

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
CIVIL SUIT NO. 154 OF 2016

ISSA WAZEMBE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff filed this suit seeking declarations that his constitutional rights under Article 20(1), (2), Article 24 and Article 26(1) (2) were violated, an order that the defendant pay punitive and general damages for the violations as well as costs for the suit.

The plaintiff pleaded that he was arrested by the military from a bus while returning to Mbale after shopping in Kampala. He was not informed of the reasons of his arrest, nor did they allow him to inform his relatives. He stated that he was tortured by the military immediately after arrest and detained him in a safe houses from Nov 2007 to August 2008.

The defendant filed a defence denying all liability.

The parties filed a joint scheduling memorandum where the following issues were agreed for court's determination;

1. *Whether the plaintiff's personal liberty was violated by the defendant*
2. *Whether the plaintiff's freedom from torture was violated by the defendant*
3. *Whether the plaintiff's right to property was violated by the defendant*
4. *Whether the plaintiff's right to be treated fairly and justly in administrative decision as violated by the defendant*
5. *Remedies*

The defendant did not appear before this court despite proof of service hence the court proceeded under Order 17 Rule 4 to determine this suit.

The plaintiff in their final submissions discussed the issue of limitation with regard to this suit. Counsel cited the case of *Hajati Safina Nakitto vs NEMA (Masaka) HCCS 46/13* where in Musoke-Kibuuka J (from page 7 of the judgment)

“It is my humble view that to apply the doctrine of laches to Constitution cases would amount to legislation where Parliament deliberately left it open ended. Secondly, there appears to have been no dispute that neither the Limitation Act Cap 80 nor the Civil Procedure & Limitation (Miscellaneous Provisions) Act Cap 72 do apply to this situation.

I have not come across any Ugandan authority on this matter. However, in the Kenyan case of Wachira Whiere vs the Honorable Attorney General Miscellaneous Civil Case No. 1184/2003 the court faced a similar situation. It observed;

“we find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there no limitation period for seeking redress for violation of the constitution of Kenya ... we find and hold that the plaintiffs claim arising from violation of his constitutional rights is not statute barred.”

The authority of Wachira is very persuasive authority in Uganda since Art.2 of our Constitution, the supremacy clause, is in pari materia with s.3 of the repealed Kenya Constitution. I, therefore find that the plaintiff’s suit was not filed out of time since it is an action to redress violation of guaranteed constitutional rights under Art.50(1) of the Constitution. She did not file her suit out of time owing to the fact that the nature of her suit is enforcement of rights as opposed to a cause of action in tort or land rights.”

I associate myself with the decision of Musoke-Kibuuka J and will therefore proceed to determine the suit.

Issue 1: Whether the plaintiff’s personal liberty was violated by the defendant.

Plaintiff’s submissions

Personal liberty is guaranteed in **Art.23** of the Constitution. No person may be subjected to arbitrary arrest and detention. The plaintiff pleaded and testified that he was arrested and detained by the military, without reasonable cause for the arrest and detention in violation of **Art.23(3)** that requires that a person arrested, restricted or detained should be informed of the

reason for the arrest and detention, in the present case the military just whisked the plaintiff from the bus without informing him the reason of his arrest and detention.

Art.23(2) prohibits detention in unauthorised ungazetted detention centres. The plaintiff was detained in safe houses which are not detention centres. The National Resistance Army (Application to Civilians) Regulations 1996, Regulation 5(1) provides that -

“upon arrest of civilian, that civilian may be detained in a military cell and shall be brought before a military court not later than forty eight hours after arrest

The plaintiff was not detained in a military cell which would have been an authorised detention centre.

In ***Joseph Tumushabe vs Ag [2005] KALR 768***, Ntabgoba, P.J. in a case filed for enforcement of the applicant’s rights and freedoms who had been detained in military custody, court found a violation of their liberty. S.188(1) of the UPDF Act 2005, provides that a person effecting under this Act shall immediately commit the person arrested to civil custody or service custody. Civil or service custody are the only authorised instances of lawful detention in military centres.

Art.23(4)(b) of the Constitution guarantees that a person detained or restricted on suspicion of having committed an offence must be taken to court not later than 48 hours. The plaintiff was in safe houses for 9 months without either being set free or taken to court.

Art.23(5)(a) guarantees that upon arrest a person shall be allowed to inform his next of kin, about the arrest. In ***Gregory Kafuuzi vs AG [2000] KALR 743***, Bamwine, J as he then was, found in a case where local defence forces arrested a cattle keeper from duty and the plaintiff’s cattle go lost. Court found that **Art.23(5)(a)** requires that an arrested person be allowed to inform his family that he has been arrested, failing which is a violation.

In the present case, the military that arrested the plaintiff never allowed him to inform his parents about the arrest. After many months in safe houses the military approached the plaintiff’s father deceiving him that they wanted to rescue his son if he paid to them money. The father lost the plaintiff’s land and house at Ush 30

million and pocketed it. All this was occasioned because the military never allowed the plaintiff to communicate with his parents.

