

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA**

**MISCELLANEOUS CAUSE NO. 154 OF 2017**

**1. KIFAMPA SIRAJE  
2. YUSUF MUSA MUSUDA:.....APPLICANTS  
VERSUS  
ATTORNEY GENERAL:.....RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

This application was brought under Article 50 of the 1995 Constitution of Uganda as amended, Section 98 of the Civil Procedure Act and Order 52 Rule 1&2 of the Civil Procedure Rules.

It was agreed by both parties that on 27<sup>th</sup> December 2016, the respondent's security personnel entered, searched and seized several documents and properties from Nakasero Mosque, a place of worship for the Jamiyyat Daawa Assalafiyyah Muslim Community in Kampala City.

The applicant sought for various reliefs from this court on grounds that the actions of the respondent were illegal and unjustified.

The applicant sought the following reliefs;

1. A declaration that the action of the respondent's security operatives of raiding, breaking into and ransacking Nakasero Mosque at dawn on 27<sup>th</sup> December 2016 with or without a search warrant was unlawful and unjustifiable.
2. A declaration that the action of the respondent's security operatives of raiding, breaking into and ransacking Nakasero Mosque at dawn on 27<sup>th</sup> December 2016 with or without a search warrant infringed or threatened to infringe on the applicant's and other members of the

Jamiyyat Daawa Assalafiyyah Muslim Community's fundamental rights protected by Articles 21, 23, 24, 26, 27, 28(3)(a), 29(1)(c), 37 and 45 of the Constitution.

3. A permanent injunction restraining the respondent and its officers, servants or agents from using all or any of the items that were purportedly confiscated during the impugned search as evidence in any prosecution or other legal proceedings whatsoever.
4. An order directing the respondent to avail the applicants in particular and other members of the Jamiyyat Daawa Assalafiyyah Muslim Community of Nakasero Mosque in general with an inventory of all items including but not limited to the computers, mobile phones, motorcycles, money, documents and compact disks containing Islamic teachings that were confiscated during the respondent's action complained of herein.
5. An order directing the respondent to unconditionally return to the rightful owners at Nakasero Mosque any and all items including but not limited to the computers, mobile phones, motorcycles, money, documents and compact disks containing Islamic teachings that were confiscated during the respondent's actions complained of herein.
6. An order directing the respondent to compensate the members of Jamiyyat Daawa Assalafiyyah Muslim Community of Nakasero Mosque with general, special, aggravated and punitive damages in the sum of UGX 50,000,000,000 (Uganda Shillings Fifty billion only) or as court may determine.
7. A permanent injunction restraining the respondent and its officers, servants or agents from repeating the unlawful and unjustifiable actions complained of herein.

8. An order directing the respondent to pay costs of and incidental to this application.

The application was supported by the affidavit of the second applicant Yusuf Musa Musuda whose grounds were briefly that;

- At about 12:30 am or thereabouts on 27<sup>th</sup> December 2016 a combined team of security operatives raided and forcefully broke into Nakasero Mosque. This raid is hereinafter referred to as the “Dawn Raid”.
- The security operatives who showed no search warrant, indiscriminately battered and arrested whoever was found inside the mosque’s compound before ransacking, pillaging and vandalizing the whole mosque in search of what up to this date is unknown to the applicants and the rest of the Jamiyyat Daawa Assalafiyah Muslim Community of Nakasero Mosque.
- As a result of the aforesaid dawn raid, the state wounded the feelings of the applicants and other members of the Jamiyyat Daawa Assalafiyah Muslim Community both at and beyond Nakasero Mosque, insulted their religion and caused them to suffer less favourable treatment and stigmatization in law enforcement on grounds of their religion.
- The impugned conduct of the respondent’s security operatives is manifestly intrusive, draconian, unacceptable and demonstrably unjustifiable in a free and democratic society.

The respondent filed an affidavit in reply opposing the application sworn by D/AIP Ocowun Celsius stating that the search was conducted as an investigative procedure in a criminal case of Murder of Maj. Kiggundu and Sergeant Mukasa Stephen Vide Old K’LA CRB 1116/2016.

That the respondent's security operatives were directed to Nakasero Mosque by Nyende Ayub, a suspect where a search was carried out lawfully and professionally on the 27<sup>th</sup> December 2016.

