THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 56 OF 2013

(coram: Kenneth Kakuru, Geoffrey Kiryabwire, Elizabeth Musoke, Cheborion Barishaki & Stephen Musota, JJA/JJCC)

HUMAN RIGHTS NETWORK UGANDA:::::::::::::::::::::::::::::::: 1st PETITIONER

THE DEVELOPMENT NETWORK OF

INDIGENOUS VOLUNTARY ASSOCIATIONS (DENIVA):::::::: 2nd PETITIONER

THE UGANDA ASSOCIATION OF

FEMALE LAWYERS (FIDA):: 3rd PETITIONER

HON.MUWANGA KIVUMBI :: 4th PETITIONER

BISHOP DR .ZAC NIRINGIYE ::::::::::::::::::::::::::::::::::::::: 5th PETITIONER

VERSUS

ATTORNEY GENERAL:: RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

This petition is brought under Article 137(3) & (4) of the 1995 constitution of the Republic of Uganda and the Constitutional Court (Petitions and References) Rules 2005 Statutory Instrument No.91 of 2005.

Background

In **Constitutional Petition No.09 of 2005 Muwanga Kivumbi Vs Attorney General**, this Court declared section 32(2) of the Police Act unconstitutional. In 2013, the Parliament of Uganda passed the **Public Order Management Act (POMA)** and it was duly assented to. The Act places rather burdensome restrictions on an individual`s ability to exercise rights to hold public meetings, assemblies and processions. It also grants the Inspector General of Police or any officers he/she designates absolute discretion and broad authority to stop, control and use force to disperse public meetings. In addition, the Inspector General of Police or any of his delegated officers are authorized to impose criminal liabilities on organizers and participants of public meetings.

On the 10th day of December 2013, the Petitioners filed Constitutional Petition No.56 of 2013 challenging the constitutionality of various sections of the Public Order Management Act, 2013. They later filed an amended petition on the 27th day of June 2016.

The petition is accompanied by an Affidavit sworn by Mohammed Muwanga Kivumbi, a Member of Parliament for Butambala Constituency-the fourth petitioner herein. He was the Petitioner in Constitutional Petition No.09 of 2005 which nullified Section 32(2) of the Police Act.

The Respondent filed an answer to the petition in which he denied all allegations in the petition and contended that the Public Order Management Act (POMA) does not violate any provision of the Constitution or fundamental rights.

The answer to the petition is also accompanied by an affidavit sworn by Batanda Gerald State Attorney in the Respondent`s chambers. He denies every allegation and prays that the petition be dismissed.

Representations

At the hearing of this petition, the Petitioners were represented by Mr. Onyango Owor, while Mr. George Kalemera, Principal State Attorney represented the Attorney General.

The Petitioners filed in court their conferencing notes on 12th February 2016. Conferencing inter partes was done on 29th February, 2019. However, at the hearing of this petition on 13th June 2019, Counsel for the Petitioners informed court that he had filed written submissions and was abandoning all other issues raised in the petition except the two issues canvassed in the written submissions.

While I found this rather strange and unwise, ultimately, the Petitioners are free to prosecute their petition as they deem fit.

The remaining issue, following the abandonment of the rest of the allegations in the petition, relates to the constitutionality of Section 8 of the Public Order Management Act 2013. In essence, the petition was reduced to the constitutional validity of Section 8 of the Public Order Management Act.

Issues

The only issues for determination by this court therefore are;

I. ***Whether the enactment and assent to section 8 of the Public Order Management Act is inconsistent with and in contravention of Article 92 of the 1995 Constitution.***

II. ***Remedies available***

The principles for Constitutional Interpretation that guide this court are well settled. In **Male Mabirizi & Others vs Attorney General**, these principles were restated and discussed at length. The Supreme Court approved of the same principles as well. I will therefore only highlight the most relevant principles for emphasis.

It is well settled that in determining the Constitutionality of Legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either the effect animated by the object the legislation intends to achieve. The history of the Country and the Legislative history of the Constitution in particular are also relevant and offer a useful guide to Constitutional Interpretation

In **Trop Vs Dulles 356 US 86 [1958],** Chief Justice Earl Warren**,** writing for the majority Justices of the United States Supreme Court opined as follows on the role of courts in constitutional interpretation;

> *"We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the constitution. The Judiciary has the duty of implementing the Constitutional Safeguards that protect the individual rights. When the Government acts to take away*

the fundamental rights... the safeguards of the Constitution, should be examined with special diligence.

If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate a challenged legislation We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

I have taken the liberty to reproduce this rather lengthy quote because it applies to the unique circumstances of this petition. The issue that this petition raises before the court is fundamental as it touches upon the constitutionally guaranteed right to demonstrate peacefully and unarmed and the extent to which this right can be limited or subject to regulation by law enforcement agencies especially the Uganda Police Force.

It is an issue that this court must resolve bearing in mind that the duty imposed upon the Constitutional Court is not to push back Constitutional limits on the validity of Acts of Parliament that aim to whittle down liberties and rights but rather to expand oversight over the same.

It does not matter, in my view that the Petitioners have chosen to dispute the validity of Section 8 of the Public Order Management Act 2013 on the very narrow ground that it is a violation of Article 92 of the Constitution. The latter Article prohibits Parliament from passing any law whose effect is to overturn a judgment of court as between two parties. The Petitioners contend that the impugned Section 8 of the Act was passed to overturn the import of the decision of this Court in **Constitutional Petition No.09 of 2005 Muwanga Kivumbi Vs Attorney General.**

The issue also concerns the extent to which the parliament and the executive can pass legislation in response to decisions of this Court. This latter issue is equally fundamental as it partly touches on the doctrine of separation of powers.

Counsel for the Petitioners submits that the Article 92 of the Constitution restricts parliament from enacting retrospective legislation and that the enactment of section 8 of the Public Order Management Act, which is in pari materia with section 32(2) of the Police Act Cap 303 that was ruled unconstitutional in **Muwanga Kivumbi versus Attorney General** has the effect of altering the said decision of the Constitutional Court contrary to Article 92 of the Constitution.

It is contended that section **32(2) of the Police Act** was successfully challenged as being unconstitutional by the 4th Petitioner, Muwanga Kivumbi in **Muwanga Kivumbi V Attorney General (Supra)** but the same contents of section 32(2) of the Police Act which was struck down were re- enacted in section 8 of POMA which gives the Inspector General of Government powers and discretion to

prohibit gatherings, peaceful assemblies and to delegate his/her powers to an authorized officer.

Counsel submitted that the enactment of section 8 of the POMA completely reverses the decision of the Constitutional Court interferes with the rationale on which the decision of the constitutional court was based and by implication takes us back to the pre- Muwanga Kivumbi`s case which is an affirmation that the enactment of section 8 nullified the valid decision of the Constitutional Court contrary to article 92 of the Constitution.

Counsel contended that the rationale for Article 92 is found in the Doctrine of separation of powers which is accomplished through a system of checks and balances and that if parliament is allowed to pass a law to reverse a judicial decision whenever they are not happy with the decision of the court, then this may bring the validity of the doctrine of separation of powers into disrepute and affect respect for the rule of law.

Counsel cited **Shri Prithvi Cotton Mills Ltd and another v. Broach Borough Municipality & Ors 1970 AIR 192; 1970 SCR (1)358, *Sebaggala v Attorney –General and others [1995-1998]1EA 295(CAU) at 301, Uganda Law Society v Attorney General [2001] 1EA 301 (CAU) and Speaker of the National Assembly v De Luke 1999 (4) S.A (SCA)*** in support of his argumcnts.

In reply, Counsel for the Respondent submits that the purpose of the POMA is clarified as "to provide regulation of public meetings; to provide for the duties and responsibilities of police, organizers and participants in relation to public

meetings; to prescribe measures for safeguarding public order; and for related matters."

He contends that the purpose of the section is to operationalize Article 29 of the Constitution. He avers that as people express their right to free speech, expression, assembly and demonstration, there is a need by the law enforcers to ensure compliance with the Constitution. That it would not be wise to assume that all persons in the exercise of their right to assemble and peacefully demonstrate shall actually do so strictly in accordance with the law.

Counsel contends, on behalf of the Attorney General that the provisions of the POMA that authorize a police officer to stop or prevent the holding of public meeting are in no way an alteration of the decision in **Muwanga Kivumbi vs Attorney General** (supra).

Counsel submits that the onus is on the Petitioners to illustrate that Section 8 of the POMA applies retrospectively and in so doing alters the cited decision of **Muwanga Kivumbi vs AG (supra)**. Counsel contended that in order to illustrate that a law operates retrospectively, it must be expressly provided for in the impugned Act. He cited the case of **Secretary of state for social security v Tunnicliffe [1991]2 ALLER 712,724 para 3** for that proposition.

In rejoinder, Counsel for the Petitioners submits that Section 8 of the POMA is fundamentally similar both in form & effect to section 32(2) of the Police Act that was declared unconstitutional by this court for being prohibitive rather than regulatory.

Finally, he prayed that this court be pleased to find that the entire Section 8 of the POMA is inconsistent with and in contravention of Article 92 of the Constitution and accordingly declare the same null and void

I have carefully considered the submissions of both Counsel on the validity of Section 8 of POMA in light of the provisions of Article 92 of the Constitution. The question of whether the impugned Section violates the provisions of Article 92 in view of this Court's decision in **Muwanga Kivumbi vs Attorney General** supra is not a difficult one.

Article 92 of the Constitution provides that;

Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.

The nullified **Section 32(2) of the Police Act titled** power to regulate assemblies and processions provides as follows:

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

(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.

(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 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.

(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.

In a unanimous decision, this court nullified the above section 32(2) of the Police Act for being inconsistent with Article 20(1) (2) and 29(1) (d) of the Constitution in **Muwanga Kivumbi Vs Attorney General Constitutional Petition 9/2005.**

The Petitioners complain that Section 8 of the Public Order Management Act was deliberately enacted to overturn the import of this Court's decision as between the 4th Petitioner and the Respondent. If true, that is indeed a very grave contention and it therefore requires a careful review of this court's decision in the Muwanga case (supra).

At a very broad level, it cannot be surely argued that POMA was targeted at this Court's decision per se as it does not take away any personal advantage accruing to the said Honourable Muwanga Kivumbi, the 4th Petitioner in his individual capacity. However, that would be to adopt a very narrow and legalistic reading of the import of Article 92 of the Constitution bearing in mind that the decision

of this court alleged to have been targeted by Section 8 of POMA was constitutional matter resolving limits on the application of police powers to control demonstrations and peaceful protests.

I will therefore briefly review the decisions of individual Justices in that judgment for the purpose of placing the present petition in its proper context. The petition in **Muwanga Kivumbi vs Attorney General (supra)** challenged the validity of Section 32(2) of the Police Act contending that it violated Article 20(2) and Article 29(1) d of the Constitution. The Court unanimously agreed and struck down the said Section 32(2) of the Police Act.

C.K Byamugisha, JA who wrote the lead judgment of the Court held as follows;

> *"This fundamental right is closely related to freedom of religion, belief and opinion, the right to dignity, the right to freedom of association and the right to peaceful assembly etc. These rights are inherent and not granted by the State. It is the duty of all Government agencies who include the police to respect, promote and uphold these rights.*
>
> *These rights and many others taken together protect the rights of individuals not only to individually to form and express opinions of whatever nature, but to' establish associations of groups of like-minded people to foster and disseminate such opinions even when those opinions are controversial.*
>
> *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.

Peaceful assemblies and protests are a vital part of every domestic 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.

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.....

.....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.

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.

Therefore, find that powers give to the Inspector General of Police to prohibit the convening of an assembly or procession an unjustified limitation on the enjoyment of fundamental rights. Such limitation is not demonstrably justified in free and democratic country like ours."

Hon. Lady Justice L.E.M. Mukasa-Kikonyogo, DCJ in the same matter concurred that to interprete and uphold Section 32(2) of the Police Act as authorizing the police to prohibit assemblies would be unconstitutional. She held as follows;

"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 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"

G.M Okello, JA also agreed with the lead judgment and emphasized that the power to prohibit assemblies was not demonstrably justifiable in a free and fair society holding as follows,

"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 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 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."

A.E.N Mpagi-Bahigeine, JA similarly emphasized that the right of assembly is the aggregate of the individual liberty of the person and individual liberty of speech and that 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.

She held that 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 as opposed to curtailing people's enshrined freedoms and liberties on mere anticipatory grounds which could turn out to be false.

Christine Kitumba, JA similarly held that the powers given to the Inspector General of police by Section 32(2) of the Police Act were in clear contravention of the Constitution. She held that in a free and democratic society, the police is supposed to keep law and order and in case the inspector general of police sees

any possibility of a breach of peace at any assembly, the police should provide protection.

The challenged **Section 8 of the Public Order Management Act, 2013** provides for powers of authorized officer as follows;

> **(1) Subject to the directions of the inspector General of police, an authorized officer or any other police officer of or above the rank of inspector, may stop or prevent the holding of a public meeting where the public meeting is held contrary to this Act.**
>
> **(2) An authorized officer may, for purposes of subsection (1), issue orders including an order for the dispersal of the public meeting, as are reasonable in the circumstances.**
>
> **(3) An authorized officer shall, in issuing an order under subsection (2), have regard to the rights and freedoms of persons in respect of whom the order has been issued and the rights and freedoms of other persons.**
>
> **(4) A person who neglects or refuses to obey an order under this section commits an offence of disobedience of lawful orders and is liable on conviction to the penalty for that offence under section 117 of the Penal Code Act.**

As earlier stated, Article 92 of the Constitution bars Parliament from passing any law to alter the decision or judgment of any court as between the parties to the judgment. The words in this provision to wit; "parliament shall not", connote or show that the provision is couched in a mandatory manner. I find the above

words in the aforementioned Article plain and clear and thus I accord them the same plain, ordinary or natural meaning.

Further, while I am aware that the history of Article 92 was to prevent the legislature from violating property rights of successful litigants accruing from specific judicial decisions, the context of this petition now calls for a broader and purposive application of the said constitutional provision to decisions made in public interest and not conferring any particular individual property rights on any litigant.

On a strict reading of **Section 8 of POMA**, the following aspects arise; first and foremost, Subsection 1 grants discretionary powers to the Inspector General of Police (the IGP) who in turn can delegate or authorize any other officer to stop or prevent the holding of public meetings.

Subsection 2 further allows an officer authorized by the IGP to issue orders dispersing a public meeting as he/she deems reasonable in the circumstances whereas **Subsection 3** provides that while doing so he/she shall have regard to the rights of those to whom the order has been issued and other persons. Lastly, under **Subsection 4**, failure to adhere to orders issued therein above is an offence punishable under section 117 of the Penal Code Act.

There is no doubt in my mind that just like the nullified Section 32(2) of the Police Act, Section 8 (1) & (2) of POMA are neither couched in a regulatory manner nor are the powers therein intended to be exercised in the regulatory manner. The provisions of Section 8, on the face of it, clearly show that the section is prohibitory in nature.

