THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-MC-0036-2009

1. FRANCIS TUMWEKWASIZE

2. TIMOTHY SIBASI :::::::::::::::::: APPLICANTS

3. IBRAHIM SADIK

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

The applicants brought this application by Notice of Motion under Article 50 of the Constitution and Rule 3 (1) of the Judicature (Fundamental Human Rights & Freedoms) (Enforcement Procedure) Rules, 2008 (S.I 2008 No.55) for orders of enforcement of Fundamental Human Rights and Freedoms of the applicants allegedly breached by the respondent's agents.

The details are set out in the affidavit of the first applicant, Francis Tumwekwasize. According to him, he was employed by WBS TV as a reporter since 2005. On 27/08/2008 he was assigned by the news editor of WBS to cover a story relating to the sanitary situation at Namboole Stadium. The public had raised concern that the Special Police Constables who were residing in Namboole Stadium had made the stadium unsanitary. He arrived at the Stadium at about 2.00 p.m. in the company of the 2nd and 3rd applicants wearing WBS labels and the van clearly marked WBS Television. On the way

to the office of the Stadium management, the trio were accosted with shouts and alarms from several Special Police Constables who barred them from entering the Stadium on account of several newspapers having written condemning the SPCs unsanitary behaviour at the Stadium. They retreated to their van but could not get out of the gate because the SPCs had closed it. The SPCs arrived at the van, forced it open, pulled them out and beat them with batons, kicks, sticks and metals and took away their cameras and their accessories and set their dogs at them. They were later set free but denied access to the Stadium. All this is denied by the respondent through its servant Laban Muhabwe, a Senior Superintendent of Police, who claims to have been at the Stadium at the time. It is Mr. Muhabwe's averment in the affidavit in reply that there were no Special Police Constables at Namboole Stadium at the time.

At the conferencing the parties agreed on one single point, that is, that the applicants went as journalists to Namboole Stadium on 27/08/08. The rest was disputed.

ISSUES:

1. Whether the applicants were assaulted, battered and molested by the respondent's agents.

2. Whether the acts complained of amounted to a breach of the applicants' freedom of the Press.

3. Whether the acts complained of amounted to cruel, inhuman and degrading treatment.

4. Remedies.

Counsel:

Mr. Rwakafuuzi for the applicants.

Mr. Karuhanga for and on behalf of the Attorney General.

I will first deal with the objection raised by learned Counsel for the respondent based on Rule 4 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008. This Rule provides that:

> ***"A motion shall not be made without notice to the Attorney General and other party affected by the application."***

It is the view of learned Counsel for the respondent that the only notice known at law which can be served on to the Attorney General is the Statutory Notice of forty five days; that failure to serve the notice on the Attorney General makes the application bad in law.

Learned Counsel for the applicants did not file any reply to the said objection.

I am inclined to the view that the notice to the Attorney General referred to in Rule 4 of Section I 2008 No.55 is different from the Statutory Notice required under Section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap.72. I say so because Article 50 of the Constitution provides a relaxed procedure for enforcement of Fundamental rights and freedoms. The procedure pointed out by learned Counsel for the respondent obtains in ordinary suits on plaint under the Civil Procedure Rules.
In ***DR. J. W. Rwanyarare & 2 Others vs Attorney General HCMA No.85 of 1993*** High Court held that in matters concerning the enforcement of human rights under the Constitution, no statutory notice was required because to do so would result in an absurdity as the effect of it would be to condone the violation of the right and deny the applicant a remedy.

See also: ***Greenwatch vs Uganda Wildlife Authority & Anor HCMA No.15 of 2004***.

I am of the view that a notice to the Attorney General under Statutory Instrument 2008 No.55 is a statutory requirement whether the Attorney General has been sued or otherwise as long as the matter concerns enforcement of the fundamental rights and freedoms under Article 50 of the Constitution. It shouldn't be confused with a Statutory

Notice required in ordinary suits where the notice period is intended for the purpose that the government may investigate the claim and if possible settle it out of court. For the reasons stated above, I would disallow the objection and I do so.

Issue No. 1: ***Whether the applicants were assaulted, battered and molested by the respondent's agents***.

I have already set out in detail the basis of the applicants' claim against the respondent. Mr. Tumwekwasize purports to swear the affidavit on his own behalf and on behalf of his co-applicants, Timothy Sibasi and Ibrahim Sadik. However, there is nothing on record to suggest that he was given any authority by his colleagues to do so.