At trial the applicants were represented by *Isaac Ssemakadde* while *Cheptoris Sylvia(SA)* represented the respondent.

The parties filed a joint scheduling memorandum where they agreed on the following issues to be determined by this court;

- *Whether the impugned conduct of the respondent's security personnel violated and or threatened to violate the fundamental rights of the applicants and other members of the JSD Muslim community protected by Articles 23,24,26,27,29 (1) (c) and 37 of the Constitution?*
- *Whether the impugned conduct of the respondent's security personnel is justifiable under the Constitution or any other law?*
- *Whether the applicants are entitled to the reliefs sought*

The parties filed final written submissions that were considered by this court.

Counsel for the respondent in their submissions prayed that Issue 1 and 2 be consolidated since the points of law disputed by the parties in the both are the same and resolve them as one.

*Issue 1; Whether the impugned conduct of the respondent's security personnel violated and or threatened to violate the fundamental rights of the applicants and other members of the JSD Muslim community protected by Articles 23,24,26,27,29 (1) (c) and 37 of the Constitution*

*Issue 2; Whether the impugned conduct of the respondent's security personnel is justifiable under the Constitution or any other law*

I will proceed to determine issue 1 and 2 together.

The applicants according to their submissions abandoned the claim under Art 21, 28(3)(a) & 45 of the Constitution but urged to resolve issue 1, insofar as it pertains to Articles 23, 24, 26, 27 and 37, in the affirmative.

**Violation of protection of personal liberty under Article 23**

The 2<sup>nd</sup> applicant in his affidavit affirmed that he and the other occupants of the mosque were handcuffed behind their backs and forced to lie face down onto the mosque floor. Counsel submitted that this was contrary to Article 23 of the Constitution.

Counsel further submitted that respondent violated Art 23(2), 23(3) and 23(4)(b) of the Constitution when it arbitrarily arrested the eleven (11) Muslims during the impugned search and detained them thereafter beyond 48 hours and in undisclosed places.

The respondent's counsel submitted that according to the Certificate of Search produced as Applicants Exhibit 2, the Imaam's and Umra's offices were listed among those suspected to be harboring suspects / accused persons, exhibits as the persons occupying the respective offices, the 2<sup>nd</sup> Applicant inclusive were suspected of having murdered the late Major Kiggundu and Sergeant Mukasa Stephen by shooting in that regard it was important to search the mosque so as to aid the delivery of justice in the Murder case.

Counsel further submitted that the right to personal liberty is limited under Article 43 (1) of the Constitution. Counsel cited the case of *Omar Awadh Omar and 10 Others versus Attorney General Consolidated Constitutional Petition No. 55 and 56 of 2011* where the Learned Justices noted that; *Under Article 23(1) (c) of the Constitution, a person may be detained on suspicion that he has committed or is about to commit a criminal offence.* Counsel concluded that the deprivation of the 2<sup>nd</sup> Applicants right to personal liberty was justified.

The 2<sup>nd</sup> applicant in his affidavit affirmed that he and the other occupants of the mosque were handcuffed behind their backs and forced to lie face down onto the mosque floor which was contrary to Article 23 of the Constitution.

The respondent justified the detaining the 2<sup>nd</sup> applicant and the other 11 muslims during the impugned search on grounds that they were suspected of having involved in the murdered of the late Major Kiggundu and Sergeant Mukasa Stephen.

As noted by counsel for the respondent, under *Article 23(1) (c) of the Constitution*, a person may be detained on suspicion that he has committed or is about to commit a criminal offence. The impugned search took place in the aftermath of the murder of Major Kiggundu and Sgt Mukasa Stephen. RW1 led evidence to show that the respondent's security operatives were led to Nakasero Mosque by one of the suspects they had in custody.

In *Omar Awadh Omar and 10 Others versus Attorney General Consolidated Constitutional Petition No. 55 and 56 of 2011* the Supreme Court held; *We are of the view that in the aftermath of the bombings and the circumstances in which Aguma Joel SSP found the petitioner, he was justified in taking the action he took under Article 23(1). His suspicion of the 6<sup>th</sup> petitioner was justifiably aroused as he did not have valid identifying information or travel documentation.*

Similarly, I find that in the circumstances the respondent was justified in temporarily detaining the 2<sup>nd</sup> applicant who was a suspect and was also present at the location suspected to be harboring suspects in the murder case.