It gives Police through the Inspector General of Police new powers to stop, prevent and disperse public meetings as was provided in the Police Act in section 32(2). Furthermore subsections 2, 3 and 4 stem from subsection 1 and thus cannot be read in isolation of subsection 1.

Without any hesitation therefore, I find that the provisions of **Section 8 of the Public Order Management Act 2013** are in pari materia with the nullificd **Section 32(2) of the Police Act**. The Justices of the Constitutional Court who determined **Muwanga Kivumbi vs Attorney General** laborcd to explain, in individual judgments, the reasons why the police cannot be permitted to have powers to stop the holding of a public gathering including a protest or demonstration ostensibly on grounds that such public meeting would cause a breach of the peace. It is a pity that their explanations for nullifying Section 32(2) of the Police Act were contemptuously ignored by parliament and the executive.

They unanimously emphasized that in the event the police anticipate a breach of the peace at a public gathering, their duty is to provide reinforced deployments and not to prohibit the planned gathering altogether. I am not convinced that this duty to provide reinforced deployments to supervise public meetings if the police have reasonable belief that a breach of peace might occur is an onerous one.

In my view, supervision of public order is a core duty of the police and it cannot be discharged by prohibiting sections of the public from exercising their constitutionally guaranteed rights to demonstrate peacefully or hold public meetings of any nature. This was the *ratio decidendi* of this Court's decision in

Muwanga Kivumbi vs Attorney General and its import is clearly limited and out rightly disregarded by the impugned Section 8 of POMA.

Consequently, the enactment of Section 8 of the Public Order Management Act 2013 was done in blatant disregard, by Parliament, of Article 92 of the Constitution. This impugned provision was calculated, rather unfortunately, to water down the import of this Court's decision in **Muwanga Kivumbi vs Attorney General.** On this ground alone, I would answer the framed issue in the affirmative and allow the present petition.

It is important to note that in as much as the impugned section 8 is not in similar words with the nullified section 32(2) of the Police Act, the latter's subject matter, purpose and effect were only modified and varied in some degree but its true identity was never lost or destroyed. Section 8 of the Public Order Management Act 2013 is clearly a "reincarnation" of the nullified Section 32(2) of the Police Act for all intents and purposes.

I must note that subverting the import of a court`s decision/judgment, in this manner, interferes with the doctrine of separation of powers contained in the Constitution. Passing legislation that alters or undermines a judicial decision has dire implications for the future application of the checks and balances necessary for the functioning of a civilized democracy and prevention of peremptory behavior by the three pillars of government, namely, the Legislature, Executive and Judiciary.

The above aforementioned doctrine has been at the very core of Uganda`s growing constitutional governance and no room should be given to attempts to

whittle down this growth and regress into the dark days of the political and constitutional instability. All efforts must be made by all arms of government to protect this young constitutional democracy. The enactment of Section 8 of POMA by the legislature following this court's decision striking down a similar provision in the Police Act was a blatant attempt at disregarding the checks on legislative powers.

While there are plausible circumstances in which Parliament may enact constitutionally valid legislation in reaction to a judicial decision without necessarily violating Article 92, those scenarios are not present in this petition. For instance, parliament may repeal a Statute that founds a cause of action and as long as it is not applied to past judgments or matters pending in court, such an Act could be valid.

In this context, the only plausible legislation that parliament could possibly pass, in reaction to the judgment of **Muwanga Kivumbi vs Attorney General**, without offending Article 92 would be to amend the said Article itself alongside Article 29 of the Constitution. Such an amendment could itself trigger very complicated constitutional questions as human rights provisions form part of the basic structure of our constitution.

It therefore defeats logic as to why parliament would rush to pass an Act of Parliament containing provisions that are in pari materia with those that were declared unconstitutional.

In my view, to uphold Section 8 of POMA which authorizes the police to stop, prevent and disperse public meetings when a similar provision was nullified in

Muwanga Kivumbi vs Attorney General would be to acquiesce in undermining the authority of this court.

It is only proper that any judgment pronounced by the court should receive the utmost respect, and should only be altered in the manner in which the law provides it may be altered. Consequently, the issue is answered in the affirmative on this very narrow ground that Section 8 of the POMA violates Article 92 of the Constitution.

However, for the sake of completeness and to give guidance to law enforcers, I will clarify on a number of concerns related to the exercise of freedom of assembly and the right to demonstrate peacefully and unarmed in relation to police powers to ensure there is no breach of peace in exercise of such rights. The learned Attorney General in his submissions contends that police powers under the unconstitutional Section 8 of POMA are necessary to prevent a breach of the peace in exercise of rights to hold public meetings and related gatherings or processions.

Public processions, meetings or gatherings, irrespective of whether they are of a political, religious or social nature are protected by the constitutionally guaranteed freedoms of expression, free speech and assembly. Peaceful public protests are equally protected by the constitution.

I do not agree that POMA was intended to operationalize Article 29 of the Constitution as asserted on behalf of the Attorney General. Clearly its principal purpose, as discernable from Section 8, is to enable the police to suppress enjoyment of a constitutionally guaranteed freedom of assembly using very

arbitrary discretion. A clear abuse of the powers vested in police by POMA was considered in **Male Mabirizi & Others vs Attorney General** in addressing the question of suppression and violent dispersal of peaceful consultative rallies organized by some of the Petitioners in the said petition.

In my view, that abuse was enabled by the impugned Section 8 of POMA which clearly authorized the police to arbitrarily determine which rallies to disperse. In other words, the said provision became a tool that the police directed to partisan purposes under the guise of preserving public order.

There is no doubt that public order is necessary in any society. A law regulating public order may be justifiable. Advanced and growing democracies, including the United Kingdom whose legal system has historically shaped ours, have legislation to regulate public order. However, the manner in which public order laws are interpreted and implemented by both the law enforcement agencies and courts of law differs sharply between this country and the English legal system.

However, world over, law enforcement organs in democratic states do not suppress public gatherings or peaceful protests in the name of protecting public order. Neither do they require that organizers of public meetings or peaceful protests must have prior permission or clearances from the police. Provided a protest or public gathering is peaceful, it does not matter that it may be disruptive or even inconveniencing due to the large numbers of individuals that may participate in the same.

Unfortunately, the context in which POMA was passed and is routinely applied portrays a different intention and understanding of the same by law enforcement

in my view. Law enforcers, particularly the Police Force, believe that POMA empowers them to ban or violently disperse public meetings of a political nature or even social gatherings organized by certain categories of individuals. This is most unfortunate.

This Court cannot fail to take judicial notice of the fact that the police have indeed suppressed numerous public gatherings of a political or social nature in the name of maintaining public order. I already pointed out that in **Male Mabirizi & Others vs Attorney General**, this Court dwelt at some length on illegal police directives that had been issued to suppress certain public gatherings of a political nature which were organized by politicians of a particular persuasion.

In my view, the illegal directives that were the subject of that petition obtained their apparent legitimacy from the provisions of POMA. It is for that reason that this Court must express itself unequivocally that the police have absolutely no legal authority to stop the holding of public gatherings on grounds of alleged possible breach of the peace if such gatherings are allowed to proceed.

The police's duty is to regulate the holding of public gatherings and ensure there is no breach of peace. For instance, organizers of a gathering intended to be held in a hospital or military installation may be directed to a different place. In all other cases, all that police needs to do is deploy its personnel to supervise a public meeting and guard against the same becoming violent. I wholly reject the notion that the police have super natural powers to determine that a particular public gathering should not be allowed to happen because it will result into a breach of the peace.

A breach of the peace may result not from participants in a public gathering but rather from unlawful interference with the same by third parties. The attention of the police is supposed to be directed at the actual individuals causing a breach of the peace. This is the approach to the notion of causing a breach of the peace in English Law.

The notion that public meetings should be held without inconveniencing anyone, which is clearly evident in the Attorney General's submissions is without merit. As this court held in **Muwanga Kivumbi vs Attorney General,** there is some reasonable inconvenience to be expected from the holding of a public gathering or political protest. There is little doubt that numerous social gatherings, such as sports related gatherings, religious gatherings, wedding motorcades inter alia cause some measure of inconvenience to the rest of the public going about their private lives yet the same are routinely, and rightly so, allowed to proceed without disruption by the law enforcement. This same attitude must be applied to political protests and public meetings of a political nature.

The assumption that public meetings of a political nature, or social gatherings held by politicians, are more likely to cause a breach of the peace because they have not been authorized by police and should not be allowed to happen is not correct. Neither is the assumption that failure to notify police of an intended public meeting of a political nature is good enough excuse to violently disperse the same. The blanket prohibition on holding of public meetings that have no police permission or prior notification is simply unconstitutional and a violation

of Article 29 of the Constitution which among others guarantees the right to freedom of peaceful assembly and demonstration.

I also take judicial notice of the fact that certain social gatherings, such as sports competitions between rival teams, music shows inter alia also occasionally cause a breach of the peace but the law enforcers do not react by prohibiting such competitions or games from taking place in the future. Besides, to do so would be unconstitutional.

The refusal to extend the same favor to public gatherings of a political nature is simply a reflection of an unconstitutional animus by law enforcement against political activities.

Public meetings/processions or gatherings, even those of a political nature, must be equally seen in the same prism as other tolerable social or religious gatherings that may provide some measure of inconvenience to the public. Individuals who conduct public meetings such as peaceful protests and processions in violation of the law or police orders should not be treated like dangerous criminals even if their defiance of lawful orders is not to be condoned.

This is not to suggest that any order by the law enforcers prohibiting a planned public meeting or ordering one to disperse is lawful. The notion that all orders issued by the police prohibiting a public meeting, procession or gathering for whatever arbitrary reason are lawful is equally unconscionable.

Such a notion, that all orders issued by police or law enforcement stopping a planned or on going public meeting are lawful, is in violation of **Article 43.**

Limitations on enjoyment of constitutionally guaranteed rights must be demonstrably justifiable and acceptable in a free and democratic society.

Prohibition of public meetings, protests or processions on grounds that the police has declined to provide permission or not received notification of the same is not a lawful limitation on the constitutional freedoms of assembly and right to demonstrate peacefully and unarmed. Police permission is not required before the public can assemble or hold a demonstration.

Unlawful orders, including those issued by law enforcement agencies such as the police, may be lawfully disregarded. Courts of law in various jurisdictions have ruled that no criminal liability should attach to an individual for disregarding a police order issued unlawfully even if under the guise of preventing a breach of the peace.

This is the practice in all civilized communities. I will therefore briefly summarize some jurisprudence on this question to confirm that this is not a novel position at all.

Public meetings, political protests and other related gatherings are not a new phenomenon unique to this country. The legality of police powers to suppress protests and public gatherings is a question that has been determined in various jurisdictions and one with very wide treatment in English Law.

Similarly, the desire by law enforcement to suppress public gatherings as opposed to regulating them is not unique to the Uganda Police Force and related security agencies. It is a temptation of law enforcement in various jurisdictions.

Courts routinely check the same in the name of preserving and asserting the fundamental rights of freedom of expression, conscience and assembly inter alia. It is only in undemocratic and authoritarian regimes that peaceful protests and public gatherings of a political nature are not tolerated.

The Judges of the English Supreme Court in **Redmond-Bate vs Director of Public Prosecutions, 1999 EWHC Admin 733 (23rd July 1999)** considered the curious conviction of a street preacher for disregard of lawful orders issued by a police officer to desist from preaching on grounds that she was causing a breach of the peace as the content of her street sermons incited some of the listeners and she refused to stop preaching when ordered to do so by a police officer. In allowing her appeal and quashing the conviction, the Supreme Court held that she had not committed any offence in preaching and the directive by the police officer to her to stop preaching was, in the circumstances, unlawful.

The Justices of the Supreme Court emphasized that the conduct of a public gathering or an individual protestor may not necessarily be the cause of a potential breach of the peace. Rather it is the reactions of others, who may not like the content of the public speech or protest that may behave unlawfully. The police is required to stop the others from behaving unlawfully in reaction to a public speech or protest as opposed to stopping the speaker or protestor from proceeding with their speech or protest.

Lord Justice Sedley emphasized that, *"A police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or*

liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable that a constable is empowered to take steps to prevent it."

For this reason, it had been held much earlier in **Beatty v Gilbanks (1882) 9 QBD 308**, that a lawful procession by religious adherents of the Salvation Army which attracted disorderly opposition and was therefore the occasion of a breach of the peace could not found a case of unlawful assembly against the leaders of Salvation Army who organized the procession. The Court held that the natural consequences of the lawful procession of the Salvation Army could not include the unlawful activities of others opposed to it.

In essence, the Court upheld the legality of the procession by the Salvation Army adherents even though the same led to a breach of the peace. It was ruled that the breach of the peace was caused by those opposed to the said procession.

In **R v Nicol and Selvanayagam 1996 Crim LR 318**, it was held that before the Court can properly find that the natural consequence of lawful conduct by a defendant would, if persisted in, be to provoke another to violence, it should be satisfied that in all circumstances it is the defendant acting unreasonably rather than the other person. In other words, even where a public gathering results into a breach of the peace, the law enforcers should direct their attention at the cause of such breach and be satisfied that it is not some other third party as opposed to the convener of the public gathering.

It is for this reason that in **Wise v Dunning 1902 1KB 167**, a Protestant preacher was held to be liable to be bound over to keep the peace on grounds

that there was evidence that he habitually accompanied his public speeches with behavior calculated to insult Roman Catholics.

In **R v Howell 1982 2 QB 416**, Watkins LJ adopted the following test for determining whether a breach of the peace had been occasioned by a public gathering;

> *"... We cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property."*

This reasoning offers useful guidance for our own law enforcement in monitoring potential breach of the peace at a public gathering.

In **Duncan v Jones 1936 1KB 218**, Lord Hewart emphasized the relationship between personal liberty and the holding of public meetings or gatherings in the following passage;

> *"There have been moments during the argument in this case when it appeared to be suggested that the court had to do with a grave case involving what is called the right of public meeting. I say "called" because English law does not recognize any special right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it*

. . . is nothing more than a view taken by the court of the individual liberty of the subject." Additional emphasis is mine.

The **European Court of Human Rights in Steel and others vs The United Kingdom (Case No.67/1997)** held that the concept of breach of peace in English law is confined to persons who cause or appear to be likely to cause harm to others or who have acted in a manner "the natural consequence of which was to provoke others to violence".

Consequently, it held that there was a violation of the European Convention on Human Rights in respect of three out of the five Applicants in the captioned matter who were arrested and detained for peacefully handing out leaflets and manifesting their opposition to arms sales in public places. By contrast, the Court ruled that the arrest of the other two Applicants was not in violation of the Convention as they were obstructing the lawful activities of others.

