

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Muzamiru Kibeedi, Gashirabake JJA]

CIVIL APPEAL NO. 91 OF 2021

(Arising from High Court Miscellaneous Applications No.26 and 31 of 2020)

BETWEEN

Paul Wanyoto Mugoya —————Appellant

AND

Sgt Oumo Joshua=====Respondent No. 1

Attorney General"" -- - ■ = Respondent No.2

*(An appeal from the ruling of the High Court of Uganda [Gidudu, J] delivered on
10th February 2021)*

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] The appellant instituted High Court Miscellaneous Application No. 26 of 2020 against the respondents under the provisions of the Human Rights Enforcement Act, 2019 and the rules thereunder seeking the following declarations and orders:

‘1. **A DECLARATION** that the conduct and actions of the 1st Respondent as an investigating officer of torturing a one Kantu Allan, A4 in Criminal Case NO. 75 of 2019 by

inserting sticks tied with rubber band between his fingers commonly known as “baibbuli” and coercing him to hand over his certificate of title and land comprised in **Busiro Block 312 Plot 841** land at **Kalambi** that would be eventually sold to the Applicant, violated, contravened, infringed upon and or threatened, the said Kantu Allan’s non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment guaranteed under **Article 24** and **44(a)** of the Constitution.

2. **A DECLARATION** that the process leading to the initiation of criminal proceedings against the Applicant under s. 3(3) of the Anti-Money Laundering Act, having acquired property from the said Kantu Allan, who, unknown to the Applicant had been tortured by the 1st Respondent before reaching a decision to dispose of the subject property, violates, contravenes, infringes upon, or threaten the Applicant’s fundamental rights and freedoms to liberty, to just and fair treatment guaranteed under **Articles 23,42** and **45** of the Constitution.

3. **A DECLARATION** that the non derogable rights and freedoms, and other fundamental rights of the accused person in Criminal case No. 75 of 2019 have been violated, threatened and or infringed upon through use of torture by the 1st Respondent.

4. **A DECLARATION** that the trial of the accused persons in criminal case No.75 of 2019 is a nullity for the blatant violations, infringement and threatens the accused person’s non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment, and other human rights and freedoms guaranteed under **Articles 23,24, 42** and **44(a)** of the Constitution by the 1st Respondent.

5. **ORDERS** that criminal proceedings be instituted by the Director of Public Prosecutions against the 1st Respondent for the gross and blatant violations, infringements and threats to the accused persons’ non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment, and other human rights and freedoms

guaranteed under **Articles 23,24,42** and **44(a)** of the Constitution.

6. **COMPENSATORY ORDERS** to be made against the Respondents for gross and blatant violations, infringements and threats to the accused persons non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment, and other human rights and freedoms guaranteed under **Articles 23,24, 42** and

44(a) of the Constitution.

7. Any other relief that this Honorable Court may deem fit and just to grant in the interest of justice.’

[2] At the hearing, the application was consolidated with High Court Miscellaneous Application No. 31 of 2020 that had been instituted by Mugisha Patrick alias Kantu Allan because the two cases originated from High Court Anti-Corruption Division Criminal Case No. 75 of 2019 and the applicants were essentially seeking the same reliefs based on the same grounds and facts. The appellant basically sought orders to halt the criminal proceedings against him on the ground that Mugisha Patrick’s non derogable rights had been violated.

[3] The trial court found that there was not sufficient evidence of proof of the allegation of torture tendered to cause the acquittal of the appellant. Being dissatisfied with the decision of the trial court, the appellant now appeals on the following grounds:

‘That the learned trial Judge erred in law and fact when he held that torture can only be proved by a medical report.

2. That the learned trial Judge erred in law and fact when he held that the evidence adduced in the affidavits and audio recordings does not prove allegations of torture inflicted on A4.

3. That the learned trial judge erred in law and fact when he declined to declare the appellant’s charges in Criminal

Case No. 75 of 2019 before the High Court of Uganda' Anti-Corruption Court a nullity after making a finding that the charges against him were actuated by malice and brought in bad faith.

4. The learned trial Judge erred in law and fact when he held that the Appellant could not get the appropriate remedy when the Director of Public Prosecutions was not heard.'

[4] The respondents opposed the appeal.