**Respect for human dignity and protection from inhuman treatment under Article 24**

According to the applicants, the inhuman treatment by the respondent's search party included;

- Overlooking the Imam and custodian of the mosque before, during and after the search operation.
- Unjustifiably invading a place of worship during the night with a disproportionately large and heavily armed troop of security personnel.
- Needlessly forcing themselves into the mosque and stepping on prayer mats within the mosque, totally disregarding the rituals of the Islamic faithful.
- Barking at and beating the 2<sup>nd</sup> applicant and other occupants of the mosque
- Kicking the 2<sup>nd</sup> applicant in the teeth and at the kneecap
- Causing the 2<sup>nd</sup> applicant to collapse onto the ground in intolerable pain
- Restraining the 2<sup>nd</sup> applicant and other occupants of the mosque in handcuffs behind their backs, and forcing them to lie face down onto the mosque floor during the search.
- Ransacking the entire mosque, its stores and adjacent structures without informing its occupiers of the specific thing(s) of interest to the search party.
- Indiscriminately destroying and looting property found at the mosque, including but not necessarily limited to priceless Islamic artifacts and electronic teachings of the Jamiyyat Daawa Assalafiyyah Muslim community, computers, sockets, mobile phones, chargers, motorcycles, etc.
- Looting cash belonging to the Jamiyyat Daawa Assalafiyyah Muslim community.
- Taking photographs of the 2<sup>nd</sup> applicant and Sheikh Kaluuma contrary to s 30(1) of the Police Act.
- Subjecting the 2<sup>nd</sup> applicant and Sheikh Kaluuma to forced labour, e.g. they were forced to load three motorcycles on a waiting break-down vehicle and another three on a police truck.

The respondent led evidence and submitted that according to DW1, during the lawful search people present were not subjected to any form of torture or inhuman treatment. Besides, the 2<sup>nd</sup> Applicant was never kicked or beaten by the Respondent's security agents and he was handcuffed just like all the other arrested persons. The 2<sup>nd</sup> Applicant's constitutional right as well as that of the other suspects arrested envisaged in Article 24 of the Constitution was not violated.

Article 24 of the Constitution of the Republic of Uganda provides for freedom from torture or cruel, inhuman and degrading treatment. Article 44 of the Constitution of the Republic of Uganda prohibits derogation from that right.

*Under Article 44 the protection from the seven conditions is absolute."*

The right to freedom from torture, inhuman and degrading treatment is also provided for in the **Universal Declaration of Human Rights** under Article 5 thereof which provides;

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

The right to freedom from torture is also envisaged in the **International Covenant on Civil and Political Rights**, Article 7 thereof provides;

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

The **African Charter on Human and People's Rights** provides for freedom from torture, inhuman and degrading treatment under Article 5 which states;

*"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*



Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical and psychological suffering, but which humiliate the individual or force him or her to act against his/her will or conscience. See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998)*

Inhuman treatment or punishment is treatment which causes intense physical or mental suffering. It includes:

- serious physical assault
- psychological interrogation
- cruel or barbaric detention conditions or restraints
- serious physical or psychological abuse in a health or care setting, and
- threatening to torture someone, if the threat is real and immediate.

Although the applicants have claimed a violation of their right to freedom from torture, they have not substantiated on this claim and did not lead evidence to prove inhumane treatment by the Uganda Police. In absence of such evidence, the court cannot find a violation as alleged.

The courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading treatment. Only worst examples are likely to satisfy the test.

Simple assault should never be interpreted as torture or inhuman and degrading treatment. It is merely a tortious act of trespass to person and should not be categorized as serious violation of the right to freedom from torture or inhuman or degrading treatment envisaged under the Constitution.

### **Protection from deprivation of property under Article 26**

The applicants stated the following as the particulars of the violations under Article 26.