The **English House of Lords in R vs Jones 2007 1 AC 13, per Lord Hoffman** while treating the question of public protestors who defy police orders and guidelines in the conduct of public protests urged lenience on the part of law enforcement and courts trying criminal suspects for violation of public order related crimes;

"... civil disobedience on conscientious grounds has a long and honorable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the

mark of civilized community that it can accommodate protests and demonstrations of this kind."

I would urge the same lenience on part of law enforcement and the courts of law in this country for the very reasons cited by the English House of Lords above. The passage of laws calculated to muzzle and penalize members of the public engaged in demonstrations, protests and similar activities is not in the interests of protecting our young democracy. We have good precedent in English law.

Outside English Law, the position is still not different. For instance, the United States Supreme Court has consistently held, in the past century, that public officials cannot have the right under the law to pick and choose which protests to permit and those to stop. It has been held that such an "unbridled power" to prohibit assemblies violates the Federal Constitution of the United States. **See Edwards v South Carolina 372 US 229(1963) and Shuttleworth v Birmingham, 394 US 147 (1969) among others.**

On the continent, in **South African Transport & Allied Workers' Union (SATAWU) & Another vs Jacqueline Garvas & Others CCT 112/11, 2012 ZACC 13**, the South African Constitutional Court nullified a provision in the Regulation of Gatherings Act of South Africa which imposed civil liability for tortious actions of organisers and convenors of protests and demonstrations. The Court held that this provision would have a chilling effect on the enjoyment of the right to peacefully assemble and demonstrate as organizers without appropriate financial muscle would be deterred from holding large protests that

they may not be able to control. Consequently, the Court ruled that the provision was not demonstrably justifiable in a democratic society.

It is also my view that the impugned provision does not pass the test of being a lawful restriction. While the right to assemble can be restricted or regulated as provided for under Article 43 of the Constitution, the restriction must be demonstrably justifiable.

Mulenga JSC in **Charles Onyango Obbo & Andrew Mwenda vs Attorney General, Constitutional Appeal No.2 of 2002** held that restrictions on enjoyment of freedoms must pass the test of being demonstrably justifiable in a free and democratic society. In this context, a provision whose effect is to give the law enforcement unbridled power to determine which public gatherings can take place is certainly not unacceptable in a free and democratic society.

In **Col (Rtd) Dr Kiiza Besigye vs Attorney General, Constitutional Petition No.33 of 2011**, in his dissenting opinion, Kakuru JA/JCC emphasized the rights of citizens to political expression and association and held that the acts of Uganda Police Force in criminalizing exercise of political rights are unconstitutional. He held as follows;

> *"Citizens of this Country are free to walk, demonstrate, shout or otherwise express their discontent with policies, actions, laws or lack of them at any time. It does not matter that those doing so are members of the political parties in opposition or ordinary citizens under whatever name called. See Olara Otunnu vs Attorney General, Constitutional Court Constitutional Petition No.12 of 2010, Muwanga Kivumbi vs Attorney General,*

Constitutional Court Constitutional Petition No.9 of 2005 and Moses Mwandha vs Attorney General, Constitutional Court Constitutional Petition No.05 of 2007. The rights enjoyed by members of the ruling party and its supporters are the same rights ought to be enjoyed by the rest of the population. One of the key tenets of democracy is that those with dissenting and or minority opinions must be allowed to express them within the law. Whilst doing so they commit no offence. Criminalizing dissent is therefore unconstitutional."

I agree with the portion of his judgment cited above. While the State has a duty to ensure that there is no breach of peace resulting from exercise of peaceful assembly by carrying out objective regulation, this duty does not amount to permission to wantonly disperse public gatherings or prohibit meetings of groups agitating for political causes that are opposed to the government of the day.

As I have elaborated, the concept of breach of the peace is subject to an objective test. It is not true that public gatherings or meetings are the cause of breach of the peace. It may, in some cases, be caused by law enforcement unduly interfering with the rights of protestors or demonstrators or individuals gathered in a particular space. Police action must be directed against those causing a breach of the peace by either interfering with peaceful public gatherings or those who, in the course of a peaceful protest, depart from its objectives.

That is the proper duty of the State and it is not to be confused with the attempt in Section 8 of POMA of providing blanket powers to the police officers to stop any intended public meeting as they please by denying the same permission or

falsely claiming that they are in possession of intelligence that a certain gathering will lead to chaos.

As pointed out in the petition, the Petitioners appreciate the need for regulation of public meetings and gatherings but contend that such regulation should not infringe on the right of assembly and demonstration. I note that the rights said to be violated are not absolute and ought to be enjoyed without prejudice to the fundamental or other human rights and freedoms of others or the public interest.

The Police have powers under other provisions of the law such as the Penal Code Act to deal with situations such as those spelt out in section 8 of the POMA.

It is the duty of the police to ensure that there is a balance of the two interests. In doing so, it has to follow clearly laid out guidelines. There is therefore, an urgent need for the legislature to put in place regulations which the Police should follow while implementing the POMA.

In conclusion on this issue, I find that in enacting and assenting to the POMA with the impugned section 8, Parliament and the Executive acted in contravention of Articles 92 of the Constitution and therefore, it's null and void.

Consequently, I allow the petition not only on the narrow ground that the impugned Section 8 violated Article 92 but also on the wider ground that it violates Article 29 that guarantees freedom of assembly and the right to demonstrate peacefully and unarmed.

I have gone to great length to explain why the regulation of public gatherings must be done in good faith and without demonstrating or harboring animus

against particular groups such as political players from the opposition or civil society groups expressing themselves on questions of the day. Hopefully, this decision will provide much needed guidance to the law makers whose enactment of the impugned provision led to this petition and a pattern of violation of Article 29 of the Constitution by law enforcement organs.

In view of my discussion above, I would still have annulled the impugned Section 8 of the Public Order Management Act on wider grounds of violating Article 29 even if the decision of **Muwanga Kivumbi vs Attorney General** had never existed.

I therefore answer issue one in the affirmative.

Remedies

The remedies sought are spelled out at the beginning of this Judgment. I shall therefore not repeat them here.

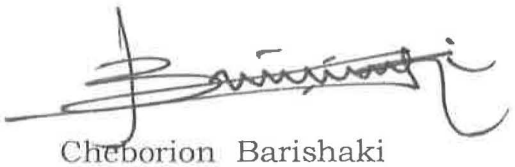
In view of my findings on issue 1, it is hereby declared that;

(a) That the action of the Respondent in enacting and assenting to section 8 of the Public Order Management Act which section is materially similar to section 32(2) of the Police Act that was declared unconstitutional by the constitutional court in Constitutional Petition No.9 of 2005, Muwanga Kivumbi vs Attorney General is inconsistent with and in contravention of Articles 29, 43 and 92 of the Constitution.

(b) The Petitioners are awarded the costs of this petition.

I so Order

Dated at Kampala this 26th of March 2020.



Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.56 OF 2013

1. HUMAN RIGHTS NETWORK UGANDA
2. THE DEVELOPMENT NETWORK OF

   INDEGENIOUS VOLUNTARY ASSOCIATIONS (DENIVA)
3. THE UGANDA ASSOCIATION OF :::::::::::::::::::::: PETITIONERS

   FEMALE LAWYERS (FIDA)
4. HON. MUWANGA KIVUMBI
5. BISHOP DR. ZAC NIRINGIYE

VERSUS

THE ATTORNEY GENERAL::RESPONDENT

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC

HON. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

HON. JUSTICE ELIZABETH MUSOKE, JA/JCC

HON. JUSTICE CHEBORION BARISHAKI, JA/JCC

HON. JUSTICE STEPHEN MUSOTA, JA/JCC

JUDGMENT OF STEPHEN MUSOTA, JA/JCC

INTRODUCTION :

This petition was brought under Article 137(3) of the Constitution of the Republic of Uganda, 1995 and the Rules 3 and 4 of the Constitutional (Petitions and References) Rules S.I No.91 of 2005, seeking for several declarations and orders.

Background

I have read the judgment of my learned brother Cheborion Barishaki JA/JCC and I agree with his summary of the background of this petition. I will not reproduce the same here.

At the hearing of the petition, Mr. Onyango Owor appeared for the petitioners and Mr. George Kallemera (Pricipal State Attorney) appeared for the respondent.

At the hearing on the 13th June 2019, Counsel for the petitioners informed court that he had filed written submissions abandoning all others issues and challenging only the constitutionality of Section 8 of the Public Order Management Act. Therefore in his written submissions, learned counsel for the petitioner raised only two issues for this court's determination which are;

> **Issues 1: Whether the enactment and the assent to section 8 of the Public Order Management Act is inconsistent with and in contravention of Article 92 of the 1995 Constitution?**
>
> **Issue 2: Whether the Petitioners are entitled to the remedies sought?**

I shall deal with the issues in the order in which they have been put to this court by the petitioners for determination.

I shall not reproduce the well settled principles for constitutional Interpretation as they have already been correctly and ably outlined by my learned brother Cheborion Barishaki JA/JCC in his lead judgment. However, I must emphasize that, as rightly observed by this court in the case of ***Dr. James Rwanyarare and Another v Attorney General*** Ruling in ***Constitutional Petition No. 5 of 1999,*** the entire constitution has to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other. In that case it was observed as follows;

> ***"Lord Justice Manyindo, DCJ (then) stated in Major General Tinyefunza Vs The Attorney General. Constitutional Petition No. 1 of 1996, Constitutional Court of Uganda (unreported) that:***
>
> > ***"...the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***
>
> ***Oder JSC (R.I.P), while talking about principles of constitutional interpretation remarked on in the same case that:***
>
> > ***"Another important principle governing interpretation of the Constitution is that all provisions of the Constitution concerning an***

issue should be considered all together. The Constitution must be looked at as a whole.

In South Dakota Vs North Carolina 192. US 268 (1940) L.ED 448, *the US Supreme Court at page 465 said that:*

> ***"Elementary rule of constitutional construction is that no one provision of the Constitution is to be segregated from all others and considered alone. All provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the instrument'.***
>
> ***In my judgment the principles of interpretation of the constitution to which I have referred above should be applied to the interpretation of our Constitution."***

I respectfully agree with those views. Different articles of the constitution on the same subject must be looked at and construed together without destroying each other so as to create harmony among them.

Determination of Issues

Issues 1: Whether the enactment and the assent to section 8 of the Public Order Management Act is inconsistent with and in contravention of Article 92 of the 1995 Constitution?

Submissions

In summary the submission of the petitioners on this issue are that since section 8 of the Public Order Management Act is similar to ***section 32(2) of the Police Act*** which was declared unconstitutional by this court,

then the enactment of the impugned ***section 8 of the Public Order Management Act*** was unconstitutional. The reason being that ***Article 92 of the Constitution of the Republic of Uganda*** restricts parliament from enacting retrospective legislation and prohibits parliament from passing any law to alter the decision of any court as between the parties to the judgment. That the decision of Parliament of the Republic of Uganda to pass the ***Public Order Management Act with Section 8*** which is similar to ***section 32(2) of the Police Act Cap 303***, which had been ruled unconstitutional in ***Constitutional Petition No. 09 of 2005; Muwanga Kivumbi vs Attorney General*** had altered the decision of this court. Further, the petitioners go ahead in their submissions to cite case authorities to demonstrate the rule against retrospective legislation and the rationale/importance of the said rule. Counsel then prays that this court finds ***section 8 of the Public Order Management Act*** unconstitutional for being inconsistent with ***Article 92 and Article 2 of the Constitution of the Republic of Uganda, 1995***.

The respondent's submission in reply, in summary, is that there is nothing retrospective about or in the effect of the provisions of the ***Public Order Management Act*** and the petitioners have not presented any proof of this allegation. Further that the ***Public order management Act*** does not alter the decision of court in ***Constitutional Petition No. 09 of 2005; Muwanga Kivumbi vs Attorney General*** because the *ratio decidendi* in the Muwanga Kivumbi case was that the impugned ***Section 32(2)*** of the Police Act was not regulatory but rather prohibitive as it gave powers to the Inspector General of Police or any authorized officer to prohibit the convening of an assembly or forming of a procession in any public place on a subjective reason contrary to ***Article 29(1)(d) of the Constitution***. In effect the learned Principal State Attorney is saying that the reason why

the said section of the ***Police Act*** was declared unconstitutional is because it gave the Inspector General of Police power to prohibit the freedom to assemble and demonstrate basing on an infinite or unspecified number of grounds. That on the other hand the purpose of the ***Public Order Management Act*** is not prohibitive but rather regulatory as seen from the long title of the Act. Counsel then prayed that this petition be dismissed for being misconceived and lacking merit.

In rejoinder, the petitioners reiterated their submissions and agreed with the respondent's submission that the rationale for declaring ***section 32(2) of the Police Act*** unconstitutional was that it was prohibitive. That however, parliament re-enacted the same provision in form of ***Section 8 of the Public Order Management Act*** which altered the decision of this court in ***Muwanga Kivumbi's case***. That the impugned ***section 8 of the Public Order Management Act*** is similar both in form and effect to the nullified provision of the Police Act and is thus unconstitutional and in contravention of the ***Article 92 of the Constitution***. Specifically counsel for the Petitioners cites ***section 8(1) of the Public Order Management Act*** which gives the Inspector General or any authorized officer power to stop or prevent the holding of a public meeting where it is held contrary to the provisions of ***the Public Order Management Act***. That the words ***"stop"*** and **"prevent"** in section 8 of ***the Public Order Management Act*** connote prohibition and not regulation.

Consideration of issue 1:

What comes out clearly from the submissions of the parties is that the resolution of this issue lies in first understanding the decision of this court in ***Constitutional Petition No. 09 of 2005; Muwanga Kivumbi vs Attorney General*** then juxtaposing the Provisions of ***Section 32(2) of the***

Police Act and ***Section 8 of the Public Order Management Act*** to determine whether they are similar both in form and effect. Last is by determining whether or not the enactment had the effect of reversing the decision of this court in **Constitutional Petition No. 09 of 2005; Muwanga Kivumbi vs Attorney General**.

I have read extensively the decision of this court in ***Constitutional Petition No. 09 of 2005; Muwanga Kivumbi vs Attorney General***. I agree with the interpretation of this decision by the learned Principal State Attorney that the reason why this court found ***section 32(2) of the Police Act*** unconstitutional is that the provision gave the Inspector General or an authorized officer powers to, out of personal discretion and for unlimited reasons, prohibit any assembly or gathering in a public place. This interpretation is clearly supported by the words which the Justices used in making the decision. I will quote;

G.M OKELLO, JA/JCC (then) had this say in support of the declaration that the provision was unconstitutional;

> ***"...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 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 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 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 fundamental right guaranteed under Article 29(1) (d). Application of purpose and effect principle of constitutional interpretation enunciated in the Queen VS Big 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."(emphasis mine)

Hon. Lady Justice L.E.M. Mukasa-Kikonyogo, DCJ (R.I.P) said while supporting the declaration of ***section 32(2) of the Police Act*** unconstitutional, that;

> ***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 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.(emphasis mine)***

Hon Justice A.E.N Mpagi-Bahigeine, JA/JCC (then) also had this to say in support of declaring ***section 32(2) of the Police Act*** as unconstitutional;

> ***It is the 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 dispersed 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.

