road Chief Magistrate's Court Criminal Case No. 0676 of 2018.
- c) I would direct the Registrar of this Court to notify the Buganda Road Chief Magistrate's Court of the decision in this Reference.
- d) I would also make no order as to costs.

Dated at Kampala this17th.....day ofMarch..... 2023.



Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)
Constitutional Reference No. 22 of 2020

BETWEEN

Lule David=====Accused No. 1
Katongole Julius=====Accused No.2
Nyanzi Fred Ssentamu=====Accused No.3
Sebufu Edward=====Accused No.4
Hon. Kyagulanyi Robert aka Bobi Wine=====Accused No.5


AND

Uganda=====Respondent

Judgment of Fredrick Egonda-Ntende, JCC

- [1] I have had the opportunity to read in draft the judgment of my sister, Musoke, JCC. I agree with it and the directions given to the trial court.
- [2] As Madrama, Mugenyi and Gashirabake, JJCC, agree, this reference is determined in the manner and with the directions proposed by Musoke, JCC.

Dated, signed and delivered at Kampala this 17th day of March 2023


Fredrick Egonda-Ntende
Justice of the Constitutional Court

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

CONSTITUTIONAL REFERENCE NO. 022 OF 2020

1. LULE DAVID}
2. KATONGOLE JULIUS}
3. NYANZI FRED SSENTAMU}
4. SEBUFU EDWARD}
5. HON. KYAGULANYI ROBERT

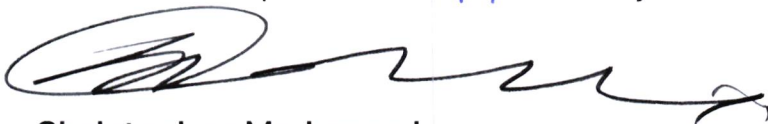
AKA BOBI WINE ACCUSED

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned sister Hon. Lady Justice Elizabeth Musoke, JCC.

I concur with the Judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the 17th day of March 2023



Christopher Madrama Izama

Justice of the Constitutional Court



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

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

CONSTITUTIONAL REFERENCE NO. 22 OF 2020

UGANDA PROSECUTOR

VERSUS

**1. DAVID LULE
2. JULIUS KATONGOLE
3. FRED SENTAMU NYANZI
4. ROBERT KYAGULANYI AKA
BOBI WINE PETITIONERS**

JUDGMENT OF MONICA K. MUGENYI, JCC

1. I have had the benefit of reading in draft the judgment of my sister, Lady Justice Elizabeth Musoke, JCC in respect of this Reference.
2. I agree with the findings and conclusions therein, as well as the orders issued.

Dated and delivered at Kampala this^{17th} day of^{March}....., 2023.



Monica K. Mugenyi

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC]

CONSTITUTIONAL REFERENCE NO. 022 OF 2020

UGANDA ::: PROSECUTOR

VERSUS

1. LULE DAVID

2. KATONGOLE JULIUS

3. NYANZI FRED SSENTAMU

4. SEBUFU EDWARD

5. HON. KYAGULANYI ROBERT A.K.A BOBI

WINE:::ACCUSED

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA/JCC

I have had the benefit of reading in draft the judgment prepared by Hon. Lady Justice Elizabeth Musoke, JA/JCC. I concur with the judgment and have nothing useful to add.

Dated at Kampala this^{17th}..... Day of ^{March}.....2023.

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Christopher Gashirabake
JUSTICE OF THE CONSTITUTIONAL COURT