- Rushing to cut padlocks on the gate and other premises within the mosque without first ascertaining whether the occupiers of the mosque at the time would grant the search party free ingress to the mosque and afford it all reasonable facilities for the search.
- Destroying the microphone that is used to summon the faithful for prayer, after it was grabbed from the 2<sup>nd</sup> applicant while he was making *Adhaan*.
- Indiscriminately destroying and looting property found at the mosque, including but not necessarily limited to priceless Islamic artifacts, electronic teachings, and administrative files of the Jamiyyat Daawa Assalafiyyah Muslim community, computers, sockets, sound systems, motor cycles, mobile phones, chargers, etc
- Looting cash belonging to the Jamiyyat Daawa Assalafiyyah Muslim community.
- See the photographs referred to in para 13 of the 2<sup>nd</sup> applicant's affidavit, and Exh YMM-1: "...[at the end] the mosque looked like a rubbish dump." See also Exh KSM – the damage/loss report

Consequently, the respondent unlawfully interfered with the property rights of the applicants and other members of the Jamiyyat Daawa Assalafiyyah Muslim Community protected by Art 26 of the Constitution.

The respondent submitted that their security agents lawfully interfered with the property rights of the Applicants and other JSD Muslim community and it was in the best interest and protection of the public.

Rw1 stated that a list attached to his Affidavit, particularly page A-2 Certificate of Search although not numbered annexure A-2 page 5, guns among others were recorded and the guns were indicated in the Certificate of search that was attached to the Respondent's Affidavit in reply in away security officers understand.

This having been a search with regard to a murder investigation, I agree with the respondent's counsel that the security agents lawfully interfered with the property rights of the applicants in a bid to look for evidence in the murder case. The applicants have not proved the allegations of loss of property in form of cash and other valuables. The circumstances under which the alleged property found its way into the mosque is not explained and there is no proof of those items/property having been in the mosque at the time of the search.

The offices at the mosque were suspected to be harboring the murder suspects as well as exhibits in the murder. It was therefore inevitable for the security agents to arrest the suspects and conduct a search without interfering with the applicants' property rights or gaining access to those offices without cutting the padlocks.

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

Counsel for the applicants submitted that Contrary to Art 27 of the Constitution, the respondent's security personnel *unlawfully* entered, searched and seized several documents and properties from Nakasero Mosque, a place of worship for the Jamiyyat Daawa Assalafiyyah Muslim Community.

Contrary to ss 27(1) to 27(8) of the Police Act, the respondent did not show evidence of any of the following records which are essential for a lawful search, entry and seizure, to wit:

1. A search warrant,
2. A warrant card, in lieu of a search warrant
3. A written record of the specific thing(s) for which the impugned search was undertaken.
4. A written record of the responsible officer's "reasonable grounds" for believing that the search, entry and seizure of particular things from Nakasero Mosque on 27 December 2016 was necessary.

5. A written record of the reasons why the responsible police officer unable to conduct the search in person and why he required his subordinates.
6. A written record of the order that the responsible police officer delivered to his subordinates (not below the rank of corporal) including RW1 to enter, search and seize particular things from Nakasero mosque.
7. A written record showing that copies of the above-mentioned records were immediately sent to the nearest magistrate empowered to take cognisance of the offence and to the owner or occupier of Nakasero mosque.

In the absence of the aforementioned records, counsel submitted that the respondent failed to substantiate the lawfulness of the search in question, contrary to allegation in para 4 of RW1's affidavit.

Counsel for the respondent submitted that RW 1 Ocowun Celicius who by virtue of his position is mandated to search without a warrant and who was an investigating officer in criminal case Old Kampala CRB: 1116/2016 in respect to the murder by shooting of Major Kiggundu and Sergeant Mukasa Stephen.

RW1 testified that they had a meeting prior to conducting the search operation at Nakasero Mosque. On 26<sup>th</sup> December, 2016, D/SSP Olal Johnson KMP CID Commander addressed and specified in writing all the Respondent's security agents as stated in the investigation Report dated 27<sup>th</sup> December 2016 and produced as Applicant Exhibit 3 and in RW1 testimony.

Counsel further submitted that according to RW 1, the application for a search warrant from police station was not necessary due to the urgency of the matter and recommendation by D/SSP Olal Johnson KMP CID Commander that the search operation was to be directed by one of the suspects "Nyende Ayub" who was under police custody and had recorded a statement at police in respect to criminal case Old Kampala CRB:

1116/2016. Besides, the 2<sup>nd</sup> Applicant retained a copy of the Certificate of Search produced as Applicant Exhibit 2.

It was counsel's submission that RW 1 and other security agents were authorized by D/SSP Olal Johnson KMP CID Commander to conduct the search at Nakasero mosque in accordance with Section 27 of the Police Act Cap.303 and they lawfully did so despite not having a search warrant.