C.K Byamugisha, JA also added that;

> ***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. (Emphasis mine)***

A logical analysis of the reasoning of the Justices of appeal/Constitutional Court in the Muwanga Kivumbi case, in my view, puts the success of this present petition before us in utter jeopardy. First the wording of the ***section 32(2) of the Police Act*** is completely different from that of **section 8 of the *Public Order Management Act***. Even the effect is totally different because in ***Section 32(2) of the Police Act*** what the IGP deemed reasonable would pass as a reason for prohibiting ***the convening of the assembly or forming of the procession*** whereas in The ***Public Order Management Act*** there is only one reason for stopping or preventing the holding of a public meeting and that reason is ***where the public meeting is held contrary to the Act.*** In my view this passes the test of what is acceptable and demonstrably justifiable in a free and democratic society.

In fact the Hon Deputy Chief Justice (then) Hon. Lady Justice L.E.M. Mukasa-Kikonyogo ***in the Muwanga Kivumbi case*** was very clear on the need for the rights under ***Article 29 to be enjoyed only in accordance with the law.*** She held that rights must be enjoyed within the confines of

the law as provided by ***Article 43 of the Constitution***. If I may quote she said;

> ***On perusal of the evidence before court and upon listening to the submissions of the counsel for both sides and the relevant provisions of the law, it is not disputed that the fundamental rights allegedly violated are not absolute. They must be enjoyed within the confines of the law as provided by Article 43 of the Constitution which reads as follows:-***
>
> > ***43. (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest.***
> >
> > ***(2) Public interest under this article shall not permit -***
> >
> > ***(a) Political persecution;***
> >
> > ***(b) Detention without trial;***
> >
> > ***(c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond 'what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.***

I therefore do not agree with the submission that the impugned section 8 of ***The Public Order Management Act*** is unconstitutional. In fact I do not believe that the enactment and assent to the said section was in contempt

of court orders or was an attempt to reverse the decision of this court. If anything the decision of this court is what caused the enactment of a clear law on the management of public order to avoid any doubt as to what the limits are. The limits are now cast in stone and are no longer at the whims or imagination of the Inspector General of Police or his authorized officers. As of today ***Section 32(2) of the Police Act Cap 303*** is still unconstitutional for the reasons which the justices of this court stated in the Muwanga Kivumbi case.

For ease of reference I shall quote the impugned provisions of the law. Under ***Section 32(2) of the Police Act*** it is enacted as follows;

> ***32. Power to regulate assemblies and processions.***
>
> ***(1) Any officer in charge of police may issue orders for the purpose of—***
>
> ***(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.***
>
> ***(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 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.

(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. (Emphasis mine)

Under ***section 8 of the Public Order Management Act*** it is enacted as follows;

8. Powers of authorized officer

(1) Subject to the directions of the Inspector General of Police an authorized officer or any other police officer of or above the rank of inspector, may stop or prevent the holding of a public meeting where the public meeting is held contrary to this Act.

(2) An authorized officer may, for the purposes of subsection (1), issue orders including an order for the dispersal of the public meeting, as are reasonable in the circumstances.

(3) An authorized officer shall, in issuing an order under subsection (2), have regard to the rights and freedoms of persons in respect of whom the order has been issued and the rights and freedoms of other persons.

(4) A person who neglects or refuses to obey an order issued under this section commits the offence of disobedience of lawful orders and is liable on conviction to the penalty for that offence under section 117 of the Penal Code Act. (Emphasis mine)

The ***Public Order Management Act*** only requires compliance with the law.

The freedom of assembly is provided for under ***Article 29 of the Constitution***. Under that ***Article 29 of the Constitution*** it is enacted as follows;

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;

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

(c) freedom to practice 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

(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—

(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.

Under ***Article 2 of the Constitution*** it is enacted as follows;

2. Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

It is true that the constitution is the supreme law and any law must be consistent with its provisions, however, the said provisions of the constitution must be interpreted as a whole and in harmony.

Article 92 of the Constitution of the Republic of Uganda provides;

92. Restriction on retrospective legislation.

Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.

I do not interpret the actions of the legislature in enacting or the president in assenting to the Public Order Management Act as altering the decision of this court in the ***Muwanga Kivumbi case***. As I have already explained in this judgment ***Section 8 of the Public Order Management Act*** provides an objective test for regulating the public. It standardized the requirements and created certainty of what is needed in order for persons to hold public meetings unlike ***Section 32(2) of the Police Act*** which left the decision entirely to the Inspector General of police and his authorized officers. I am therefore not convinced that the Public Order Management Act altered the decision of this court in the Muwanga Kivumbi case.

I also hold that the Police has a duty under Article 212 of the Constitution of the Republic of Uganda to detect and prevent crime. The constitution therefore recognizes in equal measure as it does the enjoyment of rights that it is in the public interest for the Uganda Police to prevent and detect crime. **The Public Order Management Act** facilitates the police in performing this duty. How it is done is what should be under scrutiny rather than trying to challenge the power of the police to do it. There is no society that is devoid of regulation and certainly there is no democratic society which has no regulation on how individual or group rights should be exercised. If the constitution requires that the exercise of rights must be in conformity with the law, who then must enforce it and how should it be done? In the case of public meetings, the answer lies in the Public Order Management Act and section 8 of thereof is a crucial part of the process.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0056 OF 2013

1. **HUMAN RIGHTS NETWORK UGANDA**
2. **THE DEVELOPMENT NETWORK OF INDIGENOUS VOLUNTARY ASSOCIATIONS (DENIVA)**
3. **THE UGANDA ASSOCIATION OF WOMEN LAWYERS (FIDA- U)**
4. **HON. MUWANGA KIVUMBI**
5. **BISHOP DR. ZAC NIRINGIYE::::::::::::::::::::::::::::::PETITIONERS**

VERSUS

ATTORNEY GENERAL:: RESPONDENT

(Coram: Kakuru, Kiryabwire, Musoke, Cheborion, Musota, JJA/JJCC)

JUDGMENT OF ELIZABETH MUSOKE, JA/JCC

I have had the opportunity of reading in draft the judgments prepared by my learned brothers Cheborion and Musota, JJA. I agree with the analysis, findings and conclusions reached in the draft Judgment of my learned brother Hon. Justice Cheborion, JA's draft. As a corollary, I am unable to agree with the conclusions reached in the draft judgment of Hon. Justice Musota, JA. Having said that, I have a few words of my own to add in this matter.

Background

The present Petition was brought under **Article 137 (3)** of the **1995 Constitution**, **Rules 3 and 4** of the **Constitutional Court (Petitions and References) Rules S.I No. 95 of 2005**. The 1st, 2nd and 3rd Petitioners are legal entities having a keen interest in the development of democracy in Uganda and the inclusions of the citizens in the democratic process. The 4th and 5th Petitioners are people of some standing in society, being a Member of Parliament and a retired Bishop of the Church of Uganda, respectively. The two are united by their interests in civil rights activism and good governance advocacy. The respondent, was sued as is mandatory in

Constitutional Petitions, as the legal representative of the Government of Uganda.

The petitioners seek from this Court declarations that:

"a) **Section 4 (1) of the Public Order Management Act is inconsistent with Articles 2 (2), 8A, 29 (1) (a), 29 (1) (d), 29 (1) (e), 30, 38 (1), 38 (2) of the 1995 Constitution.**

b) **Section 4 (1) of the Public Order Management Act is inconsistent with Objectives II, V, X, XII, (II), XIII and XV of the National Objectives and Directive Principles of State Policy;**

c) **Section 4 (2) (b) of the Public Order Management Act is inconsistent with and in contravention of Articles 2 (2), 21 (1), 21 (2), and 21 (3), 29 (1) (a), 29 (1) (d), 29 (1) (e), 30, 38 (1), 38 (2) of the 1995 Constitution.**

d) **The Action of the Respondent in enacting and assenting to Section 3 and 8 of the Public Order Management Act which sections are substantially and materially similar to section 32 (2) of the Police Act that was declared unconstitutional by the Constitutional Court in Constitutional Petition No. 09 of 2005- Muwanga Kivumbi vs. Attorney General is inconsistent with and in contravention of Article 92 of the Constitution.**

e) **Sections 5 (1), 5 (2) (b), 5 (2) (c), 6 (1), 6 (3) and 7 (2), 8, 9, 10, 12 and 13 of the Public Order Management Act is inconsistent with and in contravention of the Respondent's International legal obligations pursuant to Articles 2 (2), 21 (1), 21 (2) and 21 (3), 29 (1) (a), 29 (1) (d), 29 (1) (e), 30, 38 (1), 38 (2) of the Constitution."**

As Katureebe, C.J observed in **Centre for Health, Human Rights and Development (CEHURD) & 3 Others vs. Attorney General, Constitutional Appeal No. 01 of 2013**, where a person petitions the Constitutional Court under Article 137 (3) (b) for a declaration to the effect that an act or omission by the government or any person or authority is inconsistent with or in contravention of the Constitution, and for redress where appropriate. The Constitutional Court is not only authorized to hear such Petitions, it is equally obliged to resolve the issues therein.

Similarly, under **Article 137 (3) (a)**, where it is alleged that an Act of Parliament is inconsistent with any provision of the Constitution, a Petition may be brought for a declaration to that effect and redress where appropriate.

Central to the present Petition is the Public Order Management Act, 2013 (POMA) which the petitioners allege to have provisions which are inconsistent with the Constitution.

In his draft Judgment, my learned brother Cheborion, JA/JCC focuses exclusively on **Section 8** of the **POMA** viz-a-viz the decision of **Muwanga Kivumbi vs. Attorney General, Constitutional Petition No. 009 of 2005**, and finds that the provisions of Section 8 of the POMA and those of Section 32 (2) of the Police Act, Cap. 303, which was nullified in the Muwanga Kivumbi case are in pari-materia, and that the Parliament in passing Section 8 of the POMA, acted in blatant disregard of the said decision which was inconsistent with Article 92 of the 1995 Constitution. Indeed, it is not illogical to conclude, as he does, that the motive of Parliament was to water down the import of that decision, and for that reason, I agree with the orders he makes on that point.

However, In my judgment, I will go further and discuss the other allegations in the Petition which do not relate to Article 92 of the Constitution. This is notwithstanding counsel for the petitioners' having purportedly abandoned other issues besides the issue in regard to Section 8 of the POMA in his submissions.

In **Foundation for Human Rights Initiative vs. Attorney General, Constitutional Appeal No. 03 of 2009, Kisaakye, JSC** stated that the Constitutional Court has a duty to consider and resolve all the claims made in the Petition presented before it and to determine whether the impugned legal provisions were unconstitutional or not. In doing so, the Constitutional Court may disregard a party's concession.

On the basis of that authority, I will proceed to discuss the constitutionality of all the impugned legal provisions in the present petition.

The POMA has a bearing on the right of assembly, which, like other fundamental rights and freedoms of the individual in the 1995 Constitution, is inherent and not granted by the State. Such rights and freedoms are supposed to be respected, upheld and promoted by all organs and agencies of Government and by all persons. **(See: Article 20 of the 1995 Constitution)**

The 1995 Constitution establishes that every person shall have the right to freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition. **(See: Article 29 (1) (d) of the 1995 Constitution)**

This Court, has in the **Muwanga Kivumbi case (supra)** given an illustrative interpretation of the Constitutional provisions touching on the right of freedom to peacefully assemble and demonstrate. In her lead Judgment, with which other members of the Court concurred, **Byamugisha, JA/JCC** expressed the view that giving powers to the Inspector General of Police (IGP) to prohibit the convening of an assembly or procession was an unjustified limitation on the enjoyment of fundamental rights, which was not demonstrably justified in a free and democratic country like ours. She therefore nullified the impugned provision of the Police Act, Cap. 303 which gave the IGP such powers.

I must say here that the guidance offered in the above case is illustrative and not exhaustive. It can hardly be said that there can ever be an exhaustive statement of all the steps that must be taken by the relevant actors in order to respect, uphold, or promote the right to assembly. However, there are commendable steps to consider as a beginning point which take into account Uganda's international obligations in the field of respecting human rights, including the right to assembly.

The Petition raises several problems in the legal framework of the POMA. Firstly, that the definition of what a Public meeting is, as adopted in the POMA is inconsistent with **Articles 2 (2), 8 (A), 29 (1) (d) & (e) and 38 (2)** of the **1995 Constitution**.

I must observe that **Article 29 (1) (d)** which establishes the right to assembly, does not define what an assembly is. In a revised draft general

comment[1] on the right of assembly under Article 21 of the International Convention on Civil and Political Rights (ICCPR), prepared by Christof Heyns, a Rapporteur, whose first reading was finalized during the 127th Session of the UN Human Rights Committee, the following is stated:

> **"13. To qualify as an "assembly", there must be a gathering of persons with the purpose of expressing themselves collectively. Assemblies can be held on publicly or privately-owned property [provided the property is publicly accessible].**
>
> **14. The common expressive purpose of those participating in a peaceful assembly may, for example, entail conveying a collective position on a particular issue. It can also entail asserting group solidarity or identity. Assemblies may, in addition to having such an expressive purpose, also serve other goals and still be protected by article 21. While commercial gatherings would not generally fall within the scope of what is protected by article 21, they are covered to the extent that they have an expressive purpose."**

I would adopt the above definition that to qualify as an "assembly", there must be a gathering of persons with the purpose of expressing themselves collectively. Assemblies can be held on publicly or privately-owned property [provided the property is publicly accessible]. I find that the said definition is progressive enough and is implicit in **Article 29 (1) (d)** of the **1995 Constitution**. Coming to the definition in the POMA, Section 4 provides that:

> **"4. Meaning of "public meeting"**
>
> **(1) For purposes of this Act-**
>
> **"public meeting" means a gathering, assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.**
>
> **(2) A public meeting does not include-**

[1] This draft maybe accessed from the website of the Office of the UN High Commissioner for Human Rights at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx

(a) a meeting convened and held exclusively for a lawful purpose of any public body.

(b) a meeting of members of any registered organization, whether corporate or not, convened in accordance with the constitution of the organization and held exclusively for a lawful purpose of that organization;

(c) a meeting of members of a trade union;

(d) a meeting for social, religious, cultural, charitable, educational, commercial or industrial purpose; and

(e) a meeting of the organs of a political party or organization convened in accordance with the constitution of the party or organization, and held exclusively to discuss the affairs of the party or organization.

(3) ..."

Although the word "public meeting" is used interchangeably with "assembly" in the above provision, in my view, they mean one and the same thing. I have already noted earlier that rights and freedoms, like the right to assemble are inherent and not granted by the state. Parliament has no power to define where people may assemble, as for example in a public place or private place; or the power to say that assemblies with a social, religious or economic agenda are not public meetings, as it attempts to do in the above provision.

