

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV- CS- 0054 – 2008.

AFRICANUS BRIGHTON GABULA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

This matter was first brought to Court by way of Notice of Motion filed on the 16/11/2007. The Counsel representing both parties appeared before me on the 17/1/2008. The matter was then adjourned to the 3/4/2008 for hearing. Then the matters were put before my brother Hon. Justice Musoke – Kibuka on the 19/05/2010, whereby the Learned Counsel for the Attorney General (Respondent) informed Court that, similar matter had been filed by way of plaint and had been fixed before me. The Learned Judge dismissed the application (168/2007).

In the meantime the plaintiff had also filed this Suit HCCS 54/2008 on the same subject matter, on the 19/3/2008 between the same parties. This case came before me on the 18/4/2008 when I was still in the Civil Division whereby both Counsel applied to file written submissions, as the Court papers filed by both sides, were exclusively based on legal matters, regarding the interpretation of the Amnesty Act and the Constitution of Uganda.

Each side was given 14 days to file its respective submissions and replies if any. Thereafter the judgment would be on notice. The file was returned to the Civil Registry for the Counsel to comply with the order to file written submissions. In the meantime, I was transferred from the Civil Division to the then War Crimes Division, now the International Crimes Division, as its head. Thereafter it appears my cases were re-allocated to Hon. Justice Musoke – Kibuka, who was by then in the Civil Division.

I have received the file today (the 01/03/2012) from Hon. Justice Musoke - Kibuka for the purpose of writing the judgment. It is regrettable that, the Civil Registry could not forward the file to me soon after the filing of the written submission by the parties Counsel, which, according to the official stamp on them, was done in May 2008. I hope this sort of laxity on the part of the Registries will not happen again, so as to avoid unwanted delays on the dispensation of justice.

As to the merits, the plaintiff brought this action against the Attorney General of Uganda under the provisions of Article 50(1) of the Constitution of the Republic of Uganda for enforcement of his fundamental rights and freedom, for declaration under O. 9. r. 2 of Civil Procedure Rules and for general and exemplary damages for infringement of his fundamental rights and freedom.

The facts as can be gathered from the pleadings which are constituting the cause of action are briefly as follows.

The plaintiff was arrested on the 24th day of August 1988 and charged with the offence of treason. He was tried, convicted and sentenced to death in 1993 by the High Court. The Supreme Court confirmed the conviction and sentence in May 1995.

Subsequently on 21/1/2000 the Amnesty Act, Cap 294, was enacted declaring Amnesty in respect of any Ugandan who had at any time since 26/1/1986, engaged in or remains engaging in War or armed rebellion against the government of Republic of Uganda.

On 24/2/2000, the plaintiff applied for Amnesty (about 8 years after conviction) and the Amnesty Commission did not issue him with a certificate of amnesty because the plaintiff was a convict and the commission stated that it needed consultation on the interpretation of the Amnesty Act. The plaintiff wrote to the then Deputy Chief Justice, for a legal opinion on the matter. The Learned Deputy Chief Justice, advised to file the matter in Court. The Principal Judge, on the other hand, advised to re-apply to the government. Thereafter, the plaintiff made another application for Amnesty and he has never received any reply to that

application. That the Amnesty Commission advised that a person charged with treason is entitled to Amnesty. That subsequently the plaintiff's Lawyers petitioned the Director of Public Prosecution to certify that, he was under S. 2 and 3 of the Amnesty Act, entitled to amnesty. The Director of Public Prosecution however, declined to issue the Certificate as plaintiff was a convict. This resulted in filing this Suit.

The agreed issues by both parties are as follows.

- i) Whether the Amnesty Act, Cap 294, covers persons convicted of treason.
- ii) Whether the acts of the Amnesty Commission violated or engaged the plaintiff's rights under Article 20, 21 and 42 of the Constitution.
- iii) Whether the Director of Public Prosecution erred in finding that the plaintiff is not a person envisaged by Section 3 (of the Amnesty Act) as a person entitled to certification under the Amnesty Act Cap 294 for release.

Both Learned Counsel submitted at length on each issue.

I will also consider the raised issues in the same order.

- i) Whether the Amnesty Act Cap 294, covers persons convicted of treason.

Amnesty is defined by Section 1 (a) of the Act as:-

“ a pardon, forgiveness exemption or discharge from criminal prosecution or any other form of punishment by the State.”

The Learned Counsel for the plaintiff submitted, as I understood them, that, their client falls under “ any other form of punishment by the State” as he is serving a sentence or waiting to be re-sentenced following **SUSAN KIGULA & OTHERS VS. ATTORNEY GENERAL**

S.C.U. Constitution Appeal No. 6/2003 ruling, as the case might be. On the other hand, the Learned Attorney General submitted to the effect that, as the plaintiff had been tried, found guilty and convicted by competent courts, then, he falls outside the scope of the Amnesty Act. That the Act, applies only to those who are not yet prosecuted or are undergoing prosecution.

Section 2 of the Amnesty Act, Cap 294 provides as follows:-

“ (1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by

- (a) Actual participation in Combat.*
- (b) Collaborating with the perpetrators of the War or armed rebellion.*
- (c) Committing any other crime in furtherance of the War or armed rebellion.*

2 (2) A person referred to in 2(1) above shall not be prosecuted or subjected to any form of punishment for the participation in the War or rebellion for any crimes committed in the cause of the war or armed rebellion.