The Respondent's security agents did not violate the constitutional rights of the Applicants and the rest of the members of the JSD Muslim community provided for under Article 27 (1) (a), (b) of the Constitution.

#### Determination

*Privacy means-state or condition of being alone undisturbed or free from public attention, as a matter of choice or right; freedom from interference or intrusion. An important aspect of privacy is the ability to exclude others from premises.*

*It is a fundamental human right recognized in the UN Declaration of Human Rights, the International Convention on Civil and Political Rights and other Regional treaties like African Charter on Human and Peoples Rights.*

*It should be noted, however, that the right to privacy is not absolute. It should be considered on a case-by-case basis or development. It should be subject to regulations. If the scope of the right to privacy is widened beyond limit, it may interfere with governance of state or other person's constitutional rights. Similarly, if the contours of the right to privacy are too narrowed, it dilutes a person's fundamental rights.*

*Whenever an invasion of privacy is claimed, there are usually competing values at stake. Privacy may seem paramount to a person who lost it, but that right often clashes with other rights and responsibilities that we as society deem important.*

*The right to privacy is not unlimited and can be limited where there it is fair and justifiable in open and democratic society. Therefore, the law allows searches and*

*seizures where there is probable and reasonable cause or reasonable basis for suspicion in order to facilitate criminal investigations. See **Baguma-Mugarama v Uganda Revenue Authority Civil Suit No. 93 of 2014***

The purpose underlying the power of search is to assist the law enforcement officials to investigate violations of the law by unearthing evidence for the suspected commission of breaches of the law which may otherwise not be available to an investigating agency. The search is of an investigatory nature as it is conducted as a result of the belief that there is a contravention of the law.

The exercise of the power of search and seizure is of a drastic nature and constitutes a serious invasion of the affected person's privacy, property rights, reputation, business and his freedom. Therefore, the power of search and seizure must be exercised only in accordance with the law which must be strictly observed by the person conducting the search otherwise it will be declared illegal.

This is intended to minimize the chance of misuse or abuse of power of search and seizure, the question of procedural safeguards, subject to which such power may be exercised, becomes a matter of great significance.

The Police Act does not confer unqualified power of search and seizure. To do so would subject the power to constitutional objections. Some safeguards are therefore interwoven into the fabric of power of search and seizure. Such power is qualified by '*has reasonable grounds for believing*'.

There must be reasonable grounds to believe or reason to suspect that there is a breach of the law. The expression 'reason to believe' is not synonymous with subjective satisfaction of the police officer concerned. The belief must be held in good faith; it cannot be merely a pretence. There should be material adequate or evidence adequate for forming the reasonable belief to carry out a search or to issue search warrant or warrant card.

The courts have resisted attempts made from time to time by interested parties to have the scope of search power narrowed down restrictively interpreting the statutory provisions authorizing search, or by liberally interpreting the safeguards subject to which the power is given. By and large the courts have interpreted these provisions liberally and safeguards against misuse of search power narrowly.

It is open to the court to examine the question whether the reasons for the belief have a rational nexus or connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the investigation in question. If as a result of the search nothing incriminating is found, that by itself cannot conclude that, at the inception, the search was *malafide* or was for irrelevant or extraneous reasons.

The law that allows a search by police officers Section 27 imposes the following several restrictions on the power of search and seizure;

- The officer concerned must have reasonable grounds for believing that anything necessary for the purpose of an investigation of an offence may be found in any place within his jurisdiction;
- He must be of the opinion that such a thing cannot be got without undue delay otherwise than by making search;
- He should record in writing the grounds of his belief; and
- Specify in such writing, as far as possible, the things for which the search is to be made; *Section 27(1) Police Act.*
- He must conduct the search, if practicable, in person; *Section 27(2) Police Act.*
- If it is not practicable for him to make the search in person, and there is no other person competent to make the search at the time, he/she must record in writing the reasons for not making the search himself and authorize any officer subordinate to him or her not below the rank of corporal to make the search and he/she shall deliver to that officer an order in writing after specifying in writing the place to be searched;
- Thereupon search for that thing in that place. *Section 27(3) Police Act.*