An attempt by Parliament to define what amounts to an assembly in a restrictive manner as it does in the POMA is very worrying. This is because, it places unjustified differentiation on the various categories of assemblies which is contrary to **Article 21** which prohibits discrimination. It also gives state actors room for selective application of the law in total abuse of the Constitution. All those flaws would result in the undermining of the protection of the right of freedom to assemble and demonstrate with others. For those reasons, the petitioners' claims that **Section 4 (1)** is inconsistent with the 1995 Constitution has merit and I would so declare.

The other issues which were highlighted in the framework of the POMA by the petitioners relate to Section **5, 6 (1) & (3), 7 (2), 8, 9, 10, 12 and 13** of the same Act. These provisions are in respect of the notification process

and formalities prior to convening of an assembly. The petitioners allege that the provisions place burdensome restrictions on an individual's ability to exercise his/her right to assemble; grants the Police powers to use force to disperse assemblies and impose criminal liability on participants. The petitioners maintain that the said acts are inconsistent with the 1995 Constitution, and other International and Regional Human rights treaties related to the right to assembly. The respondent answered that the said provisions do not impose the restrictions alleged in the Petition. In the alternative, that the restrictions contained in the POMA are permissible within the confines of Article 43 of the 1995 Constitution.

On the notification processes prior to convening assemblies, the draft General Comment on the right of Assembly referred to earlier states that:

> "80. **Notification systems entail that those intending to organize a peaceful assembly are required to inform the authorities accordingly in advance and provide certain salient details. Such a requirement is permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others. At the same time, this requirement can be misused to stifle peaceful assemblies. Like other interferences with the right of assembly, notification requirements have to be justifiable on the grounds listed in article 21. The enforcement of notification requirements must not become an end in itself. Notification procedures should not be unduly burdensome and must be proportionate to the potential public impact of the assembly concerned.**
>
> 81. **A failure to notify the authorities of an assembly [should not render participation in the assembly unlawful, and] should not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or the imposition of undue sanctions such as charging them with criminal offences. It also does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants.**
>
> 82. **In general, assemblies should be excluded from notification regimes where the impact of the assembly on others can reasonably be expected to be minimal, for example because of the nature, location or limited size or duration of the assembly.**

Notification must not be required for spontaneous assemblies since they do not allow enough time to provide such notice.

83. **The minimum period of advance notification required for pre-planned assemblies might vary according to the particular context. It should not be excessively long, but should allow enough time for recourse to the courts to challenge restrictions, if necessary.**

84. **Authorization regimes, where those wishing to assemble have to apply for permission (or a permit) from the authorities to do so, undercut the idea that peaceful assembly is a basic right. Where such requirements persist, they must in practice function as a system of notification, with authorization being granted as a matter of course, in the absence of compelling reasons to do otherwise. Such systems should also not be overly bureaucratic. Notification regimes, for their part, must not in practice function as authorization systems."**

The provisions of the POMA are not only unduly burdensome, but also leave at the disposal of the authorities the powers to use criminal law to sanction citizens merely for wanting to exercise their right to assemble.

Moreover, the police is given blanket powers to stop citizens from exercising their right to assemble. For example **Section 8 (1)** of the POMA provides that:

> **"Subject to the directions of the Inspector General of Police, an authorized officer or any other police officer of or above the rank of inspector, may stop or prevent the holding of a public meeting where the public meeting is held contrary to this Act."**

Having considered all the provisions of the POMA, I form the opinion that the effect of the said Act is unconstitutional. The POMA achieves the undesirable result of giving powers to the Police to grant or take away, at their whims and pleasure, the people's rights to assemble and protest.

In **Attorney General vs. Salvatori Abuki, Constitutional Appeal No. 1 of 1998** Oder, JSC held that the purpose and effect of a legislation is relevant in determining its constitutionality. He made the following observations:

"...in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by the object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked if not indivisible. Intended and actual effects have been looked to for guidance in assessing the legislation's object and thus, its validity. See The Queen v. Big Mart Ltd (1996) LRC (Supra).

...

In the view, consideration of the purpose and effect of a legislation is achieved only through its practical application or enforcement. It is only what effect the application produces that the object of a statute can be measured. The effect is the end result of the object."

Hon. Muwanga Kivumbi, MP states in paragraph 10 of the Affidavit in support of the Petition as follows:

"That the imposition of a de facto authorization procedure for peaceful assemblies that grants broad discretion to refuse peaceful assemblies by the police fundamentally and negatively affects my enjoyment of the right of assembly, peaceful demonstration and expression."

I hold the view that the above allegations are true. The product of the POMA in practical terms is the empowering of the police to grant and take away people's rights at its discretion. Such an exercise of powers does not reflect the values of the 1995 Constitution, and is a limitation on the right of freedom of assembly. The said limitation is not saved by Article 43 of the 1995 Constitution. This is because in a free and democratic society the police should facilitate rather than curtail the enjoyment of fundamental human rights.

The Police as one of the State Actors, should respect and ensure that the people exercise the right to assemble and demonstrate. This requires States to allow such assemblies to take place with no unwarranted interference and, whenever it is needed, to facilitate the exercise of the right and to protect the participants. (**See: Paragraph 8 of the Draft General Comment referred to earlier**).

The only role of the Police when faced with people who want to assemble and demonstrate is to facilitate their interests, and provide security to them. The Police may adopt the approach of Her Majesty's Inspectorate of Constabulary of the UK which has stated that:

> **"The police as a service has recognized and adopted the correct starting point for policing protest as the presumption in favour of facilitating a peaceful protest."**

The Police should presume that all assemblies are peaceful and require their facilitation. In contradistinction, a violent protest does not have the protection of the 1995 Constitution, but a mere apprehension of violence by protesters should not be used to stop an assembly. Even violence by some protesters should not lead to its dispersal, but the police should apprehend the violent elements. The above principles were expressed in the various judgments of this Court in the **Muwanga Kivumbi case (supra)**.

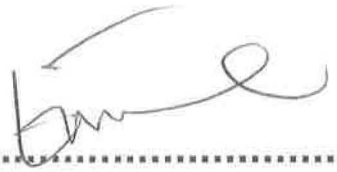
Unfortunately, the POMA embraces a regime of repression aimed at curtailing the citizens' enjoyment of their right to assemble and demonstrate. This is wholly unacceptable. In my view the effect of the POMA legal framework is that it encourages the police to begin with a presumption that assemblies should be stopped unless authorized by the police. This means that in practice the police grants and takes away the right of freedom of assembly as it pleases.

Therefore, I would have no hesitation in granting the petitioners the declarations they seek that **Sections 4 (1), 5 (1), 5 (2) (b), 5 (2) (c), 6 (1), 6 (3)** and **7 (2), 8, 9, 10, 12 and 13** of the POMA are inconsistent with and/or in contravention of **Articles 2 (2), 8A, 29 (1) (a), (d) & (e), 30, 38 (1), 38 (2) of the 1995 Constitution**. The impugned sections are therefore null and void.

I am also alive to the fact that the said impugned provisions form the core of the POMA, and give it the unconstitutional effect referred to earlier. Therefore, I would order for the Public Order and Management Act, 2013 to be struck out for having an unconstitutional effect.

I would also order each party to bear its own costs of the Petition.

Dated at Kampala this 26th day of March 2020



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Elizabeth Musoke

Justice of Appeal/Constitutional Court

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION No. 56 OF 2013

1. HUMAN RIGHTS NETWORK UGANDA
2. DENIVA
3. FEMAL LAWYERS (FIDA)
4. Hon. MUWANGA KIVUMBI
5. BISHOP ZAC NIRINGYE

PETITIONERS

VERSUS

ATTORNEY GENERAL UGANDA.....RESPONDENTS

JUDGMENT OF Hon. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

I have read the Judgment of The Hon. Mr. Justice Cheborion Barishaki in this matter and I agree with his findings and decisions. I will however add a few thoughts of my own to this decision as well.

The background, facts and issues in this matter are well laid out in the decision of The Hon. Mr. Justice Cheborion Barishaki and I shall not repeat them here in my Judgment as well. Equally my learned Brother has adequately dealt with the principles of constitutional interpretation and therefore I shall not repeat here as well.

When the Petition came up for hearing, Counsel for the Petitioner stated to the Court that he would concentrate on two issues and abandon the rest of the issues

that had been framed in the Petition. The Court then allowed the rest of the hearing to proceed by way of written submissions.

The question for interpretation rests on the constitutionality of Section 8 of the Public Order Management Act 2013 (hereinafter referred to as POMA) as framed by the parties in issue No 1 which reads

"Whether the enactment and assent to Section 8 of the Public Order Management Act is inconsistent with and in contravention of Article 92 of the 1995 Constitution?"

The second issue relates to remedies.

The said section 8 of the POMA provides for the powers of an authorised officer and states:

"

1. *Subject to the directions of the Inspector General; of Police, an authorised office or any other police officer of or above the rank of Inspector, may stop or prevent the holding of a public meeting where the public meeting is held contrary to this Act*
2. *An authorised officer shall, in issuing an order under subsection (1), issue orders including an order for the dispersal of the public meeting, as are reasonable in the circumstances*
3. *An authorised officer shall, in issuing an order under subsection (2), have regard to the rights and freedoms of persons in respect of whom the order has been issued and the rights and freedoms of other persons*

4. *A person who neglects or refuses to obey an order under this section commits an office of disobedience of lawful orders and is liable on conviction to the penalty for that offence under section 117 of the penal code Act..."*

It is argued by the Petitioners that the above section was enacted to overturn the effect and result in case of **Muwanga Kivumbi V Attorney General** Constitutional Petition No 09 of 2005. In that matter the Petitioner (also 4th Petitioner here) successfully challenged as unconstitutional Section 32 (2) of the Police Act. The said Police Act provided:

"

32. Power to regulate assemblies and processions.

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

(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.

(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

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.

(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..."

It is the case for the Petitioners in this matter that Section 8 of the POMA in effect reversed the decision of this court contrary to Article 92 of the Constitution which provides:

"...Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment..."

I agree with the findings of my learned Brother that the import and effect of Section 8 of the POMA is the same as that of Section 32 (2) of the Police Act and therefore falls foul of and is also inconsistent with Article 92 of the Constitution.

I find that this entire matter points to the need for this Court to reassert two important constitutional principles. First is the supremacy of the Constitution to which all authorities and persons in Uganda should adhere to.

Article 2 (1) of the Constitution provides:

"...

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda..."

The second principle is that the variation of a court decision by Parliament is inconsistent with the notion of the independence of the judiciary as provided for under Article 128 by *de facto* providing an alternative source of control or direction over the decisions that the Judiciary renders. Such alternative source or direction is an interference with the courts judicial function. Article 128 (1)-(3) of the Constitution is very clear and self-explanatory in this regard. It provides:

"

(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.
(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.
(3) All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts..."

The independence of the judiciary and in particular its judicial function of adjudication is an important component of the checks and balances within the arms of Government and therefore the observance of the rule of law, good governance, the principles of democracy, accountability and the protection of human rights.

Non observance of the above principles would make an Act (of Parliament with a big "A") or act (of authority or person with a small "a") that *de facto* alters a decision of court to be inconsistent with the Constitution. Article 2 (2) of the Constitution in particular provides:

"...

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void..."

It follows therefore that Section 8 of the POMA is void by reason of inconsistency with the above two principles alluded to above. My learned Brother has expounded well on this in his Judgment but I too add emphasis to what he has written on these two important constitutional principals.

It is the mandate of the courts to resolve dispute through the exercise of judicial power as provided for under Article 126 of the Constitution. It matters not in my view, whether the subject matter of the dispute is one that relates to issues of fundamental rights and freedoms (as is the case in this matter) or some other issue or subject like land and or crime. Indeed in our adversarial system of adjudication there may be successful or unsuccessful parties as a result of a decision or judgment that has been rendered by the courts. That is how it is. If a party is dissatisfied with a decision rendered by the courts, then the Constitution has established an elaborate appellate system for such a party to pursue. It is not open for that authority or person instead to seek to overturn the court decision through legislation. To do so is not only to attack the Constitution which is the supreme law of the land by operating outside its parameters but also to undermine the independence of the judiciary.

In the **Muwanga Kivumbi Petition** (supra) it was the unanimous decision of the Court to allow the petition and it was declared that Section 32 (2) of the Police Act was inconsistent and contravened Article 20 (1) (2) and 29 (1) (d) of the

Constitution and was therefore null and void. The upshot of that decision was that said Section 32 (2) of the annulled Police Act was prohibitive and not regulatory and therefore not acceptable and demonstrably justifiable in a free and democratic society. I too find that the effect and the operation of Section 8 of POMA is similar to section 32 (2) of the annulled Police Act in that POMA is interpreted and applied in exactly the same way as the annulled section in the Police Act. The result is that POMA and especially so Section 8 thereof, is applied in a prohibitive and not regulatory manner because it is completely within the discretion of the Inspector General of Police, an authorised office or any other police officer of or above the rank of Inspector, to stop or prevent the holding of a public meeting where in their view the said meeting is being held contrary to this Act. This is not withstanding the contention of counsel for the Attorney General in their written submissions that:

"...we submit that as a result of the annulment of section 32 (2) of the Police Act, the Uganda Police Force no longer had the power to prohibit a procession or assembly on a public road or street, even where the Inspector General of Police has reasonable grounds based on intelligence to believe that the assembly or procession is likely to cause a breach of the peace..."

If the submissions of counsel for the learned Attorney General were correct then this petition would not have been filed. Furthermore there are no regulations that have been made under POMA to allow for its objective, fair and equitable application. The discretion to prohibit a peaceful procession or assembly that is guaranteed under the law should be exercised justly and transparently failing which clear, acceptable and justifiable rules on how that discretion is applied should be made.

For the above reasons I too also answer issue No 1 in the affirmative. I adopt the declarations and orders of my learned brother Justice Cheborion Barishaki.

Dated at Kampala this 26th day of March 2020

Hon. Mr. Justice Geoffrey Kiryabwire

Justice of Appeal/Justice of the Constitutional Court.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 56 OF 2013

1. HUMAN RIGHTS NETWORK UGANDA
2. THE DEVELOPMENT NETWORK OF INDIGENOUS VOLUNTARY ASSOCIATIONS (DENIVA)
3. THE UGANDA ASSOCIATION OF FEMALE LAWYERS (FIDA)
4. HON.MUWANGA KIVUMBI
5. BISHOP DR .ZAC NIRINGIYE

.....PETITIONERS

VERSUS

ATTORNEY GENERAL:: RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/ JCC
Hon. Mr. Justice Geoffrey Kiryabwire, JA/ JCC
Hon. Lady Justice Elizabeth Musoke, JA/ JCC
Hon. Mr. Justice Cheborion Barishaki, JA/ JCC
Hon. Mr. Justice Stephen Musota, JA/ JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned brother the Hon. Mr. Justice Cheborion Barishaki, JA/JCC. I agree with him that, this petition raises issues for constitutional interpretation. Kiryabwire and Musoke, JJA/JJCC A also agree that, the objection to it by the respondent on that account is misconceived and without merit and ought to be dismissed. Cheborion Barishaki, JA/JCC has in his Judgment ably set out the representations, the background to this petition and the

applicable law. He has also set out the submissions of the parties. I have no reason to reproduce them here.