The affidavit itself contains averments which should have come from the aggrieved persons themselves. For example, he alleges that the 2nd and 3rd applicants were injured when none of them has indicated so in an affidavit sworn by self. He also alleges that the 3rd applicant lost money in the scuffle and yet the alleged loser of the money has not stated so himself. However, the 1st applicant has at least attached a copy of treatment notes to his affidavit, implying that he too was injured and treated at Nsambya Hospital thereafter. Besides, there is an affidavit of Dr. Ingabire showing that she attended to the 2nd respondent at the Hospital. No such evidence is available in respect of Ibrahim Sadik.

This court is cutely aware that a person is competent to swear an affidavit on matters or facts he knows about or on information he receives and believes. And under article 50 (2) of the Constitution, any person or organization may bring an action against the violation of another person's or group's human rights. Which ever way it is done, however, there must be evidence of existence of those facts.

In the instant case, it is evident that the first applicant was at the Stadium. He claims to have been in the company of Timothy Sibasi. I have already indicated that Mr. Sibasi underwent medical treatment with the first applicant. To this extent, there is evidence on which to base the inference that Mr. Sibasi was also at the Stadium. This, however, is not

so with Ibrahim Sadik who has neither made any statement on oath or given any evidence to show that he too was treated at Nsambya like his co-applicants. This is particularly important in view of Laban Muhebwa's sworn evidence that he saw two men only in a scuffle with police at the stadium. In view of this evidence and Sadik's failure to furnish any evidence to court that he too was assaulted and battered as claimed, I'm of the view that his claim cannot stand. It ought to be struck out and I do so.

As to whether Mr. Tumwekwasize and Mr. Sibasi were assaulted, I have considered the affidavit evidence of Mr. Tumwekwasize. He avers that on the way to the Stadium management, his team of journalists was accosted with shouts and alarms from several police constables. They did not stop at shouting. Several of them charged at them, surrounded them and blocked them from entering the said offices. The journalists retreated to their van but the said constables followed them there and set their dogs to bite them. This was in addition to being beaten and kicked and their cameras being taken away. On being taken to one Laban Muhebwa, he ordered that the cameras be returned to them.

Although Mr. Muhebwa denies the alleged mistreatment of the applicants in his affidavit, he does not deny seeing at least two of them at the Stadium. He confirms in paragraph 6 thereof that there was pandemonium at the Stadium and that cameras were confiscated from them. He avers in paragraph 11 that the applicants' report to him was that people who confiscated cameras from them were Special Police Constables. He admits in paragraph 12 that he ordered restoration of the cameras to them. Although he denies existence of Special Police Constables at the Stadium at the time, he does not mention in his affidavit whom he ordered to return the cameras to the applicants and why they had confiscated the said cameras from the applicants in the first instance. But he avers that the applicants exchanged words with those people and "called the police officers 'lumpens'," implying that those people who attacked them were policemen. None of them has sworn an affidavit to show that they were ordinary police officers and not Special Police Constables. Coupled with this is evidence of Dr. S. K. Kiwanuka and Dr. Prossie Ingabire that they treated these two journalists at Nsambya Hospital on the very

day of the scuffle at Namboole Stadium. The medical treatment notes show what each journalist was complaining about and how they were treated.

Against all this evidence, we have evidence of Dr. Moses Byaruhanga. Whereas the incident happened in August 2008, Dr. Byaruhanga swore an affidavit on 12/10/2009, over a year later.

From his affidavit, he did not examine any of the applicants to ascertain whether or not they or any of them sustained the injuries alleged. He sat in his office, perused their treatment notes and came to the conclusion that the applicants, 1st and 2nd, were not assaulted. He has in effect rubbished the findings of his colleagues when he did not see the subject matters of those findings, the applicants themselves. I think the respondent's evidence on this point is to say the least absurd. It is of no value.

In law a fact is said to be proved when the court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden lies on the party who asserts the affirmative of the issue in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, the allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.

Applying the above principle to the facts herein, it follows that the burden is on the applicants to prove that on 27/08/08 they were assaulted, battered and molested by agents of the respondent. As between the evidence of the doctor who did not see the applicants and that of the doctors who saw and treated them, court would obviously go by the evidence of the latter. It is evidence that establishes in a material particular that the applicants were assaulted. It disproves Laban Muhebwa's assertion that they were not assaulted. The applicants have alleged that they were assaulted by Special Police Constables. I have found no evidence to prove otherwise. It is not disputed that Special Police Constables are agents of the respondent. I hold that they are. Applicants 1 and 2

have in my view discharged the burden of proof cast on them by law. On the balance of probabilities, they were assaulted, battered and molested.

I would answer the first issue in the affirmative in respect of 1st and 2nd respondent only and I do so.

Issue No. 2: ***Whether the acts complained of amounted to a breach of the applicants' freedom of the Press.***

The applicants are relying on Article 29 (1) (a) of the Constitution. Under this law every person in this country enjoys the right to freedom of speech and expression. This right includes freedom of the press and other media. The defence argument on this point is that the applicants had no right to access the Stadium without express permission for an express purpose.

Mr. Muhabwe does not state that much in his affidavit. He was at the Stadium at the material time. He saw the applicants being molested. They had identified themselves as journalists attached to WBS TV. He has not offered any explanation as to why his men opted to harass the journalists in a ruthless manner. Free press usually means the right to publish, a right to confidentiality of sources and a right to access information.

It sounds to me superfluous that a journalist proceeding to cover a newsworthy incident would first require permission to access the venue, in the absence of any evidence that the denial of accessibility was in the interest of public peace and order. If the conditions at the Stadium were unsanitary, that was the more reason why they deserved exposure for remedial purposes. No evidence has been presented to court that the Stadium could not be accessed without any permission and that the applicants were aware of it. In my view the act of denying them access amounted to a breach of their freedom as journalists to inform the public as to the sanitary condition of the Stadium at the time.

I would answer the second issue in the affirmative and I do so.

Issue No. 3: ***Whether the acts complained of amounted to cruel, inhuman and degrading treatment***.

On this point, the applicants rely on Article 24 of the Constitution. Under this law, no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

It is noteworthy that the Constitution itself does not define the terms "torture, cruel, inhuman or degrading treatment." Courts have tried to define them depending on the context.

Learned Counsel for the applicants has drawn to my attention the opinion of one Guy Vassal Adams in connection with this case. His opinion can at best be of persuasive value. It is not evidence that the acts complained of amounted to cruel, inhuman and degrading treatment.

In ***Victor Mukasa & Anor vs Attorney General HCMC No. 24/06*** (unreported) the trial Judge was of the view that the acts of the respondent towards two ladies amounted to torture, cruel, inhuman and degrading treatment. The ladies had suffered humiliation at the hands of LC officials and Police. Each case must of course be decided on the basis of its unique facts and circumstances. There cannot be any hard and fast rule about this. Mr. Rwakafuuzi's argument, if I have understood it correctly, is that a person's dignity is guaranteed by the Constitution and should not be injured by anyone. I accept that argument. Any injury to a person's dignity should therefore be condemned by the courts. The injured person should be compensated in damages.

I have understood the import of this application to be basically about human dignity. These are journalists who went to cover an incident in Namboole but ended up being assaulted and molested by the police in dehumanizing circumstances. It has not been argued that the treatment they received at the hands of the Special Police Constables was

in public interest. In my view the acts complained of came within the meaning of 'cruel, inhuman and degrading treatment' as stipulated in the Constitution. I so hold.

I would therefore also answer the third issue in the affirmative and I do so.

Issue No. 4: ***Remedies***

The object of an award of damages is to give the plaintiff compensation for the damages, loss or injury he/she has suffered. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money. It is the best that a Court can do in the circumstances of each case.

In ***Victor Mukasa*** case, supra, the second applicant was awarded Shs.10m for torture, inhuman and degrading treatment by her Lordship Stalla Arach Amoko. In ***Ronald Reagan Okumu & Others vs Attorney General HCMA No. 63/2002***, Kania J. awarded the applicants Shs.10m each for violation of their rights or personal liberty. Learned Counsel for the applicants is of the view that in the present case the torture was more aggravated since it caused injuries and prayed that each applicant be awarded Shs.30m for the torture and degrading treatment. I have already indicated that the applicants were assaulted, battered and molested. In addition they were prevented from reaching the scene of their intended story or even to talk to the Stadium Management. The agents of the respondents earn no credit for such bizarre conduct on their part much as the applicants' cameras were returned to them. Doing the best I can in the unique circumstances of this case and taking into account the procedure adopted by the applicants of proceeding by Notice of motion instead of an ordinary suit where damages would be pleaded, strictly proved and properly assessed, an award of Shs.15,000,000/= (Fifteen million only) to each applicant, i.e. Mr. Tumwekwasize and Mr. Sibasi, whose presence at the Stadium has been proved to the satisfaction of the court, would in my view meet the ends of justice, especially in an environment where complaints of Police Constables being trigger-happy are on the increase. Journalists must be protected rather

than harassed. Each applicant's award shall attract interest of 20% per annum from the date of ruling till payment in full.

The two applicants shall also have the costs of the application.

Orders accordingly.

Yorokamu Bamwine
JUDGE
23/03/2010

23/03/10
Mr. Rwakafuuzi for applicants
Applicants absent
Elison Karuhanga for respondent

Court:
Ruling delivered.

Yorokamu Bamwine
JUDGE
23/03/2010