

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
[CORAM: TUMWESIGYE; KISAAKYE; NSHIMYE; MWANGUSYA; OPIO-AWERI;
MWONDHA; & TIBATEMWA-EKIRIKUBINZA, JJ.S.C.]

5 **CONSTITUTIONAL APPEAL NO 06 OF 2011**

BETWEEN

MUWANGA KIVUMBI ::::::::::::::::::::] APPELLANT

AND

10 **THE ATTORNEY GENERAL::::::::::::::::::] RESPONDENT**

[Appeal from the Ruling of Justices of the Constitutional Court (Kikonyogo, DCJ, Okello, Mpagi-Bahigeine, Kitumba, Byamugisha, JJA) dated 27th May 2008 in Constitutional Petition No. 09 of 2005]

JUDGMENT OF DR. KISAAKYE, JSC

15 This is an appeal from the Judgment of the Constitutional Court rendered in Constitutional Petition No. 09 of 2005.

The background to this appeal and the parties submissions have been well set out in the lead Judgment of Tibatemwa-Ekirikubinza, JSC. I therefore need not repeat them here in detail. Suffice to say that the appellant, (hereinafter referred to as Kivumbi) filed a Petition against
20 the Attorney General in the Constitutional Court challenging the constitutionality of Section 32 of the Police Act. Kivumbi contended that Section 32 of the Police Act contravened Articles 20(1) & (2), 21 (1) & (2) 29(1) (a) (b) (d) & (e), 38(2), 42, 43(3) (a) & (c) of the Constitution. Kivumbi later abandoned his allegations regarding all subsections of Section 32 with the exception of Section 32 (2).

25 The Constitutional Court found Section 32(2) of the Police Act to be inconsistent and in contravention of Articles 20(1) & (2) and 29(1) (d) of the Constitution and declared it null and void.

Kivumbi extracted a decree and sent it to the Attorney General to have it signed. The Attorney General refused to sign on grounds that no costs were awarded by the Constitutional Court.

5 Kivumbi then sought the interpretation of the Constitutional Court to pronounce itself on whether it had awarded costs to him. The Constitutional Court informed him by letter that only two Justices had awarded him costs and that therefore no costs had been awarded to him by the Court.

Dissatisfied with the interpretation of the Constitutional Court on the issue of costs, Kivumbi appealed to this Court on the following two grounds:

- 10 1. *That the Constitutional Court erred to have refused to award costs to the appellant who was the successful party.*
2. *That the Constitutional Court based on wrong principles in its decision to refuse to award costs to the appellant who was the successful party.*

15 He prayed to this Court to make an order awarding costs to him for the Petition and for this appeal.

I have had the benefit of reading in draft the Judgment of my sister Tibatemwa-Ekirikubinza, JSC. A clear reading of the five separate Judgments of the learned Justices who heard Constitutional Petition No. 09 of 2005 shows that three out of the five learned Justices awarded costs to Kivumbi even when he had not prayed for them in his Petition. In
20 my view, the Constitutional Court's award of costs to a Petitioner who had not prayed for them was an error in law. This is because the judicial discretion vested in a Judge whether under Section 27 of the Civil Procedure Act or under the general powers of a Court does not, in my view, extend to awarding costs which have not been prayed for. This was particularly serious, given that this was a constitutional matter challenging the constitutionality of a
25 given Section of the law.

My finding notwithstanding, I do not believe that Kivumbi should be made to meet the costs of this judicial error on the part of the learned Justices of the Constitutional Court or for this appeal.

5 This appeal would have been avoided, if the learned Justices of the Constitutional Court had taken trouble to properly study their Judgments in Constitutional Petition No. 09 of 2005.

Having awarded costs that were not prayed for by Kivumbi, the Constitutional Court further erred in fact when it advised Kivumbi to the effect that no costs had been awarded to him when he sought for clarification.

10 I therefore agree with the conclusion of my learned sister Tibatemwa-Ekirikubinza, JSC that the Constitutional Court awarded costs to Kivumbi.

Much as I agree with her on the issue of award of costs to Kivumbi by the Constitutional Court, I respectfully differ from the analysis and conclusions reached by my learned sister that the Petition from which this appeal arose was not a public interest petition; and (b) the holding with respect to Section 27 of the Civil Procedure Act. I address these matters in the
15 following section.

Whether the Petition from which this appeal arose was a public interest matter or not?