For the reasons set out in the Judgment of Cheborion Barishaki, JA/JCC I would likewise answer the first issue in the affirmative, and repeat the declaration and orders set out in his Judgment.

I would however, like to add further as follows;-

There are five petitioners in this petition, which they filed jointly on 10th December 2013. In their petition, they jointly and severally contend as follows:-

NOW your petitioners contend that:-

(a) Section 4(1) of the Public Order Management Act which defines a public meeting as a gathering, assembly, procession or demonstration in a public place or premise held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest is inconsistent with Articles 2(2), 8A, 29(1) (a), 29(1) (d), 29(1) (e), 38(1), and 38 2) of the 1995 Constitution of Uganda;

(b) Section 4(1) is of the Public Order Management Act which defines a public meeting as a gathering, assembly, procession or demonstration in a public place or premise held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest is inconsistent with Objectives II, V, X, XII (II), XII (III), XIII, XV, and XXVIII (1) (b) of the National Objectives and Directive Principles of State Policy;

(c) Section 4(2)(b) which states that a Public meeting does not include a meeting of any registered organization whether corporate or not, convened in accordance with the Constitution of that organization and held exclusively for a lawful purpose of that organization is inconsistent with and

in contravention of Articles 2(2), 21(1), 21(2), and 21(3) 29(1) (a), 29(1) (d), (e), 30, 38 (1), 38(2) of the 1995 Constitution;

(d) The Act of the Respondent in enacting and assenting to Sections 5 and 6 of the Public Order Management Act which sections are substantially and materially similar to Section 32(2) of the Police Act that was declared unconstitutional by the Constitutional Court in Constitutional Petition No 09 of 2005 -Muwanga Kivumbi vs Attorney General is inconsistent with and in contravention of Article 92 of the Constitution;

(e) Sections (5), 6(1) and (3), 7(2), 8, 9, 10, 12, 13 of the Public *Order Management Act which place burdensome restrictions on individuals' ability to exercise fundamental rights, grant police broad authority to use force to disperse assemblies, and impose criminal liabilities on organizers and participants of public meetings are inconsistent with the Respondent's international legal obligations pursuant to Objective XXVIII (i) (b) of the National Objectives and Directive Principles of State Policy and Articles 2(2), 21(1), 21(2), and 21(3), 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2);*

15. The petition is supported by the Affidavits sworn by the fourth petitioner and attached hereto. The 1st, 2nd, 3rd and 5th Petitioners filed supplementary affidavits;

Following the contentions set out in the petition, the petitioners seek the following remedies at pages 5 and 6 of the petition:-

> *"WHEREFORE your petitioners bring his petition and humbly pray that this honorable court may be pleased to grant the following orders and declarations:*
>
> *Declarations that:*

(a) *Section 4(1) of the Public Order Management Act is inconsistent with Articles 2(2), 8A, 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2);*

(b) *Section 4(1) is of the Public Order Management Act is inconsistent with Objectives II, V, X, XII (II), XII (III), XIII, and XV of the National Objectives and Directive Principles of State Policy;*

(c) *Section 4(2)(b) of the Public Order Management Act IS inconsistent with and in contravention of Articles 2(2), 21(1), 21(2), and 21(3) 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2) ofthe 1995 Constitution;*

(d) *The Action of the Respondent in enacting and assenting to Sections 5 and 6 of the Public Order Management Act which sections are substantially and materially similar to Section 32(2) of the Police Act that was declared unconstitutional by the Constitutional Court in Constitutional Petition No 09 of 2005 -Muwanga Kivumbi vs Attorney General is inconsistent with and in contravention of Article 92 of the Constitution;*

(e) *Sections 5(1), 5(2) (b), 5(2) (c), 6(1) and (3), 7(2), 8,9, 10, 12, and 13 of the Public Order Management Act inconsistent with and in contravention of the Respondent's international legal obligations pursuant to Articles 2(2), 21(1), 21(2), and 21(3,) 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2) of the Constitution;*

ORDERS that:

(a) *Sections 4(1), 4(2)(b), 5, and 6 of the Public Order Management Act be struck out of the Act for being inconsistent and in contravention of Articles 2(2), 8A, 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), and 38(2); Objectives II, V, X, XII (II), XII (III), XIII, XV,*

and XXVIII of the National Objectives and Directive Principles of State Policy;

(b) Sections 7(2), 8, 9, 10, 12, and 13 of the Public Order Management Act be struck out of the Act for being inconsistent and in contravention of, or modified to bring in compliance with Objective XXVIII of the National Objectives and Directive Principles of State Policy; and Articles 2(2), 21 (1), 21(2), and 21(3) 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2).

(c) Prohibiting the Minister of Internal Affairs and or any other government officer from appointing a commencement date for the Public Order Management Act until orders in (a) & (b) above have been complied with.

(d) Costs of this petition be paid by the Respondent.

(e) Any other orders that court may deem fit."

Whilst setting out, the background to this petition, Cheborion Barishaki, JA/JCC observed that,

The Petitioners filed in court their conferencing notes on 12th February 2016. Conferencing inter parties was done on 29th February, 2019. However, at the hearing of this petition on 13th June 2019, Counsel for the Petitioners informed court that he had filed written submissions and was abandoning all other issues raised in the petition except the two issues canvassed in the written submissions

It seems to us that Counsel for the Petitioners did not realize that this Court, even without further submissions on his petition, is required to pronounce itself on the constitutionality of a provision of the law once the same has been challenged in a petition such as the present one.

In **Gerald Karuhanga vs Attorney General,** this Court found in the Petitioner's favour despite his and that of his Counsel's failure to argue all the grounds set out in their petition. It was found that, the casual abandonment of significant allegations raised in the petition was irregular. I too find that, it was irregular for the petitioners to abandon the grounds set out in the petition, without leave of this Court and/or without having amended the petition. The Court only became aware of this development from the petitioners written submissions, after the closure of the oral hearings

I would proceed to hear and determine all the grounds of thus petition as I did in *Moses Mwandha vs Attorney General Constitutional Petition No. 05 of 2007* and ignore the irregular approach taken by Counsel for the petitioner in their written submissions. Both the petitioners and the respondent have filed on Court record their respective conferencing notes addressing all the grounds set out in the petition as a whole. All the grounds of the petition require determination, if for no other reason but to avoid multiplicity of suits, already evident in this petition and that of *Moses Mwandha vs Attorney General (Supra)* that have required this Court to determine questions that had been alluded to or determined earlier by this Court *in Muwanga Kivumbi vs Attorney General Constitutional Petition No. 9 of 2005.*

I will accordingly proceed to resolve the grounds of this petition as set they are out in the petition dated 10th December 2013. I have disregarded the amended petition dated 27th June 2016 as I was unable to ascertain from the record that, the petitioners obtained leave of this Court before proceeding on it. In any event, the scheduling conference was held on 29th February 2016, the petitioners conferencing notes having been filed on 12th February 2016 and the respondent having replied to the same on 7th March 2016. Therefore an amended petition filed

on 27th July 2016 without the leave of Court would be irregular and I find so. I would for the above reasons strike it out of the Court record.

I will now proceed to determine the grounds set out in the original petition dated 10th December, 2013.

> *Whether Sections 4(1), 4(2)(b) 5, 6,7(2), 8, 9, 10, 12 and 13 of the impugned Act are inconsistence with and/or in contravention of Articles 2(2), 21(1), 21(2), 21(3), 29(1),(a), 29(1)(d), 29(1)(c), 30, 38(1) and 38(2) of the Constitution.*

The determination of this one broad issue, which is derived from the orders and declarations sought by the petitioners in this petition will in my considered view determine all the other questions that have been raised herein.

The Public Order Management Act 2013 herein referred to as 'POMA' or the 'impugned Act' provides in its long titles as follows:-

> *'An Act to provide for the regulation of public meetings; to provide for duties and responsibilities of the police, organisers and participants in relation to public meetings; to prescribe measures for safeguarding public order; and for related matters.'*

This title does not set out the mischief the law intended to remedy. This is a legal requirement for any claw back legislation.

It is common ground, indeed undisputed that, freedom of assembly, freedom of expression, freedom of speech , freedom of association and freedom of press and media are derogable rights therefore subject to limitations. The limitations to these and such other rights and freedoms can only be legal to the extent that is permitted under Article 43 of the Constitution which provides as follows:-

43. General limitation on fundamental and other human rights and freedoms.

(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;

(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.(Emphasis added).

What we are required to determine here therefore, is whether or not the provisions of impugned Act impose a limitation on the freedoms set out above, that is acceptable and demonstrably justifiable in a free and democratic society. The petitioner is required to satisfy this Court that:-

(1) The Constitution guarantees a right or freedom.

(2) That right or freedom has been limited, infringed or otherwise abridged by the impugned legislation.

Once the petitioner has satisfied this Court of the existence of a right or freedom the burden at that point shifts to the respondent to prove that the limitation it intends to impose or has imposed is within the scope provided for under *Article 43(2) (c)*

(*supra*). See: *Onyango Obbo & Another vs Attorney, Supreme Court Constitutional Appeal. No. 2 of 2002.*

While determining the constitutionality of the now repealed Section 50 of the Penal Code Act Justice C.K Byamugisha Ag. JSC stated as follows:-

> *'The petitioner alleged that Section 50(Supra) is inconsistent with and/or is in contravention of the provisions of the Constitution. The petition ended with one of the prayers seeking a declaration that the Section is inconsistent with the provisions of Articles 29(1)(a) and (b),40(2) and 43(2)(c) of the Constitution.*
>
> *Having said that, the burden was on the appellants to prove that the state or someone else under the authority of the law has violated their rights and freedoms guaranteed under the Constitution. Once that has been established the burden shifts to the state or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation".*

In the same case Karokora, JSC observed as follows:-

> *"I think that the respondent (Attorney General) in the instant case could not justify prosecution of the appellant under Section 50 of the Penal Code Act by claiming that, they did so in public interest, because the onus was on the respondent to adduce evidence which they never did to prove that, the existence of Section 50 of the Penal Code is acceptable and demonstrably justifiable in a free and democratic Uganda today within the meaning of Article 43(2)(c) of the Constitution."*

Justice CK Byamugisha Ag. JSC on her part clearly set out the position of the law in respect of a petition of this nature as regards the evidential burden in Constitutional matters.

"The answer to the petition did not state that the restrictions imposed by ***section 50*** *are demonstrably justifiable in a free and democratic society or what is provided under the Constitution. The answer to the petition should have shown why publication of false news and rumours ought to remain a criminal offence in a free and democratic society like ours. To me this was the crux of the matter. In other words, Attorney General should have shown clearly that the limitation imposed by* ***section 50*** *falls within* ***Article 43****(supra) or any other provisions of the Constitution and the provisions of the* ***Press and Journalist Act.*** *It is my considered opinion that the Director of Public Prosecutions should not have the powers to determine on behalf of over 20 million people living in this country that a statement, rumour or report published by any person is likely to cause fear and alarm to the public or to disturb public peace.*

This cannot be right.

The Attorney General in my view did not discharge the evidential burden of justifying the continued existence of the impugned section on our statute books."

From the foregoing I am compelled to ascertain from the respondent's case, whether or not evidence has been adduced to prove that indeed the limitations set out in the sections of the impugned law set out above pass the justification test set out in *Article 43* of the Constitution.

One Mr. Batanda Gerald a State Attorney with the respondent who deponed the affidavit in support of the answer to the petition dated 13th January 2014 stated as follows:-

1. *That I am a male adult Ugandan of sound mind, a State Attorney in the Chambers of the Attorney General of Uganda and conversant with the matters raised in Constitutional Petition No.56 of 2013 and wish to respond as follows;*

2. *That Respondent vehemently denies the Contents of the said Petition and the Petitioner shall be put to strict proof of the contents therein.*

4. *That the Respondent avers that the Public Order Management Act(POMA) does not violate any provision of the Constitution of Uganda neither does it violate any fundamental human rights.*

5. *In particular the respondent avers that;*

e. section 4(1) of the POMA in defining what amounts to a public meeting is not inconsistent with constitutional objectives II, V ,X, XII(III), XIII, XV and XXVIII(I)(b) of the National Objectives and Directive Principles of State Policy neither is it in contravention nor inconsistent with Articles 2(2),8A, 29(1)(d)(e), 38(1)(2) of the 1995 Constitution of Uganda.

f. Section 4(2)(b) which defines what a public meeting does not include is not inconsistent neither is it III contravention of Articles 2(2),21 (1)(2)(3), 29(1)(a)(d)(e), 30, 38(1)(2) of the 1995 Constitution.

g. Section 5 and 6 of POMA is not substantially and materially similar to section 32(2) of the Police Act, and was therefore not affected by the Judgment in Constitutional Petition No.9 of 2005-Muwanga Kivumbi V Attorney General and thus was not enacted in contravention of Article 92 of the Constitution.

h. *Sections (5), 6(1)(3), 7(2), 8, 9, 10, 12, 13 of POMA do not place burdensome restrictions on individuals ability to exercise fundamental rights neither do they grant police broad authority to use force to disperse assemblies nor do they impose criminal liabilities on organizers and participants of public meetings and are thus not inconsistent with the Respondent's international legal obligations pursuant to objective XXVIII(i)(b) OF THE National Objectives and Directive Principles of State Policy and articles 2(2), 21 (2)(3), 29(1)(a)(d)(e), 30, 38(1)(2).*

4. *That the Respondent avers that the limitations contained in the POMA are within the confines of Article 43 of the 1995 Constitution of Uganda and are acceptable and demonstrably justifiable in a free and democratic society.*

5. *That whatever is stated herein is true to the best of my knowledge and belief.*

The above affidavit cannot be said to amount to an answer or defence to the petition. It falls short of that, to say the least. It would not pass as a defence in any suit as it is only a general denial See:- *Narmadashanker Joshi vs Uganda Sugar Factory Ltd [1968] EACA 6* Per Law JA And order 6 Rule 8 of the Civil Procedure Rules (SI-71-1). It is a general denial of allegations set out in the petition and as such cannot suffice as a valid defence. This is so because the respondent contends that the impugned Act imposes limitation on the enjoyment of functional rights and freedoms set out in the Constitution. However, no attempt is made by the respondent in the answer to the petition to prove that the limitations imposed by the impugned Act fall within the ambit of *Article 43(2)(c)* of the Constitution.