Submissions of Counsel

[5] At the hearing, the appellant was represented by Mr. Jude Byamukama while the respondents were represented by Mr. Ojiambo Bichachi, State Attorney from the Attorney General's chambers. The parties opted to adopt their written submissions on record.

[6] Counsel for the appellant set out the duty of a first appellate court as was stated in IP Buko Dafisi & Anor v Uganda [2016] UGCA 65. Counsel opted to argue grounds 3 and 4 together and grounds 1 and 2 together.

[7] With regard to grounds 3 and 4, it was counsel for the appellant's submission that a prosecution founded on malice violates the right to a fair hearing that is non-derogable under Article 44(c) of the Constitution. He relied on section 11(2) of the Human Rights (Enforcement) Act, 2019 for the submission that where it is proved in any criminal proceedings that an individual's non-derogable rights guaranteed under the Constitution have been violated, the court should declare the trial a nullity and acquit the accused person. Counsel further stated that it has been held by courts of law in numerous cases that prosecutions conducted in violation of fundamental rights and freedoms guaranteed under the Constitution are a nullity. He referred to Dr. Kizza Besigye and 10 others v Attorney General [2010] UGSC 6 to support this submission.

- [8] Counsel for the appellant further submitted that courts have power to ensure that the rule of law and human rights are upheld. He relied on Regina v Horseferry Road Magistrates, ex parte Bennet [1994] 1 AC 42 and Albanus Mwasia Mutua v Republic [2006] eKLR. He also submitted that prosecutors ought to regard themselves as ministers of justice assisting in the administration of justice rather than advocates of the cause. Counsel relied on Wilson Ndege & Anor v Uganda [1978] UGSC 22 and Rex V Banks [1916] 2 KB 621 to support this submission.
- [9] Counsel for the appellant also submitted that when illegalities are established by court, the proceedings ought to be stayed and the suit declared a nullity. He relied on Makula International Ltd v His Eminence Cardinal Nsubuga [1982] UGSC 2. He contended that the trial judge having found that the prosecution through respondent no. 1 brought charges against the appellant which were actuated by malice and in bad faith should have stayed the proceedings against the appellant and declared the trial and proceedings a nullity. He contended that by failing to do so, the trial court ratified the wrongful charges against the appellant and continued violating the appellant's constitutionally guaranteed rights and freedoms.
- [10] Counsel for the appellant also faulted the trial court's finding that the appellant could have obtained an appropriate remedy in the circumstances had the application been instituted under the Judicature Act and joined the Director of Public Prosecutions as a respondent. Counsel contended that the office of the Director of Public Prosecutions is not able to sue or be sued because it is not a legal entity. He relied on Sentiba Gordon & 2 Others v Inspector of Government F2010] UGSC 30 where the Supreme Court held that the capacity to sue or be sued by any public body can only be prescribed by Parliament.
- [11] Counsel argued that in the absence of an Act of Parliament conferring legal capacity on the Director of Public prosecutions, it was erroneous for the trial judge to hold that the Director of Public Prosecutions had to first be heard for an appropriate remedy to be granted. Counsel for the appellant also relied on Charles Harry Twagira v Attorney General and Two Others

[2008] UGSC 10 where it was held that the Director of Public Prosecutions is a government department but not a body corporate with powers to sue or be sued. He contended that according to Article 250(2) of the Constitution, civil proceedings by or against the government are instituted by or against the Attorney General. Counsel for the appellant concluded by submitting that it was not a legal requirement that the Director of Public Prosecutions be added as a party to the proceedings.

- [12] In response, counsel for the respondents submitted that the statement by the learned judge to the effect that the appellant was charged maliciously was merely an observation thus an *obiter dictum*. Counsel relied on Paul Nyamarere v Uganda Electricity Board (In Liquidation) [2009] UGCA 41 where the term *obiter* was defined as mere remarks incidentally made and not directly upon the question before court. He also contended that section 11 of the Human Rights (Enforcement) Act, 2019 is only applicable to criminal proceedings which is not the case in this matter. Counsel contended that this being a civil matter, the appellant was seeking a remedy in the wrong court thus the learned judge was justified in denying the remedy.
- [13] Counsel for the respondents further submitted that it would be an interference with the Director of Public Prosecutions' discretionary powers if courts are to dictate how it should carry out investigations and operate its office. Counsel cited Article 120(6) of the Constitution in support of this submission which is to the effect that the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority. That in light of the above, the learned judge could not acquit the appellant without an input from the Director of Public Prosecutions.
- [14] Regarding grounds 1 and 2, counsel for the appellant submitted that it was erroneous for the learned judge to hold that medical or physical evidence was required to prove the torture that was inflicted on Kantu Allan. He contended that the evidence adduced in the affidavits and audio recording sufficiently proved the allegation of torture. Counsel for the appellant submitted that at all material times, Kantu Allan was in prison and could

not even be produced for the hearing of his own application. He submitted that Kantu Allan deponed in his additional affidavit in support of the application the incidents of torture he went through while in police custody at Central Police Station in Kampala.