Section 3 of the Amnesty Act, governs the grant of amnesty. It states as follows:-

3 (1) A reporter shall be taken to be granted amnesty declared under Section 2 of the reporter:-

- (a) reports to the nearest army or police unit, a chief, a member of the executive committee of a local government, a Magistrate or religious leader within the locality.*
- (b) Renounces and abandons involvement in the war or armed rebellion,*
- (c) Surrenders at any such place or to any such authority or person any weapons in his or her possession; and*
- (d) Is issued within a certificate of Amnesty as shall be prescribed by the Minister.*

3 (2) where a reporter is a person charged with or is under lawful detention a relation to any offence mentioned in Section 2, the report shall be deemed to be granted the amnesty of the reporter:-

- (a) declares to a prison officer or to a judge or Magistrate before whom he or she is being tried that he or she removed the activity referred to in Section 2, and*
- (b) declares his or her intention to apply for the Amnesty under this Act.*

3 (3) A reporter to whom Sub-Section (2) applies shall not be released from custody until the Director of Public Prosecution has certified that, he or she satisfied that:-

- (a) the person falls within the provisions of Section 2 and*
- (b) he or she is not charged or detained to be prosecuted for any offence, not falling under S. 2.”*

In my considered view, the plaintiff in this case falls under Section 3(2) of the Amnesty Act, as he had been charged with treason, which no doubt falls within the Provisions of S. 2 of the Amnesty Act. He is also under lawful detention following his trial and subsequent conviction and sentence by a competent Courts of Law.

As to whether or not he qualifies for Amnesty depends upon whether the conditions set in Section 3(2) (a) of the Amnesty Act, have been met.

Section 3 (2) (a) provides as under:-

a-----declares to a prison officer or to a Judge or Magistrate **BEFORE WHOM HE OR SHE IS BEING TRIED**, that he or she recovered the activity referred to in Section 2-----“ (emphasis supplied).

In my considered view, it must be before or during the trial of the suspect when he/she can declare to the prison officer or to the trial court for his renunciation of rebellion. It cannot in my view, include those who are already convicted by the Court. If this was the intention of Parliament, it should have expressly stated so. It is not in dispute that the plaintiff in this case, was tried, found guilty and convicted by the High Court. This was in 1983. The conviction and sentence was confirmed on appeal by the Supreme Court of Uganda. This is the highest Court of the land. The plaintiff is in my considered view seeking to circumvent, the Court's decision, through this suit, which would be tantamount to this court, to review the decision of the Supreme Court. I think the only way forward for the plaintiff is to pursue the general pardon as a convict before the President or he awaits for re-sentencing process in line with the **SUSAN KIGULA case**, whereby we could use part of the submission he has raised here in mitigation of his sentence of death.

All in all, I find that, the plaintiff as a convict, does not fall within the provisions of the Amnesty Act, and hence he does not benefit therefrom. The first issue is therefore answered in the negative.

As to the second issue of whether the acts of the Amnesty Commission violated or infringed on the plaintiff's rights under articles 20, 21 and 42 of the Constitution, Articles 20 and 21 of the Constitution are found in Chapter four which deals mainly with the protection and promotion of fundamental and other rights and freedom. In the recent case of **THOMAS KWOYELO alias LATONI VS UGANDA, U.C.A. CONSTITUTIONAL PET. NO. 36/2011** the Constitutional Court of Uganda held inter alia , that,

“ Some of the freedom under this (Chapter 4) are absolute and others are subject to some limitations and qualifications.”

Their Lordships went to state that:

“ The rights created under articles 20 and 21 are not absolute. They are subject to Limitations and modifications which must be demonstrably justifiable under a free and democratic Society. To justify unequal treatment under the law, there must exist reasonable and objective criteria for such unequal treatment or discrimination. The burden is on the party who is discriminating to explain the reasons for the unequal treatment or dissemination.”

In this particular case, the defendant is of a view that, the plaintiff does not qualify because he is already a convict. And following my finding on the first issue, I agree with him. This means that, the plaintiff is justifiably disseminated against by the Amnesty Commission. The end result is that, there is no infringement on the plaintiff’s rights under articles 20, 21 and 42 of the Constitution. The second issue is therefore answered in the negative.

I now turn to the third and last issue of whether the Director of Public Prosecution erred in finding that, the plaintiff is not a person envisaged under S. 3 of the Amnesty Act to receive a certificate under the Amnesty Act. Having found as I have on the first issue that as a convict the plaintiff does not qualify for Amnesty, I find that, the Director of Public Prosecution was within his mandate not to grant the certificate of Amnesty to the plaintiff. This issue is also answered in the negative.

All in all I find no merit in this Suit and is dismissed for the reasons I have stated herein above. As this is an extraordinary case, seeking the interpretation of a relatively new of legislation and hence of great public interest and importance, I deem this is a proper case where each party will bear its costs.

Order accordingly.

**AKIIKI – KIIZA
JUDGE
03/03/2012.**

Order: The Assistant Registrar International Crimes Division, to Summon the parties and counsel and read this Judgment to them on the 6/03/2012.

AKIIKI – KIIZA
JUDGE
03/03/2012