All in all, the military violated all the guarantees to liberty of the plaintiff. The defendant filed a mere denial, did not present contrary evidence nor did he cross-examine the plaintiff and his witness inspite of all opportunities availed to him through several adjournments.

In ***Pamela Sabina Mbabazi vs Henry Bazira CACA 44/04 [2005] KALR 412***, the court of appeal found that failure by the respondent to adhere to the dictates of **O.8, r.3 CPR**, which require that every allegation of facts must be traversed specifically, amounted to admission. In the present case, court gave the defendant several opportunities to produce contrary evidence or at least cross examine the witnesses. The plaintiff has proved that his guarantees to personal liberty were violated.

However, the right to liberty is not absolute since **Art.23** is not one of the non derogable rights. Under certain justifications provided for under **Art.43(1)** of the Constitution, the rights to liberty can be restricted. However, it is the defendant to plead justification which was not done. The plaintiff cannot speculate that may be his arrest and detention was justified.

Resolution

The subject of the preservation of personal liberty is so crucial in the Constitution that any derogation from it, where it has to be done as a matter of unavoidable necessity, the Constitution ensures that such derogation is just temporary and not indefinite.

The Constitution has a mechanism that enables the enjoyment of the right that has been temporarily interrupted to be reclaimed through the right to the order of habeas corpus which is inviolable and cannot be suspended. **See; Hon Sam Kuteesa & 2 Others Vs Attorney General (Constitutional Reference No. 54 of 2011)** stated that:

In this case the military that arrested the plaintiff never allowed him to inform his parents about the arrest neither was he ever charged of any criminal offence before any court of the law. The plaintiff was not detained in a military cell which would have been an authorised detention centre. This is all proof that the arrest and

detention were unlawful and a violation of the plaintiff's right to personal liberty guaranteed under **Article 23** of the Constitution. Further still, the defendant did not lead any evidence justifying why the plaintiff's right was restricted.

The person arrested and detained has a right to know the reasons for detention right away at the time of arrest. The person effecting arrest must explain the reasons in clear and simple language.

This information helps the person being arrested or detained to know and assess how serious the situation is. They can then make an informed decision about their other rights.

The justification of arrest will usually rely on the reasons advanced at the time of arrest and any absence will invite justification for challenge of the arrest and detention by the person whose liberty is curtailed.

It is lawful to arrest any person who is reasonably believed to have committed an offence or suspected to have committed an offence. The person effecting such arrest must carry out such arrest in accordance with the Constitution and other laws for the purpose of maintenance of law and order.

The fact that the plaintiff was never charged before any court of law coupled with the failure to give reasons for his arrest, his arrest was unjustified and arbitrary. This issue is resolved in the affirmative.

Issue 2: Whether the plaintiff's freedom from torture was violated by the defendant

Plaintiff's submissions

Art.24 of the Constitution guarantees freedom from torture, cruel, inhuman or degrading treatment or punishment. This guarantee is absolute and in fact prohibitory. Consequent upon **Art.24** Parliament enacted the Anti-Torture Act.

The plaintiff pleaded and led evidence of the torture occasioned to him by the military. He showed court that he now has only one leg, the other having been amputated. His doctor witness testified that the amputation became necessary because his leg developed gangrene due to the untreated wounds occasioned by torture. The leg had to be amputated. Like we have submitted under issue 1, the

defendant never traversed the plaintiff's pleadings nor did the defendant bring adverse evidence in court to disprove the plaintiff's allegations. Court is invited to find that indeed the plaintiff's freedom from torture was violated.

Freedom from torture is absolutely guaranteed and cannot be justified under whatever circumstance. That notwithstanding the defendant never pleaded justification.

Resolution

Article 44(a) of The Constitution of The Republic of Uganda states;

"Notwithstanding anything in this constitution, there shall be no derogation from enjoyment the following rights and freedoms-

(a) Freedom from torture and cruel, in human or degrading treatment or punishment."

Freedom from torture is a non derogable right under the constitution

Section 2 of the Prevention And Prohibition of Torture Act, 2012 defines torture to mean 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;

- obtaining information or a confession from the person or any other person;
- 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
- intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

For an act to amount to torture, not only must there be a certain severity in pain and suffering, the treatment must also be intentionally inflicted for the prohibited purpose.

There is uncontroverted evidence that the plaintiff was tortured. The plaintiff testified and described the particulars of torture as follows;

- I. Beating, kicking, slapping, blindfolding, piercing his body with sticks, water logging him, hitting his legs with metallic rods,
- II. electroshocking him.
- III. undressing him

- IV. feeding him with urine
- V. refusing him food
- VI. keeping him in a safe house from Nov 2007 to August 2008

Consequently the plaintiff had his right leg amputated now he is lame.