- [15] Counsel for the appellant further submitted that the affidavit of the appellant in support of the application provides several statements of fact of proof of torture which this court ought to evaluate. This is backed by the audio recording from a Sony Voice Recorder ICD- PX470-1155833 which was also corroborated by the Forensic report authored by Emuye Francis who also swore a supplementary affidavit in support of the application.
- [16] Counsel for the appellant argued that the absence of a medical report was not fatal to the case considering the decision of Jennifer Muthoni Njoroge & 10 Ors v Attorney General [2012] eKLR, where Lenaola, J acknowledged the difficulties that suspects have in bringing forth the usual evidential material expected of them in trials of such nature. He opined that when one is arrested and tortured mercilessly, there is no opportunity to take photographs of the torturers, get medical reports to show the injuries inflicted and no opportunity to call eye witnesses. Counsel also referred to Harun Thungu Wakaba v Attorney General [2016] eKLR and the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment and punishment, Juan E. Mendez A/HRC/25/60, 4th March 2014.
- [17] On the other hand, counsel for the respondents cited a wealth of legislation defining torture. Counsel for the respondents thereafter submitted that the burden of proof was on the appellant to prove the allegation of torture in light of section 101 of the Evidence Act. He contended that the standard of proof in such cases goes beyond the ordinary standard of proof on a balance of probabilities in civil cases. He contended that the applicant is supposed to prove with absolute certainty the existence of torture and this duty is not lessened by the fact the suit proceeded *ex parte*. He relied on Kailash Mine Ltd v B4S Highstone Ltd [2015] UGHCLD 55 to support this submission.

[18] Counsel for the respondents referred to numerous cases in the High Court where it has been held that allegations of torture must be proved by medical evidence. These cases included Bukeni & 48 Others v Attorney General & 3 others [2021] UGHCCD 12, Issa Wazembe v Attorney General¹20191 UGHCCD 181 , Nakaziba v Attorney General¹20201 UGHCCD 31 and Yahaya Lukwago & 4 others v Aiso & 3 Ors [2019] UGHCCD 232. Counsel contended that given the decisions in the above cases and in consideration of the doctrine of *stare decisis*, the learned judge properly applied the principles and law regarding evidence of proof of torture. He prayed that this court upholds the decision of the learned judge.

Analysis

Grounds 1 and 2

[19] Grounds 1 and 2 shall be handled together since they essentially touch on the question whether torture was proved. It was the appellant's contention that Mugisha Patrick alias Kantu Allan from whom he bought land leading to his arrest and charge in High Court Anti-Corruption Division Criminal Case No.75 of 2019 was subjected to torture while in police custody. Article 24 of the Constitution of Uganda states:

‘No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.’

[20] Under Article 44(a) of this Constitution, the right and freedom from torture is non derogable. Section 2 of the Prevention and Prohibition of Torture Act, 2012 defines torture as follows:

‘(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in

an official or private capacity for such purposes as—

- (a) obtaining information or a confession from the person or any other person;
- (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or
- (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.’

[21] Under section 2 (a), severe pain or suffering means prolonged harm resulting from the intentional infliction or threatened infliction of physical pain or suffering. The evidence of torture adduced in court was contained in the appellant’s affidavit in support of the application, the additional affidavit in support of the application of Mugisha Patrick and the supplementary affidavits of Emuye Francis and Katende Isaac.