The laxity and the casual manner in which the Attorney General handles serious constitutional matters at this Court is appalling to say the least. It verges on neglect of duty if not outright abuse of office. A serious constitutional matter such as the one before us necessities serious attention by the Attorney General. I would on account of the respondents' failure to justify the limitation in their pleadings allow this petition since the respondent has failed to discharge its legal burden.

I am however, constrained by the seriousness of the constitutional questions raised herein to proceed with their determination.

Before this Court determines the constitutionality of the impugned legislation, it must consider the following established principles:-

1. That, the objective or purpose and effect of the impugned legislation or act must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

2. That, the impugned legislation meets a legitimate objective standard of limitation set out in the Constitution.

3. That, the objectives of the impugned legislation are not trivial or discordant with the principles integral to a free and democratic society.

4. That, the limitation at a minimum is necessary, objective and relates to public concerns which are pressing, reasonable and substantial in a free and democratic society.

5. That, the means chosen within the impugned legislation to attain its objective and effect are reasonable, objective, rational and demonstrably justified in a free and democratic society.

6. That, the measures adopted in practice to attain the limitation are proportional to the objective in question, are not arbitrary, unfair, subjective or irrational.

7. That, there is proportionality between the effect of the measures taken to limit the right or freedom and the constitutional objective of the law or act.

The above principles have also been called "the constitutional yardstick." See: *Onyango Obbo & Anor vs Attorney General (SC) Supra, Regina vs Oakes 26 D.LR(4th) (Supreme Court of Canada), Bates vs Bater 1950 2 ALL ER.458, Pumbun and Another vs Attorney General & Another [1993] 2 LRC (Court of Appeal of Tanzania), Ontario Film & Video App. Society vs ONT. Board of Censors 147 DLD (3rd) Chavunduka & Another vs Minister of Home Affairs and Another SC/2000 (Supreme Court of Zimbabwe), Thappar vs State of Madras [950] SCR 594(SC) Supreme Court of India) among many other authorites.*

The objective, purpose and effect test.

I have already set out above the objective and purpose of the impugned law as it appears in its long title. I am unable to discern from the long title the objective of POMA. The mischief it intended to address is not clear. It could not be that this Country which is stated by Government to have been on a steady path of progress since 1986 has suddenly become unruly and unmanageable.

The objective of the impugned law was set out by the respondent's written submissions as follows:-

> *"That the state has a duty to protect public safety and under no circumstances should this duty be assigned or delegated to the organizer of an assembly.*
>
> *As far as the protection of the rights and freedoms of others is concerned:*

It's our submission that the police has a duty to strike a proper balance between the important freedom to peace- fully assemble and the competing rights of those who live, work, shop, trade and carryon business in the locality affected by an assembly. In doing this the State ensures that other activities taking place in the same space may also proceed if they themselves do not impose unreasonable burdens.

Section 6 of the Act *deals with what happens after the notification has been lodged with the authorized officer. In fact it's a provision that shows how democratic the state is in that while business owners and local residents do not normally have a right to be consulted in relation to the exercise of fundamental rights where their right are engaged, it is good practice for organizers and law enforcement agencies to discuss with the affected parties how the various competing rights claim might best be protected to the mutual satisfaction of all concerned. In this case alternative venues will be taken and where one is not satisfied with the decision he has an alternative remedy of appealing to the Magistrate."*

As already noted above the objective of the impugned law which is the basis upon which the limitation is premised is neither set out in answer to the petition or is in the affidavit accompanying it which has been reproduced above. The justification for the limitation only appears in the submission of Counsel

Almost every freedom and or right in its enjoyment has a likelihood of impacting negatively on other people's rights. But that is the nature and price of democracy. The contention that, public assemblies would disrupt businesses, traders or commerce has no basis at all, at least none has been established in this petition. Firstly, no evidence was provided to prove this allegation of fact. That contention is mere speculation and conjecture. I say so because the traders and the business

communities in urban centres may themselves wish to hold public assemblies, rallies or protest as a way of expressing their concerns. This law would limit them from doing so. No affidavit or evidence has been proved from the business community, the National Chamber of Commerce or any other body to prove it.

The reason given by the respondent as the objective of the impugned law appears to presuppose that, there is a group of trouble makers distinct from the general law abiding members of the public. And that there is a need to protect the law abiding citizens for these out laws. I find, this an illegitimate objective, one that is not compelling enough or of such importance as to justify a limitation of freedom of expression, speech and or assembly. There is no justification upon which this assumption has been made. It is just a conjecture and speculation.

While dealing with a similar matter in *Onyango Obbo and another vs Attorney General (Supra)* Mulenga, JSC who delivered the lead Judgment at page 17 stated as follows:-

> *"In regard to competing interests that I alluded to earlier, the competition in the instant case is between the interest of upholding the right to the freedom of expression, on the one hand, and the interest of protecting the public against such exercise of the freedom as is "likely to cause public fear or alarm, or disturbance of public peace", on the other. Ultimately, in the context of clause (1) of Article 43, the question to answer is whether the danger, against which section 50 protects the public is so substantial, as to prejudice public interest and warrant limitation of enjoyment of the guaranteed right to freedom of expression."*

It cannot be said that, possible interruption of businesses is sufficiently important as to warrant overriding a right to freedom of assembly, speech, expression and the

press and media freedom for all Ugandans all the time. I say so because Uganda has for the last 34 years been committed to adherence to universal democratic values and principles in view of its past history recalled in the preamble to our Constitution and set out in the National Objectives and Directive Principles of State Policy.

Further, the impugned legislation appears to serve no legitimate purpose or objective. I find so because, there already exists on our statute books legislation tailored to curb the mischief if any resulting from unfettered freedoms and rights to expression, association, speech and the press and media.

The whole chapter VI of the Penal Code Act covers Treason and offences against the state. Chapter VII of the same law contains 26 Sections all relating to unlawful assemblies, riots and other related offences.

It is evident that the provisions of the Penal Code Act in Chapters VI & VII and other Sections of the Penal Code Act already sufficiently deal with all matters that were intended to be dealt with by POMA. To that extent, the impugned legislation's intended objectives are redundant. The objective of impugned legislation in view of the fact that, there is already in place a law to manage public order is not therefore sufficiently important as to curtail and further override the constitutionality protected rights and freedoms set out in this petition.

I find that the impugned legislation does not pass the test set out in principles 1 and 2 above.

The Standard test

While articulating the standard test in *Onyango Obbo (supra)* Mulenga JSC stated as follows at P.19.

"The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which 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 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."

Sections 3 and 4 of the impugned Act provides as follows:-

3. Power of the Inspector General of Police or authorised officer.

The Inspector General of Police or an authorised officer shall have the power to regulate the conduct of all public meetings in accordance with the law.

4. Meaning of "public meeting".

(1) For purposes of this Act--

"Public meeting" means a gathering, assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.

(2) A public meeting does not include-

(a) a meeting convened and held exclusively for a lawful purpose of any public body;

(b) a meeting of members of any registered organisation, whether corporate or not, convened in accordance with the constitution of the

organisation and held exclusively for a lawful purpose of that organisation;

(c) a meeting of members of a trade union;

(d) a meeting for a social, religious, cultural, charitable, educational, commercial or industrial purpose; and

(e) a meeting of the organs of a political party or organisation, convened in accordance with the constitution of the party or organisation, and held exclusively to discuss the affairs of the party or organization.

No evidence was provided to prove that, in free and democratic societies, the power to regulate the conduct of public meeting is in hands of the Police. I have already stated that the Penal Code provides for offences that relate to unlawful assemblies, riots, malicious damage to property and such other offences against public order.

The meaning of public meeting set out under Section 4 is such that the Police has power to stop and disperse or otherwise prohibit any public or private meeting, demonstration, procession, gathering of whatsoever nature and wherever it considers it desirable to do so.

The section restricts lawful assemblies to be only those conserved or attended by "concerned" by members of specified bodies. The Section clearly excludes public demonstrations, processions, and such other public gathering of whatever nature in a public or private place.

I find the enactment of the impugned Act unjustified since it replicates the above mentioned provisions of the Penal Code act.

While determining a petition of this nature this Court must always bear in mind that, it is conducting an inquiry into the constitutionality of an impugned law or act in light of its constitutional obligation to uphold and defend the rights and freedoms

of the citizen of this Country. This is not an ordinary adjudication process to determine which of the parties has a better argument or the interpretation of English words. It is about upholding and defending human rights and freedoms in view of our past history as enshrined in the preamble to our Constitution.

The second contextual element of interpretation is what is provided for under *Articles 43(2) (c)* in the words "demonstrably justifiable in a free and democratic society". This Court therefore must, be guided by the values essential to a free and democratic society which include respect for inherent dignity of human beings commitment to social justice and equality, acceptance and accommodation of a wide variety cultural, religious and political beliefs and views. A free and democratic society guarantees and not just permits to a restricted extent freedom of expression, freedom of speech, freedom of association, freedom of media and press, freedom of movement and free political debate. The above values and freedoms are the bedrock of a free and democratic society upon which the impugned legislation must be weighed.

A law such as Public Order Management Act that defines a public meeting so broadly as to cover any gathering of 'two or more people" almost anywhere at any place in this Country cannot pass the test set out in *Article 43(2) (c)* of our Constitution.

The impugned law requires that there must be an organizer, that he or she must fill a form at a police station . Wherein to he or she must state the following:-

- Name
- Physical address ,
- Postal address
- Immediate contact
- Occupation,
- Age

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- Name
- Physical address ,
- Postal address
- Immediate contact
- Occupation,
- Age

- Nationality,
- Proposed venue of the meeting (giving full details)
- Date of Public meeting
- Time of commencement of a public meeting,
- Duration of public meeting, estimated number of persons expected to attend the meeting,
- Proof of consent of the owner of the venue and,
- Other relevant information

It is further required that, the notice of intention to hold a public meeting must be received by the Inspector General of Police at least 3 (three) days and not more than 15 (fifteen) days before the date of the public meeting.

The impugned law in my humble opinion imposes conditions and restrictions that are unjustified. It makes it almost impossible for any person to hold a public meeting in Uganda unless of course the police permits him or she to do so. The law can only be applied subjectively and as such the limits that it imposes on the citizen of Uganda are not demonstrably justifiable in a free and democratic society.

The Rationality Test

The rights and freedoms guaranteed under the Constitution must be balanced against the collective rights of society. Therefore, a law that restricts these right and freedoms must be rational and must not be arbitrary.

In *Pumbum and Another vs Attorney General & Another (Per Kasanga JA) (Supra)* .The Court of Appeal of Tanzania while dealing with a law imposing similar restrictions on constitutional rights and freedoms held as follows:

"It is most apparent that the law is arbitrary. It does not provide for any procedure for the exercise of the minister's power to refuse to give consent to sue the Government. For instance, it does not provide any time limit within which the minister is to give his decision, which means that consent may be withheld for an unduly long time. The section makes no provisions for any safeguards against abuse of the powers conferred by it. There are no checks or controls whatsoever in the exercise of that power, and the decision depends on the minister's whims. And, to make it worse, there is no provision of appeal against the refusal by the minister to give consent. Such law is certainly capable of being used wrongly to the detriment of the individual.

Turning now to the requirement that the law must not be: drafted too widely, it is obvious once again that s. 6 does not pass that test either. The section applies to all and sundry, including even those against whom it was never intended. If, is contended by Mrs Sumari, the object is to exclude or discourage the: bringing of frivolous and vexatious litigation against the Government, it is not shown how that object is achieved without also limiting the right of persons who have genuine and legitimate claims against the Government.

Even if the limitation imposed by s. 6 could be selective, the pertinent question to ask is whether there was really a compelling need for such limitation. In other words, In what way is the limitation justified in the public interest so as bring it with the purview of art 30(2) of the Constitution." (Emphasis added)

On its part in *Re: Ontario Film and Video Appreciation Society and Ontario Board of Censors,* The Ontario High Court of Justice (Canada) observed and held as follows;-

(b) Reasonable limits: The Crown argued that the limits are reasonable since they curtail only the freedom of those who wish to exhibit films to the public or for gain. Anyone may still make films, show them privately, rent them and sell them. Hence, it is said, freedom of expression is only curtailed to the extent that a person wishes to exhibit them to the public or for profit. However, the prime purpose of making films is to exhibit them to the public, if a film-maker cannot show his film to the public there is little point in making it. Moreover, the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong in making a profit from one's art or one's ideas. In addition freedom of expression extends to those who wish to express someone else's ideas or show someone else's films, It also extends to the listener and to the viewer whose freedoms to receive communications is included in the guaranteed right. The argument that a prohibition can be reasonable if it applies only to filmmakers, not to authors of books, publishers of papers, performers on the stage, TV producers, etc cannot be accepted, The Charter, in allowing reasonable limits, does countenance the total eradication of freedom of expression for those who use a particular form of expression such as film, If film is the medium in which an individual works, he could thereby be denied completely his only means of self expression, To say that other media are available to him is no comfort at all. This argument involves the question of fair treatment between various forms of communication, Hence, although one particular form of expression may not be prevented completely, a legislative body, acting within its jurisdiction, may place

limits only upon one type of expression and not on others provided that such limits meet the test set out in S.1 5, Whether the standards issued by the board of censors would be considered to be reasonable limits need not be decided in view of the position taken by the court on the next issue, However, the Courts will exercise considerable restraint in declaring legislative elements, whether they be statutory or regulatory or to be unreasonable.

(c) Prescribed by law Statute law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force: This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years, This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms. The Crown argued that the board's authority to curtail freedom of expression is prescribed by law in ss. 3, 35 and 38 of the Theatres Act. Although there has been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon freedom of expression of film –makers have not been legislatively authorized, The Charter requires reasonable limits that are prescribed by law: it is not enough to authorize board to censor, or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal.

However dedicated, competent and well-meaning the board maybe, that kind of regulation cannot be considered as "law". Law cannot be vague, undefined and totally discretionary: it must be ascertainable and understandable. Any limits placed on freedom of expression cannot be left to the whim of an official; such limits must be articulated with some

precision or they cannot be considered to be law. There are no reasonable limits contained in the statute or the regulations." (Emphasis added)

In *Chavunduka & Anor vs Minister of Home Affairs and Anor* (Supra), the Supreme Court of Zimbabwe and while considering a similar matter observed and held as follows:-

"Expectedly, it was the submission of counsel for the applicants that when dealing with the permissible limitation upon constitutionally protected rights, a ***court muss ensure that if human conduct is to be subjected to the authority of any*** *criminal law, the terms of such must not be vague; for otherwise there will be of due process. In this contex reference may be made to three opinions of the united states supreme Court:-*

In Connolly vs General Construction Co.269 US 385(1925) at 391 it was pointed out that:-

> *"a statute-which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (emphasis added).*

Then, in Cline v ran Dairy Co 274 S 445 (1927) at 465 the first essential of due process of law was identified as being that:

> *"it will not do to hold an average man to the peril of an indictment for the unwise exercise of his ... knowledge involving so many factors of varying effect that neither the*

person to decide in advance, nor the jury to try him after the fact, can safely and certainly judge the result."