One of the Justices who declined to award costs to Kivumbi did so, on grounds that the Petition was a public interest matter. This was strongly denied by Kivumbi in his submissions before this Court. I have therefore found it necessary to consider this issue.

20 What is a Public interest matter is not defined anywhere in our Constitution and Statute Books. However, Black's Law Dictionary 9th Edn at Page 1350 defines public interest as: ***“the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake; especially, an interest that justifies governmental regulation.”***

25 ***Stroud's Judicial Dictionary of Words and Phrases 4th Edn at Pages 2186-2187*** also cites the dictum of Campbell C.J. in ***R v. Bedfordshire, 24 L.J. Q.B. 84*** where he defined a matter of public or general interest ***‘not to mean that which is interesting as to gratify curiosity or***

a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.'

It is my view that the subject matter and the likely effect of a Judgment once it has been delivered are strong indicators that the Court takes into account in determining whether a matter before it is of a public interest kind. Examples of suits or Petitions whose subject matter may lead to an inference that they are public interest cases even when the Petitioners have not specifically stated so include (i) those challenging the constitutionality of some provisions of the laws of a country (See for example ***Paul K. Ssemogerere & 2 others vs. Attorney General, Constitutional Appeal No. 01 of 2002***), (ii) Suits or petitions filed against environmental pollution or threatened wastage of a country's natural resources by the State, a corporation or an individual (See for example ***Advocates Coalition for Development & Environment (ACODE) vs. Attorney General, High Court Misc. Cause No. 0100 of 2004***), (iii) Suits challenging the constitutionality of anything done under the authority of any law of the country, (iv) Suits challenging the violation of individuals' basic human rights or brought for enforcement of human rights, (v) Suits challenging the constitutionality of any act or omission by any person or authority (See for example ***Greenwatch Vs Attorney General & Anor. High Court Misc. Cause No. 140 of 2002*** and ***Centre for Health, Human Rights and Development (CEHURD) & 3 others vs. The Attorney General, Constitutional Appeal No. 01 of 2013.***) Such suits or petitions qualify, in my view to be categorized as public interest cases even if such suits were filed by an individual or group of individuals in their individual capacity or in their own interest. It is the nature of the suit and the effect once it has been adjudicated upon that will determine whether the matter is of public interest.

Furthermore, there is no requirement under our Constitution that a Petition or suit to qualify as a public interest kind must be filed by a group of persons. It therefore follows that a public interest matter can be filed by either an individual or by a group of persons or an organization. A 'person alleging' referred to under Article 137(3) of the Constitution covers both the person who is directly affected by the alleged violation, as well as other persons who are affected by the issue complained of as well as other legal persons alleging the

unconstitutionality of the act, law, commission or omission complained of and who can bring it to Court on behalf of the public.

As I stated in my judgment in *Kwizera Eddie v. Attorney General, Constitutional Appeal No. 06 of 2011 (SC)*, my view is that any matter brought under Article 137 of the
5 Constitution, where a Constitutional Court makes a declaration that the law or act or omission contravenes the Constitution of Uganda, and an order for redress qualifies to be treated as a public interest matter, even if it is brought by an individual. Such a Petition becomes a public interest matter because the primary objective of Petitions filed under Article 137 of the Constitution is to seek the Constitutional Court’s interpretation on
10 whether the facts as alleged are inconsistent with or contravene the Constitution-the supreme law of the land.

It should also be noted that categories of Public Interest Litigation are not only confined to the categories listed above. As Lord Hailsham rightly observed in *D v National Society for the Prevention of Cruelty to children, HL [1977] 1 All ER 589, 605*:

15 ***“The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.”***

This now brings me to consider the question whether Kivumbi’s Petition was a public interest matter? Kivumbi contended before this Court that his Petition was not a public
20 interest matter. He submitted that he filed the Petition in his own capacity and for his own benefit to challenge Police powers which had been used to frustrate his own political activities. He further contended he suffered as an individual.

The Constitutional Court agreed with him and held that Section 32(2) of the Police Act which gave the Inspector General of Police powers to prohibit the convening of an assembly
25 or procession, placed an unjustified limitation on the enjoyment of a fundamental right guaranteed under Article 29 (1) (d) of the Constitution. Article 29 (1) (d) provides as follows:

“Every person shall have the right to freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition”

It is not disputed that Kivumbi suffered as an individual when the police frustrated his efforts to express himself as provided for under Article 29(1) (d) of the Constitution. Be that as it may, I have already pointed out that in determining whether a matter before the Constitutional Court is of a public interest nature or not, the Court should consider such

5 factors such as the nature of the case and the likely effect of the decision of the Court.

The right to demonstrate, which Kivumbi sought to enforce is not an exclusive right that he would enjoy alone. This right extends to other citizens of Uganda, who may wish to exercise it at different times or even never exercise it at all during their lifetime. We therefore need to see this right not only in light of Kivumbi but also in light of other citizens

10 that would be affected by the prohibition on its enjoyment before Kivumbi filed Constitutional Petition No. 09 of 2005, as well as those Ugandans who would enjoy the right after the impugned Sections of the Police Act were quashed by the Constitutional Court.

It should further be remembered that when an individual or a group of individual protest, they are usually communicating a message either to their government to stop what they

15 perceive as anti- people or anti-development actions or policies. On the other hand, some demonstrations may be targeting the general public to influence public opinion about a given issue of concern to the demonstrators, or to change certain undesirable conduct, or public attitudes or to galvanize action from either the general public or a section thereof in a particular direction.

20 It is therefore immaterial that Kivumbi filed this Petition because he had been a victim of Police harassment and that he felt that he needed personal protection and redress from the Constitutional Court regarding his political demonstrations. This did not take his Petition out of the realm of public interest.

I am fortified in my observations by the observations of Prof. J. Oloka Onyango in his

25 Article titled **“Human Rights & Public Interest Litigation in East Africa: A Bird’s Eye View”** where he discussed the public interest litigation concept in the following terms.

“The dominant view of Public Interest Litigation holds that it focuses on issues of particular importance to the community at large, a major section of the public, or disenfranchised minorities. As is evident from its name, public interest litigation is

5 *defined as court action seeking remedies aimed at a broader public good, as
opposed to the specific interests of the individual litigant(s). The outcome of such
litigation is deemed important in that it is likely to impact not only the individual
litigant filing the suit, but also a larger cross-section of society. Public Interest
10 Litigation therefore has wide ramifications for the public at large, even if initiated
by a single individual. Such cases have the effect of altering the law, indeed
sometimes even declaring a law incompatible with the Constitution, and thereby
reinforcing or protecting the rights of the wider populace. Common cases of this
nature generally focus on the freedoms of expression, association, and
15 participation, but also extend to the rights of discrete groups such as women,
minorities (social and sexual), and on group or collective rights (e.g. the right to a
healthy environment.)”*

The second question that arises from the learned Justice’s reasons and the parties’
submissions before this Court is whether Costs should be awarded in public interest matters.

15 Kivumbi contended that even when a Petition is filed in public interest, a petitioner incurs
costs in the process of doing so for which he should be reimbursed. He further submitted
that failure to award costs to a person who has successfully sued in public interest amounts
to penalizing that person. Lastly Kivumbi also contended that a person who files a Petition
in public interest which is not frivolous or vexatious and loses, should not be condemned to
20 costs.

As I observed in *Kwizera v. Attorney General* (supra) filing a public interest petition by its
nature involves costs which include filing fees, and research costs made prior to the case, as
well as pleadings, Advocate’s fees for drafting, consultation and arguing the Petition.

I stand by the views I expressed in *Kwizera* that I do not believe that Section 27 of the Civil
25 Procedure Act should be applied to constitutional matters. However, I do agree with
Kivumbi that a litigant who successfully files a public interest matter deserves to be
reimbursed for his or her direct costs provided these costs were prayed for. On the other
hand, a litigant should not be awarded costs if he or she has not prayed for them in the
Petition.

30 In awarding and assessing costs in constitutional litigation, Courts should not lose sight of
the danger that would arise if the constitutional order in this country were to break down. In
my view, society owes a litigant, who averts such a breakdown in the constitutional order

through a constitutional petition pointing out areas of contravention of the Constitution, a duty to reimburse him or her for the direct costs he or she incurred in the process of filing and prosecuting the petition and/or appeal. Such a litigant should not bear the economic burden of maintaining the constitutional order for the rest of Ugandans.

5 Conclusion

I would allow this appeal with costs in this Court and for reasons stated earlier in this Judgment in the Constitutional Court.

Dated at Kampala this day of 2017.

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JUSTICE DR. ESTHER KISAAYE
JUSTICE OF THE SUPREME COURT.