[22] Mugisha Patrick alias Allan Kantu deponed in his affidavit as follows:

41. **THAT** I am a male adult Ugandan of sound mind, accused number 4 (A4) in Criminal Case No.075 of 2019 pending before this court and currently on remand in Luzira.
2. **THAT** I am a victim of human rights violations by the Respondents herein and therefore well versed with the facts of this matter and therefore deponed this affidavit in that capacity.
3. **THAT** Myself and the Applicant are accused persons in criminal case number 75 of 2019 in which we are charged/indicted with offences under the Anti-Money Laundering Act 2013. A copy of the indictment is attached hereto and marked “A”.
4. **THAT** the 1st Respondent is a police officer at the rank of Sergeant, attached to the Flying Squad and also the Investigating officer (I.O) in Criminal case no.75 Of 2019.
5. **THAT** in July 2018, I was arrested and detained by the 1st Respondent at CPS Kampala for a period of more than 30 days which is more than the mandatory 48 hours, up to

early September 2018 on charges of obtaining money by false pretences.

6. **THAT** after spending over 30 days in police custody, I was arraigned at Buganda Road Chief Magistrates Court, charged with obtaining money by false pretences and, subsequently granted bail vide Buganda Road Criminal Case No. 797/2018.

7. **THAT** while in detention at CPS Kampala I was tortured by Sgt Oumo Joshua, the 1st Respondent herein and the Investigation Officer, personally, directly or indirectly through other police officers/flying squad members under his watch and command, on many occasions and among other “torture tactics” applied, inserted/ put sticks between my fingers and tightly tied them together with rubber bands commonly known as “baibbuli” and forced me to confess to crimes I did not commit.

8. **THAT** whenever I was being tortured by Sgt Oumo there would be someone (a police officer) recording everything on his mobile phone.

9. **THAT** as a result of the torture, cruel, inhuman and degrading treatment inflicted on me and in order to gain freedom from the torture and pain I was routinely subjected to for over 30 days I spent in police custody before being presented to court at Buganda Road, Sgt Oumo Joshua, the 1st Respondent herein demanded that I look for money for them.

10. **THAT** when I failed to get the money, I was coerced to sell my land comprised in Busiro Block 312 Plot 841 land at Kalambi to someone who I later came to know as Wanyoto Paul Mugoya, the applicant herein to raise money the 1st Respondent had demanded from me in order to gain freedom.

11. **THAT** the 1st Respondent demanded that I send for my certificate of title of the said land so that they can get a purchaser and get the money they were demanding from me.

12. **THAT** having been in detention for a long period of time under torture, and desperate to gain freedom, I asked my wife to bring the certificate of title for land comprised

in Busiro block 312 Plot 814 and hand it over to the 1st Respondent. A copy of the certificate of title is attached hereto and marked annexure “B”.

13. **THAT** I was forced to sign transfer forms for the said property and I later discovered that the said land was sold at Ugx. 40,000,000 (Uganda shillings forty million) only to Mr. Wanyoto Paul Mugoya the applicant.

14. **THAT** in September 2018 when I was released on court bail by Buganda Road Chief Magistrate ’ s court vide C.R No.797/2018,1 was escorted by Joshua Oumo and

Hassan Mutyaba to the office of the Applicant who is also accused Number A7 in Criminal Case No. 075 of 2019 to collect the balance of Ugx Shs 20,000,000/= (Uganda Shillings Twenty Million Only) for my land and thereafter handed the money to them.

15. **THAT** as soon as I was free from the said police officers I returned to the applicant's office and poured my heart to him explaining how I had been forced to sell my land below its real value.
16. **THAT** the applicant was kind enough to accept and left me to place it back on the market where I sold it at Ugx 120,000,000 /= (Uganda shillings one hundred and twenty million only) and refunded his money to him.
17. **THAT** the sale of my land comprised in Busiro Block 312 Plot 841 land at Kalambi was hastily concluded at an unfairly low price engineered by extreme circumstances/conditions imposed on me by the investigating officer Oumo Joshua while in police detention, including torture and intimidation inflicted on me by 1st Respondent and his associates in order to extort money from me.
18. **THAT** I was tortured by the 1st Respondent and other persons under his watch and command which violated, contravened, infringed upon and or threatened my non derogable rights and freedoms from torture, cruel, inhuman treatment and other fundamental rights and freedoms guaranteed under Articles 23, 24, 42 and 44(a) of the Constitution.
19. **That** I have been informed by my lawyers of M/S WEB Advocates & Solicitors that the provisions of S.II

of the Human Rights Enforcement Act 2019 have implications on any criminal trial where the non derogable rights and freedoms are violated.

20. That as a victim of human rights violations and a strong believer in the rule of law and enforcement and protection of human rights and freedoms guaranteed under the law. I swear this additional affidavit in support of this application for the enforcement and protection of human rights and freedoms.'