Finally, in Papachristou v City of Jacksonville 405 US 156 (1972) at 162 it was said:

"This Ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute' and because it encourages arbitrary and erratic arrests and convictions. . . Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed of what the State commands or forbids'. Langetta v New Jersey 306 US 451 at 453."

More particularly, it has been emphasised that even stricter standards of permissible statutory vagueness must be applied where freedom of expression is at issue; for at jeopardy are not just the rights of those who may wish to communicate and impart ideas and information but also those who may wish to receive them." (Emphasis added)

In the *Sunday Times vs The United Kingdom (1979-80) 2 EHRR 245.* The European Court of Human Rights was required to consider what was meant by the "expression prescribed by the law" in *Article 10(2)* of the convention on Human Rights. The majority of the Court held as follows:-

'In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to

enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

I have endeavored to cite authorities from different countries on different continents in order to high light what constitutes a justifiable limitation in a free and democratic society. Having done so I have no reservation in finding that the impugned act set limits that are irrational and vague. An ordinary person is unable to contemplate the conduct it forbids and that it does not. I therefore find that the impugned legislation cannot constitute "a prescribed law" under our Constitution.

The Effect Test

Whereas a law may appear to serve a legitimate and lawful purpose on the face of it, its implementation may go beyond the limitation prescribed under Article 43(2)(c). In otherwise, a law may be constitutional but its implementation may not. This Court is therefore, duty bound to look beyond the letter of the impugned legislation and inquire deeper into the effect and nature of its implementation.

It is evident from the body of the impugned statute that no safe guards have been provided within the law itself or by way of regulations. It is therefore impossible for the public and/or the Police to ascertain from the law the limits of its implementation. The Police has by default or design been implementing the impugned law in any way they have considered desirable. In the result that, a law, the purpose of which was to manage and regulate public assemblies lawfully is

now being used to effectively stop all public gathering especially those of a political nature conceived by the police.

Section 14 of the impugned Act provides as follows;-

> *14. Regulations*
>
> *(1) The minister may, by statutory instrument, make regulations generally for the better carrying into effect of the provision or purpose of this Act.*
>
> *(2) The Minister may in any regulations made under this Act prescribe for a contravention of the regulations, a fine not exceeding one year or both and in case of a continuing offence, prescribe an additional fine not exceeding ten currency points for each day on which the offence continues.*
>
> *(3) The Minister may, in addition to any penalty prescribed under subsection (2), prescribe a requirement that anything used in the commission of an offence shall be forfeited to the State.*
>
> *(4) Regulations made under this section shall, before taking effect, be laid before Parliament for approval.*

It appears clearly to me that this section was as a result of the recognition by the legislation, the fact that, the implementation of this law without Regulations would be problematic. It is now almost 13 years since the impugned law came into force. In spite of public out cries and appeals to Parliament no Regulations have been put in place. It is my considered view that, in absence of clear Regulations, it is impossible to have this law implemented in a manner envisaged under the Constitution.

As a result of absence of Regulations law has become an instrument of political oppression. It criminalizes legitimate political dissent, debate, discussion and any other form public political expression. It goes further to curtail and criminalise the legitimate acts of the press and media, in the normal execution of duty. It has criminalised membership of political opposition and other members of society considered by the Police as being undesirable elements of society. This is neither a legitimate nor a legal purpose of law.

In Moses *Mwandha vs Attorney General, Constitutional Petition No. 05 of 2007*, I stated as follows:-

> *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 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 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 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 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 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 Section 35 of the Police Act is unconstitutional and I hold so.

In *Col. (Rtd) Dr. Kiiza Besigye Vs Attorney General Constitutional Petition No. 33 Of 2011.* I stated as follows;-

"Citizens of this Country are free to walk, demonstrate, shout or otherwise express their discontent with polices, actions, laws or lack of them at anytime. It does not matter that those doing so are members of the political parties in opposition or ordinary citizens under whatever name called. See: Olara Otunnu

vs Attorney General, Constitutional Court Constitutional Petition No.12 Of 2010, Muwanga Kivumbi vs Attorney General, Constitutional Court Constitutional Petition No.9 of 2005 and Moses Mwandha vs Attorney General, Constitutional Court Constitutional Petition No. 05 of 2007.

The rights enjoyed by members of the ruling party and its supporters are the same rights ought to be enjoyed by the rest of the population. One of the key tenets of democracy is that those with dissenting and or minority opinions must be allowed to express them within the law. Whilst doing so they commit no offence. Criminalising dissent is therefore unconstitutional."

The legislature of this Country, has itself has been unable to understand how the impugned law could be implemented since it does not set out parameters or guidelines for public and the police to follow This has prompted debate in Parliament which was reported in the Hansard of 26th February 2020 as follows:-

"Wednesday, 26 February 2020

3.31

MR MEDARD SSEGGONA (DP, Busiro County East, Wakiso): *Thank you, Madam Speaker. I rise on two matters of national importance that call for the attention of this House as well as responses from the specific ministers concerned.*

Yesterday, as mourners were coming back from burial in Kiboga in Katera, people lined up along Hoima Road cheering hon. Robert Kyagulanyi Ssentamu, who was driving in the thick traffic of Nansana. The reaction by the police and Local Defence Units (LDUs) again was to fire live bullets that resulted into the death of a young man called Kyeyune, who was shot in the eye, which demonstrates that they were targeting to kill someone. Another young man was also shot in the palm and lost that part of his hand.

Madam Speaker, I think the genesis of this is the way police manage public gatherings. We passed a law here in 2015 called the Public Order Management Act, which has continued to be abused by the police. In their interpretation, it is about disallowing any public meeting, which is not of their choice.

Hon. Kyagulanyi has indicated that he intends to run for the presidency of this country. He, accordingly, wrote to the Electoral Commission as required by the Presidential Elections Act and notified them. He also complied with the Public Order Management Act, 2015 by writing to the police, notifying them and attaching a schedule.

The reaction of the police first is not to respond to the letter until the last hour, when they gave unimaginable conditions. One of such examples was the meeting that was supposed to be held in Gayaza. On Sunday night, for a meeting scheduled for Monday morning, the District Police Officer (DPC) invited hon. Kyagulanyi's team and among the ridiculous demands by the police was that the organisers should provide –

1. *A traffic plan for people who are coming from different directions;*
2. *Fire brigade services in the event of a fire;*
3. *Sniffer dogs, as if they man the canine unit of the police.*

The following morning – First, the police had written to the proprietor of the venue, Gayaza Parish, and instructed them to withdraw the permission to hold the meeting there. The police issued guidelines, which contravene the Act by requiring venue or hotel operators, before offering their venues, to demand for police clearance. On the other hand, when you go to the police to notify them, the key demand they place is that you must have consent from the owner of the place. This defeats logic!

One of the demands they place is that if you are to hold a public meeting, it has to be inside a hall. We said that whereas the law does not require that, we agree. The latest was on Monday this week when we organised the meeting at Pope Paul Memorial Hotel, Ndeeba. It is fenced, outside the central business district and in a hall. We paid after the police had refused to respond to our letter and we took their consent and

confirmation that we were cleared. It is not in the middle of any businesses because they said that we disrupt business.

The police never responded until Monday morning when they went and deployed. How can you deploy without notifying the person who wrote to you? When hon. Kyagulanyi proceeded to Ndeeba, the results were teargas, arresting and shooting.

Madam Speaker, I have raised this matter for the good of this country and to notify the public that if there is no need for this election, we should be informed accordingly. This Parliament made a law that a year to nomination, any aspirant is free to consult provided he notifies the Electoral Commission, local authorities and the local police.

MR PATRICK NSAMBA: *Thank you very much, Madam Speaker. Recently, my father had a thanksgiving ceremony. That old man was turning 77. He had gone through some treatment the previous year and he thought he needed some celebration. The old man went through an ordeal because the police determined his function not right. The old man had to keep waiting every other time until a Regional Police Commander (RPC) had to decide when he will have his function.*

I first spoke to the RPC and he said, "No; you are against us." I told the RPC that he is a police officer who is supposed to ensure that we have law and order in this country. I told him that his job is to ensure that the function runs properly. The RPC told me frankly, "I am here to ensure that our Government stays in power."

Madam Speaker, to me, that was so unfortunate. We went and pleaded with this man to allow the function of the old man and it took place on the 31st. However, on that day, the RPC gave instructions that he does not want Members of Parliament at that function. I am a Member of Parliament and my friends and colleagues are Members of Parliament. They are the people I work with.

The RPC told the DPC, "If I see any Member of Parliament at that function, I am going to close it" and it happened that way. When MPs arrived at the function, the great RPC gave an order to the DPC and the

DPC came and told the people who came around for the function that everyone should go home. He told them, "We are either going to teargas you or we are going to shoot you live". The DPC was on record. He claims he is protecting his job. He told us, "You people, I am protecting my job. Leave this place; I am protecting my job".

Madam Speaker, that is the kind of police that we have in this country. They have turned themselves into a regime protection force, which is really very unfortunate for many Ugandans who are living in this country. Thank you very much.

***THE SPEAKER:** I have already given instructions to the Prime Minister to come and address the country on this issue."*

There appears therefore to be consensus across the political spectrum for the need to enact Regulations and /or guidelines for the implementation of the impugned law.

The excerpt from the Hansard above clearly proves that in the absence of Regulations the Police is using the impugned Act to stop and criminalise private functions. The Police has now barred gathering in private homes if in its own wisdom it conceives them to be of a political nature. The Police however, have not stopped any assemblies, processions or gatherings that are sanctioned by government or the Ruling party. In this regard therefore I find that the effect of this law is to stifle political dissent and to criminalize a legitimate right to freedom of assembly, association and speech. In its over Zealousness the police has not spared the press, beating and arresting journalists who cover such associates See:- *Mwandha vs Attorney General (Supra).*

It was pointed out by the Tanzania Court of Appeal in the case of *Director of Public Prosecutions vrs. Daudi Pete: Criminal Appeal No.28 of 1990 that:-*

" the only offending laws that have been saved by the claw back clauses, are those that provided a procedure as a safeguard, which is reasonable, fair and just for the purpose of depriving the citizen his basic rights. The said laws should not deny a citizen his rights arbitrarily or in a too broad manner.

That is the view that has also been taken by the European Court of Human Rights when construing claw back clauses as exemplified in its decision of the Sunday Times Case 1979/2 E.H.R.R 245 and the Silver case 1983/5 E.HR.R 347. It was emphasized in those cases that the restriction to basic rights must be accompanied by adequate safeguard and effective control against arbitrary interference because the rule of law stipulates that interference by the authorities with an individual's rights should be subject to effective control. In other words the restriction should not be contrary to the international human rights norms as given in international instruments and that the restriction should not be incompatible with the evolving standards of decency. Implicit in this standard is the notion that the restriction even if justified to achieve one of the state purposes of maintaining law and order, yet it must be framed so as not to limit the basic right more that is necessary. In other words, the restriction must be proportionate and closely tailored to the aim sought to be achieved See: Art.19 (3) of the International Covenant on Civil and Political Rights (1966) which Tanzania ratified on 11th June 1976.

In the case at hand I find no valid reason as to why policemen should be given such broad powers as to interfere with private meetings e.g. wedding parties , birthday parties, football gatherings, ngoma parties e.t.c. Therefore it is my finding that section 41 of the Police Force

Ordinance is not saved by claw back clauses. Section 40 (5) of the Police Force Ordinance and section 11(1) (a) of the Political Parties Act No. 5/1992 which empower Police officers to interfere in respect of public rallies , are sufficient provisions for the purpose of maintenance of law and order. However as to whether those two provisions are constitutional, that may be decided by the Courts at any other time. In this case l construe section 41 of the Police ordinance be void."

I accept the reasoning and the conclusion arrived at by the Court of Appeal of Tanzania and I would adopt it.

I therefore find that the Public Order Management Act through its unregulated application by the Police sets limitations that are far beyond what is demonstrably justifiable in a free and democratic society and as such it is inconsistent with Articles 2(2), 21 (1) and (2), 21(3), 29(1), 30, 38(2) and 43 of the Constitution.

Justification

It appears from the answer to the petition and accompanying affidavit that the case for the respondent is premised on need to keep peace, order and tranquility in the Country especially in urban areas, to protect shop keepers and the business community from undue interferences with their businesses resulting from unnecessary demonstrations, public gathering and political rallies.

In every democracy the economy is propelled by democratic principles and not by repression. Repression stifles economic progress. Traders would want to be free to demonstrate against unjust taxes or their enforcement. They need to demand services such as security, roads, street lights, and garbage collection e.t.c. The market vendors, students, teachers, doctors all have their grievances which they would require to raise through public gatherings, precessions and demonstrations.

When they do, the powers that be maybe moved to take note and in most cases address them. This in turn fosters economic growth and addresses public discontent. This is what good governance requires in a free and democratic country.

No evidence whatsoever has been provided to show let alone prove that, public gatherings stifle economic growth or disrupt business beyond what is justifiable in a free and democratic society.

The Government and its agencies including security organs have frequently used demonstrations to publicise their own programs and to positively rally the public for just causes.

In the recent past His Excellency The President led a huge demonstration across the capital highlighting the evils of corruption in public institutions. All the activities in the capital went to a standstill, but it was a welcome measure.

The city carnival, spontaneous celebrations as such when the national football team "the cranes" qualified for the African Cup, the Martyrs' day processions, visiting dignitaries such as the Pope, the United States President, Nelson Mandela to mention but a few attracted huge processions and crowds in the capital bringing to a standstill almost all businesses. Nonetheless, none of those public gatherings did result into violence nor did they disrupt business, commerce or public order or trade beyond what is demonstrably justifiable in a free and democratic society. The point is that, in a democracy one cannot choose and pick. It is a whole package and everything goes together. Any attempt to remove one component destroys the other.

It is my finding that, the impugned legislation in the absence of clear, detailed Regulations that meet the Constitutional yardstick set out in the Constitution and

expounded upon in this judgment sets limitations that are far beyond what is demonstrably justifiable in a free and democratic society and as such it is void.

For the reasons I have endeavored to set out in this Judgment I would find and hold that the entire Public Order Management Act is inconsistent with Articles 2(2), 21(1), 21(2), and 21(3) 29(1) (a), 29(1) (d), 29(1) (e), 30, 38(1), 38(2) of the 1995 Constitution.

FINAL DECLARATIONS AND ORDERS:

By majority decision Kakuru, Kiryabwire, Musoke, Cheborion Barishaki, JJA/ JJC it is hereby declared and ordered as follows;-

1. (i) Section 8 of the Public Order Management Act is unconstitutional and is hereby declared null and void.
   (ii) All acts done under that law are hereby declared null and void.
2. This petition having been brought in Public interest no order is made as to costs.

Dated at **Kampala** this ....26th.....day of ....March..... 2020.

.....

Kenneth Kakuru

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT