

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)**

AT DAR ES SALAAM

**CONSOLIDATED MISCELLANEOUS CIVIL CAUSE NO 4 OF 2018
AND MISCELLANEOUS CIVIL CAUSE NO 8 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA, 1977-AS AMENDED FROM TIME TO TIME
[CAP. 2 R. E. 2002]**

AND

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
ACT [CAP.3 R.E. 2002]**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF SECTIONS 43, 44, 45 AND 46 OF THE
POLICE FORCE AND AUXILIARY SERVICE ACT**

**(CAP 322 R.E. 2002) AND SECTION 11 OF POLITICAL PARTIES
ACT [CAP 258 R.E. 2002]**

BETWEEN

FRANCIS MUHINGIRA GARATWA.....1ST APPLICANT

BARAKA MWAGO.....2ND APPLICANT

ALLAN BUJO MWAKATUMBULA.....3RD APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

Date of last order: 24/12/2019

Date of Judgement: 18/03/2020

MLYAMBINA, J.

This is a Judgment in respect of consolidated Misc. Civil Cause No. 4 of 2018 and Misc. Civil Cause No. 8 of 2018. There are two main issues to be determined in this matter, namely:

1. Whether or not the provisions of Sections 43, 44, 45 and 46 of The Police Force And Auxiliary Services Act (Cap 322 R.E. 2002) and Section 11 of The Political Parties Act (Cap 258 R.E. 2002) are unconstitutional for offending Articles 13 (6) (a), 18, 20 (1), 21 (2) and 29 (2) of the Constitution of the United Republic of Tanzania 1977, as amended (hereinafter referred to as "The Constitution").
2. Whether the afore mentioned provisions after being declared unconstitutional should be expunged from the statute book immediately and without giving time to the Government to amend as it will allow continuation of human right violation in Tanzania.

In order to appreciate the gist from which this decision stems, we find it necessary to give a brief background of the matter. On 23rd day of February, 2018 the petitioners namely; Francis Muhingira Garatwa, Baraka Mwago and Allan Bujo Mwaka Tumbula filed an originating summons against the Attorney General before this Court. It was made under Articles 26 (2) and 30 (4) of the Constitution of the United Republic of Tanzania 1977, Sections 5 and 8 of the Basic Rights and Duties Enforcement Act, Cap 3 (R.E. 2002) and Rule 4 of the Basic Rights and Duties Enforcement

(Practice and Procedure) Rules 2014. The petitioners moved this Court for declaration:

- a) That, provisions of Sections 43, 44, 45 and 46 of The Police Force and Auxiliary Act Cap 322 R.E. 2002 and Section 11 (2), (4), (5), (6) and (7) of the Political Parties Act (Cap 258 R.E 2002) are unconstitutional for offending the provisions of Article 13 (6) (a), 18, 20 (1), 21 (2) and Article 29 (1) of the Constitution of The United Republic of Tanzania of 1977 as amended.
- b) That, the provisions of Sections 43,44,45 and 46 of the Police Force and Auxiliary Act (Cap 322 R.E. 2002) and Section 11 (2), (4), (5), (6) and 7 of The Political Parties Act (Cap 258 R.E. 2002), be declared unconstitutional, and expunged from statute book immediately without giving time to the Government to amend as it will allow continuation of human rights violation.
- c) Each party to bear its own costs.

On 14th day of March,2018 the petitioner, The REGISTERED TRUSTEES OF ACT WAZALENDO filed a petition before this Honorable Court challenging the provisions of Section 43, 44, 45 and 46 of the Police Force and Auxiliary Act (Cap 322) and Section

11 of The Political Parties Act (Cap 258 R.E. 2002) as being unconstitutional.

By consensus, the two matters were consolidated together and disposed of by way of written submissions.