- [23] The evidence of torture in the affidavit evidence of the appellant was mostly an account of what Mugisha Patrick told him which is hearsay. The video recording of the torture he alluded to was not adduced into evidence. The appellant claimed that he had lost it when he bought a new phone and discarded some of the information on his phone.
- [24] The appellant stated that he only became aware that Mugisha Patrick had been tortured and forced to sell his land to him when Mugisha Patrick came to him and informed him of what had transpired after he was released on bail. It was respondent no.1 and a one Hassan Mutyaba who brokered the sale. He thereafter contacted Katende Isaac, a police officer attached to the flying squad to inquire about the allegation of torture.
- [25] Katende Isaac swore in his affidavit that he was contacted by the appellant and instructed to confirm whether Mugisha Patrick from whom he had purchased land through respondent no.1 while in police custody was tortured. He organised a meeting with respondent no.1 and Hassan Mutyaba who were fellow operatives in which he recorded the conversation that transpired. The meeting took place on 12th March 2020 at around 2:00 pm in a car at Nsambya Police Barracks. Emuye Francis, an ICT freelance consultant by profession carried out the digital forensic examination of the audio. The audio was played in court. Respondent no.1 denied that it was not his voice in the audio but rather the person in the audio was just imitating his voice. The learned trial judge found that

respondent no.1 was properly identified by voice as participant no.1 in the audio. He stated:

'I have had sufficient opportunity to listen and hear the 1st respondent speak in court in his submissions opposing the application. I have also listened to the audio recording which runs for **26 minutes**. The audio speaks about matters relating to the charges preferred in **criminal case**

75 of 2019. It dwells on matters canvassed in this application regarding the property that the 1st applicant bought from the 2nd applicant.

My conclusion is that the voice in the audio is that of Sgt Oumo, the 1st respondent. There is no doubt about that. AU circumstances irresistibly point to the 1st respondent as a protagonist in the audio. What he promised to do in the audio happened. This is no coincidence. I believe that audio recording was genuine. The 1st respondent's denial that he was not the one recorded cannot be true. He was put on the spot in the audio. It was his true soprano voice- a type of classical female singing voice. It was consistent with his free speech. There was no attempt to imitate his voice for the entire **26 minutes**. 26 minutes were long enough for the court to assess that there was no imitation of Sgt Oumo's soprano voice. He was the one.'

[26] The above findings of the learned judge are not challenged. I have perused the transcribed version of the audio that was translated to English. From the transcription, it was clear that a group of people were tortured by and under the command of respondent no.1. None of the names of the people that were tortured were mentioned and respondent no.1 was quite evasive in the conversation concerning torture. I find that the audio recording considered together with the affidavit evidence of Mugisha Patrick was sufficient to prove that the respondent no.1 tortured and or allowed Mugisha Patrick to be tortured under his command.

[27] Respondent no.1 denied the allegations of torture put forth in the affidavits in support of the application. He stated that Mugisha Patrick was neither

tortured by him nor by any other police officer. He contended that the appellant was not arrested in July but rather on 4th August 2018 by Detective ASP Nuwahereza Hilary and detained at SID Kireka where his statement was obtained and then transferred to Flying Squad from where he was produced before the Buganda Road Chief Magistrates' Court and charged. He denied having participated in the sale of Mugisha Patrick's land and also contended that Mugisha Patrick did not complain about torture in his complaint against the respondent to the Police Professional Standards Unit nor in his bail application. Respondent no.1 averred that the application was tainted with material falsehoods, was *malafide* and an intention to evade, delay and frustrate the prosecution of the appellant.

[28] The evidence of respondent no. 1 is destroyed by the transcript of the recording in which the learned trial judge identified the respondent no.1's voice and concluded that he had participated. The audio recording shows that he was involved in selling Mugisha Patrick's land to the appellant and Mugisha Patrick stated in his affidavit the circumstances under which he came to sell the land to the appellant. Mugisha Patrick was never brought to court

to be examined on the allegations in his affidavit and no reason was given for the failure to do so. He was on remand at the time of hearing this application.

[29] While arriving at the conclusion that the allegation of torture was not proved to the satisfaction of court, the learned judge stated:

‘It was incumbent upon the 2nd applicant, A4, to adduce medical or physical evidence to demonstrate the effect the alleged torture had on his hands or his mental condition.