- Copies of the record above shall immediately be sent to the nearest magistrate empowered to take cognizance of the offence and to the owner or occupier of the place searched. *Section 27(5) Police Act.*
- Presence of the occupant or some other person in his or her behalf or where possible a local leader should be present during the search. *Section 27(6) Police Act*
- No police officer shall search any premises unless he or she is in possession of a search warrant issued under the Magistrates Courts Act or is carrying a warrant card in such a form as shall be prescribed by the Inspector general. *Section 27(7) Police Act.*
- A search shall be carried out in a humane manner and unnecessary damages or destruction to property shall be avoided. *Section 27(9) Police Act.*

The above are significant safeguards against arbitrary exercise of power of search and seizure by police officers. The recording of reasons in writing for undertaking the search and specifying in writing the thing to search are of special significance. They are mandatory and must be complied with before a police officer can validly institute a search. Immediately after the search, he must send the copies of any record which contained any reasons to the nearest magistrate empowered to take cognizance of the offence and to the owner of the place searched.

It is equally obligatory that a search must be conducted in presence of the occupant or some other person on his or her behalf or where possible a local leader should be present. This provision seeks to ensure that searches are conducted fairly and squarely and that there is no planting of any article by the police officer(s) conducting the search.

The respondent's security agents in this case were conducting an investigation into the murder of Major Kiggundu and Sergeant Mukasa Stephen. They were authorized by D/SSP Olal Johnson KMP CID Commander to conduct the search at Nakasero Mosque (Masjid) in accordance with Section 27 of the Police Act Cap 303.



The applicants challenged the legality of the search conducted by the police officers. They have only stated in an affidavit of D/AIP Ocowun Celsius that “ *In the course of investigation of Old K’LA CRB 116/2016, we were directed by Nyende Ayub, a suspect; to Nakasero Mosque where a search was carried out lawfully and professionally on the 27<sup>th</sup> December, 2016.*”

The respondent’s never attached any documents required under the Police Act that would determine the lawfulness of the search conducted. A plain statement even if made under oath could not be a substituted for the required documents or record in writing containing the grounds of belief, the thing for which search is to be made.

The record which contains the reasons for the search is mandatory and its absence would render the entire search illegal and unlawful, and contrary to the Police Act. The said record was supposed to be sent to the nearest magistrate empowered to take cognizance of the offence. This was not done or at least the respondent’s witness does state that it was done in his affidavit in reply.

The police in this case carried out the search without recording reasons envisaged under the Police Act, the search was therefore illegal. Since the recording of reasons is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches.

The police officers were conducting a search on premises and the law enjoins them either to have a search warrant or a warrant card in such form as shall be prescribed by the Inspector General. **Per Lord Wilberforce in R v. IRC, ex p. Rosminster Ltd [1980] AC 952, 1000:** “There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf **authorising the doing of an act which would otherwise be illegal.**”

The respondent did not present either of these documents to prove the legality of the search that was carried out by police. In absence of any

evidence to the contrary, the said search was carried out without the search warrant and warrant card. It was thus illegal and unlawful.

It should be emphasized that statutory powers are not charters of immunity for any injurious or violation of rights done in exercise of them. The act done in pursuance of the statutory powers given by a statute must be exercised with judgment and caution in accordance with that law.

The power to search or seek an order for a search is an exercise of discretionary power and the court will interrogate whether the officer concerned has acted *bonafide* or *malafide* in ordering a search or acted on non-existent grounds or irrelevant considerations or has applied his mind or not to the question. *See Fuelex (u) Ltd v Commissioner General Uganda Revenue Authority HCCS No. 04 of 2010.*

The power to search being discretionary in nature, it is subject to all those restraints to which any discretionary power is subject. Therefore an order to conduct a search can be challenged by way of judicial review on any of the grounds on which exercise of a discretionary power can be challenged.

If the power of search is exercised bonafide, and in furtherance of the statutory duties of officers of government, then any error of judgment on the part of will not vitiate the exercise of power especially there has been minimal violation of human rights.

Regarding the circumstances in this case, I find that the search was illegally and unlawfully conducted and there was violation of the right to privacy under Article 27 of the constitution.

**Right to religious and cultural freedom under Article 29(1)(c) and 37**

The applicants' counsel submitted that the respondent's entry, search and seizure of cash and numerous properties of the faithful from Nakasero mosque having been carried out in contravention of the law, this

undoubtedly infringed or threatened to infringe the fundamental rights of the applicants and other members of the Jamiyyat Daawa Assalafiyyah Muslim Community protected by Art 29(1)(c) and 37 of the Constitution.

Counsel submitted that the manner in which the impugned search was carried out fell short of the State's obligation to observe, respect, uphold and promote the applicants' Art 29(1)(c) and 37 rights. The respondent's security personnel displayed contempt or lack of reverence towards something considered sacred or inviolable by the applicants, to wit the place of worship, artifacts and teachings of the Jamiyyat Daawa Assalafiyyah Muslim Community.

Counsel further submitted that it cannot be gainsaid that the reputation of a religious association is an exceptionally important component of their constitutionally protected rights under Art 29(1)(c) and 37. It is a valuable asset for attracting followers, partners and supporters of development projects that are spearheaded by the leaders of the religious association.

Reputational damage through arbitrary State action is, therefore, a serious risk to the sustainability of a religious association. That the ignominy of the respondent's night raid on the grand mosque and headquarters of the Jamiyyat Daawa Assalafiyyah Muslim Community at Nakasero and arbitrary seizure of numerous properties there-from, with no reasonable suspicion to justify the search and seizures in the first place, diminished or had the effect of tending to diminish and degrade the image and reputation of the Jamiyyat Daawa Assalafiyyah Muslim Community by casting its headquarters and premier place of worship as a safe haven for criminals.

In the totality of circumstances, objectively viewed, this was a gratuitously offensive attack on a place of worship, and the applicants were rightly outraged. A similar raid on the premises of any religious organisation would cause significant pain, distress, embarrassment and wounded religious feelings to the faithful of ordinary sensibilities placed in the applicants' shoes.

The respondent submitted that the 2<sup>nd</sup> Applicant clearly stated in his Affidavit in Support affirmed on 16<sup>th</sup> March, 2017 when the security officers came, the 2<sup>nd</sup> Applicant got a microphone and proceeded to make Adhaan (Islamic emergency prayers) in effort to alert other mosque members within the nearby area that they are under attack.

That the 2<sup>nd</sup> Applicant and 11 other caretakers at Nakasero mosque were not praying at the material time when the Respondent's agents arrived at Nakasero mosque and conducted, however, they even had the ample time to conduct the emergency prayers.

That they conducted a lawful search as instructed and authorized by D/SSP Olal Johnson KMP CID Commander. That the 2<sup>nd</sup> Applicant in his Affidavit in support at paragraph 1 clearly stated that he is the Imam in charge of the daily 6.00a.m Subhuhi prayers at Nakasero mosque.

The Respondent's agents were at Nakasero mosque to carry out the lawful search at 12.30a.m according to the contents of paragraph 2 of the 2<sup>nd</sup> Applicant's Affidavit in support.

Counsel submitted the right to exercising right to freedom to practice, profess and enjoy any religion under Articles 29 (1) (c) and 37 of the Constitution was never interfered with and there was no intention to deprive the Applicants of the said right.

In rejoinder, counsel submitted that with great respect, the respondent's appreciation of the rights protected by Art 29(1)(c) and 37 of the Constitution is unjustifiably too narrow and self-serving urging court to reject their submissions.

### **Determination**

**Section 27(9) of the Police Act** provides that;

*A search conducted under this section shall be carried out in a human manner and unnecessary damage or destruction to property shall be avoided.*

A search on any place of worship must be conducted in such a manner that would not desecrate the sanctity of the place of worship. There must be respect for their known practices in order not to insult that religion and its believers or faithfuls.

**Section 118 of the Penal Code** provides;

*Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons, with intention of thereby insulting the religion of any class of persons, or with knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to its religion, commits a misdemeanor.*

The above provision underscores the importance of preserving places of worship. Places of worship are an essential element of the manifestation of the right to freedom of religion or belief to the extent that the great majority of religious communities need the existence of a place of worship where the members can manifest their faith.

*International Standards 13b; 1981 Declaration of the General Assembly* provides for right to worship;

Article 6(a): The right to freedom of thought, conscience, religion or belief includes the freedom to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.

*Human Rights Council resolution 6/37*

9(e): The Human Rights Council urges States;

To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction.

9(g); The Human Rights Council urges States;

To ensure, in particular, the right of all persons to worship, or assemble in connection with religion or belief and to establish and maintain places for these purposes.