Section 43 (1) (c) (2) and (3) of the Police Force and Auxiliary Act provides for a requirement of making notification prior to holding an assembly and gives power to the Minister to make particulars which need to be in the notification to police officer. Section 43 (1) (c) (*supra*) encapsulates:

"43 (1) any person who is desirous of convening, collecting, forming or organizing any assembly or procession in any public place shall, not less than forty eight hours before the time when the assembly or procession is scheduled to take place, submit a written notification of his impending assembly or procession to the police officer in charge of the area specifying

a. N/A

b. N/A and

a. Such other particulars as the minister may from time to time by notice published in the gazette specify.

43 (2) where a person submits a notification in accordance with subsection (1), he may proceed to convene, collect,

form or organize the assembly or procession in question as scheduled unless and until he receives an order from the police officer in charge of the area directing that the assembly or procession shall not be held as notified.

43 (3) a police officer to whom a notification has been submitted pursuant to subsection (1) shall not give a stop order under subsection (2) in relation to the notification unless he is satisfied that the assembly or procession is likely to cause a breach of the peace or to prejudice the public safety or the maintenance of public order to be used for any unlawful purpose.

Sections 44, 45 and 46 of the Police Force which are being challenged provide in nutshell for power to disperse assemblies and processions wherever held unlawfully and for penalties. In particular term, the provisions read:

44. The officer in charge of Police may stop or prevent the holding

or continuance of any assembly or procession in any place whatsoever if, in the opinion of such officer the holding or continuance, as the case may be, of such assembly or procession breaches the peace or prejudices

the public safety or the maintenance of peace and order and may, for any of the purposes aforesaid, give or issue such orders as he may consider necessary or expedient, including orders for the dispersal of any such assembly or procession as aforesaid.

45. When assembly or procession unlawful

Any assembly or procession in which three or more persons attending or taking part neglect or refuse to obey any order for dispersal given under the provisions of subsection (4) of Section 43 or Section 44, shall be deemed to be an unlawful assembly, within the meaning of Section 74 of the Penal Code.

46. Penalties

1) Any person who—

(a) neglects or refuses to obey any order given or issued under the provisions of subsection (4) of Section 43 or Section 44; or

(b) contravenes any particular specified by the Minister in accordance with paragraph (c) of subsection (1) of Section 43,

shall be guilty of an offence and may be arrested without a warrant and shall be liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

(2) Subject to the provisions of any order made under subsection (5) of Section 43, where any assembly or procession in a public place has been convened, collected, formed or organised otherwise than in accordance with subsection (1) of Section 43—

- (a) every person taking part in convening collecting, forming or organising such assembly or procession shall be guilty of an offence and may be arrested without a warrant and shall be liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment;*
- (b) every person attending such assembly or taking part in such procession, who knows or has reasons to believe that such assembly or procession has been convened, collected, formed or organised otherwise than in*

accordance with the provisions of subsection (1) of Section 43, shall be guilty of an offence and may be arrested without a warrant and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

The petitioner through representation of learned counsel Steven Ally Mwakibolwa submitted that, the provisions of Section 43 (2) and (3) of the Police Force and Auxiliary Act Cap 322 (R.E. 2002) violates the right to be heard because it gives powers to one organ or person to make decision on the right that is provided for in the Constitution of the United Republic of Tanzania without consultation and by giving light reasoning as to the reasons of his decision. The petitioner maintained that no one should be the judge and jury in any matter regardless of their position in the society.

It was submitted by the petitioner that the above provisions by interpretation creates a room in which fundamental rights can be abused. Further, the current provision provides no time limit or mechanism or means against abuse of exercise of this power. A person might have prepared his event taking into account all costs and the necessities only to be told by the police officers that the

event cannot go on because of security concerns, or by the reasons if he is satisfied that the assembly or procession is likely to cause a breach of the peace or to prejudice the public safety, or the maintenance of public order, or to be used for any unlawful purpose.

According to the petitioners, the afore reasons are too wide, unclear, vague and too subjective thus contravening the right to a fair hearing, right to be heard, freedom of expression, right to association and peaceably assembly, right to participate in public affairs of the country and the right to enjoy fundamental human right as provided for under Article 13 (6) (a), 18, 20 (1) 21 and 29 (2) of the Constitution of The United Republic of Tanzania.