No medical assessment or report was filed for my benefit.

An applicant cannot just allege torture and ask court to find in his or her favour. There should be physical, mental or psychological injury capable of medical assessment to satisfy the court that there was torture.

Indeed, if torture is proved to the satisfaction of court, the court would be compelled to offer compensation and order

the prosecution of the offender. **See sections 9(3) and 11(3) of the Human Rights (Enforcement) Act, 2019.**’

[30] I respectfully disagree with the position adopted by the learned judge. The requirement for medical evidence to prove torture has no legal basis. It should be noted that it is rare to have direct evidence of torture because of the nature of the crime. Most of the torture cases are carried out in secret while the victim is in detention making it difficult to obtain a medical report. The High Court of Kenya in Jennifer Muthoni Njoroge v The Attorney General (supra) was alive to these challenges. Lenaola J, upon reviewing the holding in Azania Peoples Organisation (AZAPO) and Others v President of The Republic of South Africa and others f 1996) ZACC 16 stated:

‘11. The above holding is attractive to me because it addresses the difficulties that suspects have in bringing forth the usual evidential material expected of them in trials. **When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses?**

12. One James Opiyo has been named as the leader of the of the torture squad at Nyayo House at the material times. **Would it be expected that the Petitioners should politely call Opiyo and ask him to call his juniors to testify of their actions?** Obviously not and Okwengu, J. in Harun Thungu Wakaba & Others vs. Attorney General,

H.C. Misc. Application No. 1411 of 2004 stated as follows;

[31] In the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/25/60 4th March 2014 by Juan E. Mendez at page 8 while discussing the burden of proof on the admissibility of material obtained by torture in courts, it was stated:

‘In this context, it is necessary to have due regard for the special difficulties in proving allegations of torture, which

is often practiced in secret, by experienced interrogators who are skilled at ensuring that no visible signs are left on the victim. In addition, all too frequently those who are charged with ensuring that torture or other ill-treatment does not occur are complicit in its concealment.'

[32] Further, the unjustified prolonged detention of Mugisha Patrick beyond the constitutionally mandated time before being formally charged strengthens his case that he was tortured.

[33] Considering the above, I would hold that grounds 1 and 2 have merit and should therefore succeed.

Grounds 3 and 4

[34] It is the appellant's contention that the learned judge should have rendered the charges against him a nullity and discontinued the prosecution against him in High Court Criminal Case No. 75 of 2019 having found that the charges against the appellant were actuated by malice.

[35] It is apparent from the evidence on record that the charges against the appellant were actuated by malice. Upon analyzing the transcription of the audio recording, I find that the appellant was charged following a deal gone wrong that had been brokered by respondent no. 1. The deal concerned the sale of Mugisha Patrick's land to the appellant. Mugisha Patrick was in police custody at the time and respondent no. 1 was the police investigating officer in charge of his case. It is clear that the respondent and others backing him had for a long time waited for means of criminally implicating the appellant but in vain. When the deal he brokered did not go as he intended, respondent no. 1 used the opportunity to frame and charge the appellant as an accomplice in High Court Criminal Case No. 75 of 2019. This is what he referred to as his plan 'B' against the appellant. There is evidence of respondent no. 1 concealing evidence in the case in order to exonerate himself from having been involved in the sale of land. He alludes to a search certificate where he excluded the duplicate

certificate of title as one of the items that was received as an exhibit following the search of Mugisha Patrick's premises.

[36] Whereas the learned trial judge was alive to these facts, I do not agree with the manner in which he dealt with this matter. He stated:

'But before I take leave of this matter, I would like to express my concern about the manner in which investigators deal with cases involving -money and exhibits before deciding to charge suspects in court. There is strong evidence to prove that charges against the 1st applicant were slapped upon him in bad faith. I am satisfied that the 1st respondent, Sgt Oumo has abused his mandate as an investigator to cause charges to be preferred against a buyer of property where he was a broker. He brokered deals to dispose of exhibits' and turned around to seek the arrest of one of the buyers. If the 1st applicant had brought this application under the provision of the Judicature Act and cited the DPP as respondent, he could have obtained an appropriate remedy which I cannot grant now because I have not heard the **DPP** in reply.'

[37] Article 28(1) of the Constitution provides for the right to a fair hearing. It states:

'(1) In the detennination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.'