The *Special Rapporteur* also considers that places of worship should be exclusively for religious and not political purposes. As places for prayer and meditation, they should be protected against tension and partisan struggle. The State should therefore ensure that places of worship remain neutral ground and are sheltered from political currents and ideological and partisan controversy.

International obligations in respect of freedom of religion and belief are primary obligations incumbent upon the State, not upon religious communities of any kind. International law requires States to take positive steps to put an end to any situation in which the freedom of religion or belief is violated.

The respondent's security operatives/police officers according to the applicants; while conducting their search had little or no regard for the traditions and practices observed by the Muslims of Nakasero mosque. The respondent's agents renegaded on their International obligation of ensuring freedom of religion.

They did not observe requirements such as removing shoes before entering the mosque, displayed contempt or lack of reverence towards some things considered sacred or inviolable by the applicants, to wit the Holy Quran, the place of worship, artifacts and teachings of the Jamiyyat Daawa Assalafiyyah Muslim Community.

Considering the applicant's evidence on record, the security agents left the premises looking like a dump and had no regard for the sanctity of the Holy Quran, the place of worship, artifacts, books and other documents sacred to the JDA Muslim community of Nakasero Mosque.

The failure to have or secure a search warrant or warrant card could have aggravated the situation since there were no guidelines on how the search was to be conducted. The police raided the mosque as if they were raiding

a market place which is a clear violation of the freedom to worship and the right to practice the Islamic faith teachings.

Places of worship should be searched in a manner that preserves the dignity and sanctity of the place and above all in an orderly and organised manner.

The violation at the places of worship affects the entire community and persons who profess and practice that religion. This could have far reaching effects on the entire country due to recklessness of persons who are carrying out the search.

These actions violated the rights of the applicants under Article 29 and 37 of the constitution. The respondent's agents ought to have conducted their search with high regard to the traditions of the members the mosque.

On that note issue 1 and 2 as combined succeed in part.

### Remedies

1. This court declares that the action of the respondent's agents (security operatives/police) of raiding, breaking into and ransacking Nakasero Mosque at dawn of 27<sup>th</sup> December 2016 without a search warrant or warrant card was unlawful and illegal.
2. The actions of the respondent's agents (security operatives/police) during the unlawful and illegal search violated Article 29 & 37 of the Constitution.
3. This court orders that the respondent's agents (Uganda Police) must return all items that were taken from Nakasero Mosque during the illegal and unlawful search to the mosque administration.(Jamiyyat Daawa Assalafiyyah Muslim Community)

## Compensation

Article 50(1) and 126(2)(c) of the Constitution guarantee redress which may include adequate compensation for any person or group whose human rights are found to have been infringed or threatened.

The value that the court attaches to the different rights will guide the amount of damages. For example prohibition from torture also categorized as '*an absolute right*' is highly valued than rights which can undergo balancing such as the right to privacy or freedom of expression.

Therefore, damages ought to be awarded according to the severity of the violation as well as the losses suffered will capably promote the recognition of human rights.

In awarding damages in human rights cases the courts should adopt a vindictory approach, modeled on those rules and principles applied in tort cases when the basic rights are violated.

Court should not award pecuniary damages if there is lack of actual proof clearly establishing pecuniary damage. Damages for human rights violations ought to be handled differently and depending on the circumstances of each case.

It is surprising that advocates have a tendency of seeking exaggerated sums as damages and this reduces the enforcement of rights applications to commercialization of human rights violation instead of vindicating rights.

In the present case, the applicant's counsel sought fifty billions (50,000,000,000/=) as damages. I don't know how counsel imagined such a huge amount without even laying any basis for such a claim. It would appear that human rights cases have become commercial transactions/deals between lawyers and the victims of human rights violations.



Court finds the award of UGX 50,000,000 as sufficient and adequate compensation for the violation of the applicants' rights and all other Muslim faithfuls under Article 29 of the constitution. The compensation shall be paid to Nakasero Mosque administration (Jamiyyat Daawa Assalafiyyah Muslim Community).

The applicants are awarded costs of the application.

It is so ordered.

*Dated, signed and delivered by email and whatApp at Kampala this 1<sup>st</sup> day of June 2020*

**SSEKAANA MUSA**  
**JUDGE**