The petitioners has challenged the provision of Section 43 (3) and (4) of Cap 322 (*supra*) as they contravene the right to a fair hearing, right to be heard and the right to appeal as protected under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977. Thus, a person aggrieved by a decision of anybody the minister included should not be prevented from seeking justice in higher decision-making authorities such as Courts.

Regarding Section 44 of the Police Force and Auxiliary Services Act Cap 322 R.E. 2002, the petitioners submitted that, it violates the right to fair hearing, right to be heard, freedom of expression, right to association and peaceably assembly, right to participate in public affairs of the country and the right to enjoy fundamental human right because it is too objective and open to any interpretation at the whims of the law enforcers as it allows opinion of a particular office to violate the right of the people.

The petitioners contended that, the police officer if in his opinion can give or issue orders in regard to holding or continuance of an assembly or procession, that means, it is the discretion of a police officer to limit an assembly or procession arbitrarily or not. To back up such position, the petitioner cited *inter alia* the case of *the State of Bihar v. K.K Misra and Others* AIR 1971 1667 at 1675 where the Supreme Court of India expressed the view on laws imposing restrictions on fundamental rights that;

“in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable”

The other case cited by the petitioner was of *the Sunday times v. United Kingdom* 1979 2 EHRR 245 in which it was observed:

"Restrictions to basic rights must be accompanied by adequate safeguard and effective control against arbitrary interference, not contrary to international human rights norms. The restriction even if justified to achieve one of the State purposes to maintain law and order, it must be framed not to limit the basic right more than is necessary."

On Section 45 of the Police Force and Auxiliary Act (*supra*), the petitioners submitted that the said provision is wide and vague as to the meaning of unlawfully assembly and it is unreasonable. The provision do not guarantee the right to freedom of assembly and procession as people will not be able to plan their affairs. In view of the petitioners, the position that three people constitutes an assembly is too awkward and unreasonable. In their opinion, the meaning should be wider enough to enable citizens plan their affairs before being caught by the law.

As to Section 46 of the Police Force and Auxiliary Act (*supra*), the petitioners submitted that the said provision is too wide, vague and capable of being abuse and does not assist individuals to plan their

affairs. Also, there are some provisions which lacks element of *mens-rea*.

The petitioners emphasized on Section 11 (1) (a) of the Political Parties Act Cap 258 R.E. 2002 by submitting that under that Section, a political party intending to hold such meeting in any area shall notify the police officer in charge of the concerned area and not to seek permission or approval to hold such gathering. It was clearly submitted by the petitioner that the police officers in-charge do violate the statutory given right when they stop political parties and other people to enjoy the right of meetings, gatherings and other associations among themselves in a society. Section 11 (1) (a) of the Political Parties Act (*supra*) read:

(1) Every party which has been provisionally or fully registered shall be entitled –

(a) to hold and address public meetings in any area in the United Republic after giving notification to the police officer in charge of the area concerned for purposes of publicising itself and soliciting for membership;

In reply, the respondent through representation of Abubakar Amin Mrisha, Senior State Attorney was of submission that there is no such thing as “.....*huge, unfettered and unquestionable powers of*

the Minister in the United Republic of Tanzania." Every power conferred by law, is exercisable in accordance with the standards set by the Constitution of the United Republic of Tanzania, 1977 and other laws. Such law, must not derogate from the fundamental rights on any grounds including public interest, particularly when it confers some powers to an authority. To buttress such position, the respondent did cite the cases of *Kukutia Ole Pumbun and Another v. Attorney General and Another* (1993) TLR 159; *Julius Francis Ishengoma Ndyanabo v. Attorney General* (2004) TLR 14; and *Director of Public Prosecutions v. Daud Pete* (1993) TLR 22 which established two tests that must be met:

- i. Such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective control against abuse of those in authority when using the law.*
- ii. The limitation imposed must not be more than necessary to achieve the legitimate object.*

The respondent submitted that, the provision of Section 43 (1) (c) of the Police Force and Auxiliary Services Act is a lawful delegation of legislative powers to a competent authority exercised in accordance with the laws governing legislative process under superintendent of Article 30 (2) (a) and (b) of the Constitution of

the United Republic of Tanzania, 1997 as amended. The said provision requires the legislature to enact legislation for ensuring that rights and freedom of others or the public interest are not prejudiced by the misuse or the individual rights and freedoms and for ensuring public safety and public order.

It was further submitted that it is premature for the petitioners to challenge the exercise of powers of the Minister vested under *Section 43 (1) (c) of the Police Force and Auxiliary Services Act Cap 322 (R.E. 2002)* because, such powers are yet to be exercised. However, and be it as it may, this honorable Court cannot belabor to exercise its powers under Article 30 (5) basing on the Petitioners assumptions on the possible abuse of Ministers powers while they are yet to be exercised. As it was stated in the case of *Rev. Christopher Mtikila v. Attorney General (1995) TLR 31 (HC)*:

"....A breach of the Constitution, however, is such a grave and serious affair that cannot be arrived at by mere inferences, however attractive and I apprehend that this would require proof beyond reasonable doubt..."

In addition, the respondent was of reply that Section 43 of the Police Force and Auxiliary Service Act (*supra*) does not operate to take away the Petitioners' freedom of assembly or processions.

Instead, it is a furtherance of the legislative normal functions of ensuring existence of adequate safeguards and guaranteed public safety, order and peaceful enjoyment of Constitutional rights to all citizens.

The respondent called upon the Court to note that law making as a process is undertaken in accordance with set procedures and must conform to the overriding principles of legality, rationality, reasonability and proportionality. Thus, restriction imposed by the law, must pass the test of reasonableness and overriding public interest. To back up such averment, the respondent cited the case of *Director of Public Prosecutions v. Daudi Pete* (1993) TLR 22, where it was held at page 43 that:

".....any legislation that falls within the parameters of article 30 is Constitutionally valid, notwithstanding that it may violate basic rights of the individual. But the legislation must fit squarely within the provisions of that article in that it could be construed as being wholly for "ensuring the interests of defence, public safety, public order..."

The respondent was, therefore, of strong view that Section 43 (1) (c) of the Police Force and Auxiliary Services Act Cap 322 (R.E 2002) falls within the ambit of article 30 (2) (a) and (b) of the

Constitution of the United Republic of Tanzania, 1977 as amended; since it is squarely for the purpose of protecting interests of public safety and public order.

The determination of the first issue involves a survey and analysis of the object of Section 43 (1) of Cap 322 (*supra*). In our view, as correctly submitted by the respondent, Section 43 (1) (*supra*) does not curtail assemblies and processions in public places. It provides for the procedure and time limit within which whoever interested of convening, collecting or organizing any assembly or procession in public places has to comply with.

A careful reading of the decision of the Court in the cited case of *Kukutia Ole Pumbun (supra)* and of *Daudi Pete (supra)* in line with the cherished Article 30 of the Constitution of United Republic of Tanzania, we find Article 43 (1) does not confer arbitrary powers to police officer. It only requires whoever intending to convene, collect, form or organize a procession in a public place to notify the police officer in-charge of that area within 48 hours. The petitioner has failed to establish how such provision curtails the right to freedom of expression, association and peaceful assembly.

Another point worthy of note is that under Section 43 (2) (*supra*) a person who submits a notification is at liberty to proceed with the

procession unless he receives an order from police officer restraining such assembly or procession. The point of misuse of powers by police officer in charge cannot be decided in generality. It has to be looked at on a case to a case basis.

Further, the provisions of Section 43 (3) (*supra*) does away with arbitrary powers of a police officer. A stop order for the assembly or procession can be issued only when the police officer is satisfied:

1. That, the assembly or procession is likely to cause a breach of the peace;
2. That, the assembly or procession is likely to prejudice the public safety;
3. That, the assembly or procession is likely to cause the maintenance of public order to be used for any unlawful purpose.