[38] Under Article 44 (c), this right is non derogable. Section 11(2) (b) of the Human Rights (Enforcement) Act mandates the trial court to declare a trial a nullity and acquit the accused person if it is brought to the attention of the competent court that an accused's non derogable rights and freedoms have been infringed upon.

[39] It states,

'11. Derogation from non-derogable rights and freedoms

(1) It is an offence for a person to derogate from a non- derogable right and freedom guaranteed under the Constitution.

(2) Whenever, in any criminal proceeding-

(a) it appears to the judge or magistrate presiding over a trial,

- (b) it is brought to the attention of the competent court; or
- (c) the competent court makes a finding, that any of the accused person's non derogable rights and freedoms have been infringed upon, the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

[40] The impugned criminal prosecution of the appellant and Mr Mugisha Patrick for money laundering and other charges was clearly engineered by the respondent no.1 for improper purposes. Firstly, to punish the appellant and Mugisha Patrick in exposing the criminal actions of the respondent no.1 in the torture of Mugisha Patrick, forcible selling of the Mugisha's property, and obtaining part of the sale price. It was planned by the respondent no.1 as his plan B in case there was any attempt to expose his unlawful and illegal actions in relation to Mugisha Patrick. The right to a fair hearing is always violated when it is commenced for improper purposes as it is clearly the case in the matter at hand.

[41] In Regina v Horseferry Road Magistrates' Court, Ex parte Bennett (supra), the defendant, a citizen of New Zealand was alleged to have committed criminal offences in England. He was traced to South Africa by the English police and forcibly returned to England. There was no extradition treaty between the two countries and although special arrangements could be made under section 15 of the Extradition Act 1989, no such proceedings were taken. The defendant was arrested and brought before a magistrates' court to be committed to the Crown Court for trial. He sought an adjournment to enable him to challenge the court's jurisdiction but the application was refused and he was committed for trial. He sought judicial review of the magistrates' court's decision but the application was denied on the ground that the English court had no power to inquire into the circumstances under which a person appearing before it had been brought within the jurisdiction.

[42] While determining whether the High Court properly exercised its discretion in dismissing the application, Lord Griffiths stated:

'...If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human

rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended.

So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.'

[43] He further stated:

CI echo the words of Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254,1354: "The courts cannot contemplate for a moment the transference

to the Executive of the responsibility for seeing that the process of law is not abused." The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.'

[44] In *Albanus Mwasia Mutua v Republic* (supra), the appellant had been brought before the magistrate's court for charging 8 months from the date of his arrest, while finding that there was gross violation of the appellant's right to a fair hearing under section 72(3) (b) and section 77(1) of the Constitution of Kenya, the Court of Appeal of Kenya stated:

'At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.'

[45] I am satisfied that it is our duty as courts of law to enforce fundamental human rights and freedoms under the both the Constitution and the Human Rights (Enforcement) Act, 2019. Both the High Court of Uganda and the magistrates' courts are competent courts under the said Act to enforce fundamental human rights and freedoms. The law does not permit competent courts to turn a blind eye to the actions of respondent no.1 which amounted to a

violation of the appellant's right to a fair hearing. The law compels us to hasten to protect people's fundamental rights and freedoms and has provided various remedies including nullifying any prosecution that violates the non-derogable rights of a person.

[46] The learned judge ought to have discontinued the charges against the appellant on that basis. Besides, the appellant could not have instituted proceedings against the Director of Public Prosecution because it is a government agency and not a legal person with powers to sue or be sued. See Charles Harry Twagira v Attorney General and Two Ors [2008] UGSC 10. Under Article 250(2) of the Constitution, civil proceedings against the government are instituted against the Attorney General. It is on record that the Attorney General was served with the application but never responded to the application.

[47] In light of the above, I would hold that grounds 3 and 4 should succeed. **Remedies**

[48] I would allow this appeal with costs here and below.

[49] I would grant the following declarations and orders:

1. The conduct and actions of the respondent no.1 as an investigating officer of torturing a one Patrick Mugisha alias Kantu Allan, A4 in Criminal Case NO. 75 of 2019 by inserting sticks tied with rubber band between his fingers commonly known as “baibbuli” and coercing him to hand over his certificate of title and land comprised in **Busiro Block 312 Plot 841** land at **Kalambi** that was eventually sold to the Applicant, violated, contravened and infringed upon the said Kantu Allan’s non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment guaranteed under **Article 24** and **44(a)** of the Constitution.

2. The process leading to the initiation of criminal proceedings against the Applicant under s. 3(3) of the Anti-Money Laundering Act, having acquired property from the said Patrick Mugisha alias Kantu Allan, who, unknown to the Applicant had been tortured by the Respondent no.1 before reaching a decision to dispose of the subject property, violates and contravenes the Applicant’s fundamental rights and freedoms to liberty, to just and fair treatment guaranteed under **Articles 23,42** and **45** of the Constitution.

3. The non derogable rights and freedoms, and other fundamental rights of the appellant and Patrick Mugisha alias Kantu in Criminal Case No. 75 of 2019 have been violated and infringed upon through use of torture by the respondent no. 1.

4. The trial of the appellant and Patrick Mugisha alias Kantu in criminal case No.75 of 2019 is a nullity for the blatant violations and infringement of the accused persons' non derogable rights and freedoms from torture, cruel, inhuman and degrading treatment, and other human rights and freedoms guaranteed under **Articles 23,24, 42 and 44(a)** of the Constitution by the Respondent nol.

5.1 would direct the Registrar of this court to transmit to the Director of Public Prosecutions, a copy of this judgment, in light of the functions of the Director of Public Prosecutions under article 120 (1) & (2) of the Constitution.

[50] The appellant also sought compensatory orders for the gross and blatant abuse of the fundamental rights of the appellant. Unfortunately, Mr Mugisha Patrick alias Kantu is not a party to this appeal and I am not in a position to make an award of damages to a person who is not a party to this appeal. However, Mr Mugisha Patrick was a party in the court below. In the interests of justice, I would refer this portion of the appellant's claim back to the High Court of Uganda, to the learned trial judge, to cause a hearing to be done in respect of the original applicants, including the appellant and determine the appropriate compensation for the appellant and Mr Mugisha Patrick alias Kantu Allan.

Decision

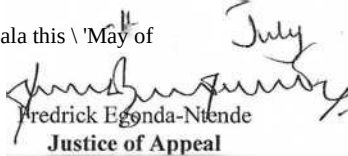
[51] As Kibeedi and Gashirabake, JJA, agree this appeal is allowed with costs here and below and with the orders proposed herein above.

[52] The charges against the appellant and Patrick Mugisha alias Kantu Allan in High Court Anti-Corruption Division Criminal Case No. 75 of 2019 are nullified. A stay of prosecution against the appellant and Patrick Mugisha in respect of the charges in High Court Anti-Corruption Division Criminal Case No. 75 of 2019 is ordered.

Signed, dated and delivered at Kampala this \ 'May of

July

2022.


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Muzamiru Kibeedi, Gashirabake J J A]

CIVIL APPEAL NO. 91 OF 2021

(Arising from High Court Miscellaneous Applications No.26 and 31 of 2020)

BETWEEN

Paul Wanyoto Mugoya

Appellant

AND

Sgt Oumo Joshua=====Respondent No.1

Attorney General===== Respondent No.2

(An appeal from the ruling of the High Court of Uganda [Gidudu, J] delivered on 10(h February 2021)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEEDI, JA

I have had the benefit of reading in draft the Judgment prepared by my brother, Hon. Justice Egonda-Ntende, JA. I concur with the reasoning, conclusions and orders proposed.

Dated at Kampala this

8th day of July
Kibeedi

2022

Muzamiru Mutangula
Kibeedi

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

[Coram: Egonda-Ntende, Muzamiru Kibeedi, C. Gashirabake, JJA

CIVIL APPEAL NO. 91 OF 2021

(Arising from High Court Miscellaneous Applications No. 26 and 31 of 2020)

BETWEEN

PAUL WANYOTO MUGOYA:..... :: ::APPELLANT
AND **RESPONDENTS**

- 1. SGT OUMO JOSHUA**
- 2. ATTORNEY GENERAL**

(On appeal from the ruling of the High Court of Uganda [Gidudu, J] delivered on 10th February 2021)

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

I have had the benefit of reading in draft the Judgment prepared by Hon. Justice Egonda-Ntende, JA. I concur with the reasoning and conclusions

Dated at Kampala this


.....

day of


.....

2022

therein. I have nothing useful to add.

Christopher Gashirabake, **JUSTICE OF APPEAL**