In this case, the petitioners have not pointed out a specific scenario in which any police officer has arbitrarily denied anyone a right to assembly or procession. The Court cannot issue a buoyant order in vacuum. The petitioners' allegation that Section 43 is too wide, vague and unclear lacks any justification.

In the same line of reasoning, Section 44 of the Police Force and Auxiliary Services Act does not curtail the freedom enshrined under

Article 13 (6) (a), 18, 20 (1) 21 (2) and 29 (2) of the Constitution. Section 44 (*supra*) provides for power to the police officer in charge to disperse assemblies and processions wherever held.

A literal reading of the provision of Section 44, as a whole, clearly reveals that the conditions precedent imposed for the police officer in charge to stop or prevent the continuance of assembly or procession are three:

1. The assembly or procession breaches the peace.
2. The assembly or procession prejudices the public safety.
3. The assembly or procession prejudices the maintenance of peace and order.

There is nothing illegal with the conditions set out under the provisions of Section 44 (*supra*). If the police officer in-charge violates the conditions set out under Section 44 (*supra*) that has to be dealt with on a case to case basis; regard being had to availability of other adequate means of redress.

Equally, from the reading of Section 45 and 46 of the Police Force and Auxiliary Service Act (*supra*), it is discernible to note that Section 45 creates an offence for three or more persons making an assembly or procession against an order for dispersal. Indeed, Section 46 provides for penalties to any person who neglects or

refuses to obey any order given under the provisions of subsection 4 of Section 43 or 44 (*supra*).

It is our found view that, if the provisions of Section 45 and 46 (*supra*) are to be found unconstitutional, as the petitioners want this Court to hold, it will create an anarchy because persons will be defying lawful order of the police officers in charge and no any criminal charges and penalties will be levelled against them.

Coming now to the petitioner's argument in respect of the provision of Section 11 of the Political Parties Act Cap 258, we find the words of the provision are plain, precise and unambiguous. Section 11 (*supra*) provides for the rights and privilege, and meetings of Political Parties. Section 11 (2) of the Political Parties Act applies by giving mandatory application and effect of Section 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act (*supra*). The provisions of Section 11 (4) and 11 (7) of the same Act mandate the police officer in charge to stop the assembly only if:

- a) There is a previous notification for the meeting, other function or procession in the same place at the same time;
- b) The meeting or procession is intended for unlawful purpose;
- c) The meeting is likely or intended to cause breach of peace or to prejudice the public safety of the area.

The afore three condition are in our view, lawful conditions which provides safeguard and control against arbitrary decisions and abuse of power. A person or political leader has the right to complain if a police officer in charge either stops the meeting or procession arbitrarily or abuses the authority when using the provision. Even if such complains are proved, the provision will remain valid and within the purview of the Constitution. It is the act of the police officer in charge which can be declared illegal and therefore challenged.

In the afore view of the findings and to answer the 2nd issue, it is the position of the Court that the provisions of Sections 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act (*supra*) and Section 11 of the Political Parties Act (*supra*) are Constitutional and do not allow violation of human rights. As such, there are no good reasons for expunging the same provisions from the statutes.

In the end result, the two petitions, namely Misc. Civil Cause No. 4 of 2018 and Misc. Civil Cause No. 8 of 2018 are dismissed for lack of merits. No order as to costs.



B.S. MASOUD

JUDGE

18/03/2020



Y. J. MLYAMBINA

JUDGE

18/03/2020



S. MAGOIGA

JUDGE

18/03/2020

Judgement pronounced and dated 18th March, 2020 in the presence of counsel Jebra Kambole and Maria Mushi for the petitioners and Senior State Attorney Abubakary Mrishi for the respondent.


B.S. MASOUD

JUDGE

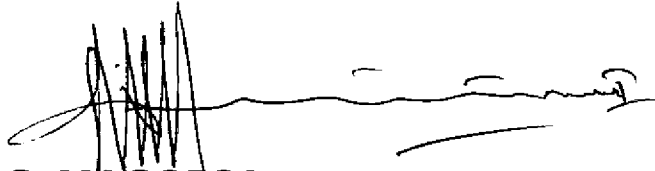
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