PW2 Dr. Onzinva too, presented a witness statement and a medical report written by his colleague Dr. Odubu explaining the medical history of the plaintiff that the plaintiff was tortured by

- I. Hitting him on the knee joint using metal bars
- II. Electro shocking the trunk
- III. Whipping

During the course of his torture he developed gangrene and his leg was amputated. The doctor concluded that the plaintiff needed

- I. psychiatric assessment
- II. correction of the knee joint deformity
- III. prosthesis by orthopedic team

Freedom from torture is one of the most universally recognized human rights. Torture is considered so barbaric and incompatible with civilized society that it cannot be tolerated. Torturers are seen as the 'enemy of mankind'.

The ban on torture is found in a number of International treaties, including Article 2 of the United Nations Convention Against Torture and Article 3 of the Human Rights Convention and Article 5 of the Universal Declaration of Human Rights and Article 5 of the African Charter on Human and People's Rights.

*In **Ireland vs United Kingdom ECHR Application No.5310/71** Court explained the distinction between Torture and inhuman or degrading treatment lies in the difference in the intensity of suffering inflicted. In deciding whether certain treatment amounts to torture, the court takes into account factors of each individual case, such as the duration of treatment, its physical and mental effects, and age, sex, health and vulnerability of the victim.*

The courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading treatment. Only worst examples are likely to satisfy the test.

There are no exceptional circumstances whatsoever to justify torture.

The fact that the plaintiff was held being held *incommunicado* also merits further consideration as torture in terms of international human rights law. The United Nations Human Rights Committee has directed that states should make provisions against *incommunicado* detention, which can amount to a violation of article 7 (torture and cruel treatment and punishment) of the International Covenant on Civil and Political Rights to which Uganda acceded.

Furthermore, the Commission itself has stated that;

“ holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.” See Communications 48/90, 50/91, 52/91 and 89/93

I am inclined to believe the evidence of the plaintiff that indeed he was tortured when he was held *incommunicado* and as a result of such physical torture he lost his leg after it had developed gangrene due to refusal to treat the inflicted wounds.

This issue is resolved in the affirmative.

Issue 3: Whether the plaintiff's right to property was violated by the defendant

The plaintiff's counsel submitted that the Right to property is guaranteed in **Art.26 (1)** of the Constitution. The plaintiff alleged that he had merchandise on his way from Kampala to Mbale, for sale, when he was arrested and detained by the military, he lost his merchandise. He did not plead nor prove the value of the merchandise he had on the bus but he pleaded that his entire business was valued at Ush 100million. He also pleaded and proved that he lost his house which he father sold to rescue his son from military custody. Therefore the plaintiff lost property worth Ush 130 million.

Resolution

Article 26(1) of our Constitution provides that:
“Every person has a right to own property either individually or in association with others.”

The plaintiff has however did not lead sufficient evidence to prove that he was in possession of any merchandise when he was captured by the defendant. The plaintiff also failed to prove that he was indeed a trader whose business was worth the estimated capital of UGX 100.000.000.

The plaintiff's testimony alone even though uncontroverted failed to prove this issue on a balance of probabilities hence it is in resolved in the negative. The mere statements made were not satisfactory to this court.

Issue 4: Whether the plaintiff's right to be treated fairly and justly in administrative decision as violated by the defendant

Counsel for the plaintiff did not make any submissions in regard to this issue hence I will presume that it was abandoned.

Issue 5: Whether the plaintiff is entitled to any remedies

The plaintiff's counsel submitted that **Art.50(1)** of the Constitution entitles a person who claims that his fundamental rights and freedoms have been violated to file an action in a competent court. Court in determining an application under **Art.50** may award redress to the applicant which may include compensation. Redress is wider than compensation. Redress includes orders of release for those complaining of illegal detention. Redress also includes punitive damages. Punitive damages are meant to punish the violator for violation of the Constitution.

In *Hon. Ronald Okumu & Anor vs AG HCMC 63/02 [2003] KALR 378* Kania J, held hat damages under **Art.22(1)** of the Constitution 1995 for the intentional taking away of life do not take into consideration lost dependency. In other words he meant that damages under **Art.22(1)** are punitive and not compensatory. The same opinion was reiterated by Mwangusya, J (as he then was) in *Magidu Kayizzi vs Major General Kale Kaihura & Anor HCMC 68/16 HCMC 68/10* thus ***“the applicant claimed for Ush 550m/- as compensation. Unlike claims under Law Reform (Miscellaneous Provisions) Act, the age, status of the deceased in society and dependence of others on him or her are immaterial in applications of this nature. The claim for compensation is for the unlawful and intentional causing of death of the deceased, the award is dependent on court's discretion.”***

Both Justices Kania and Mwangusya are opining that under **Art.50(1)** there is not compensation but courts have the discretion to award punitive damages against the violator of the Constitution.

It was counsel's humble opinion, that their Lordships are not correctly directing themselves to the guarantees in **Art.(50)(1)** of the 1995 Constitution. Their Lordships in my humble opinion are more influenced by the provision of the 1967 Constitution, Art 22(1) which provided -

“subject to the provision of clause (5) of this article if any person alleges that any of the provisions of Art.8 - 20 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the High Court for redress.”

Under the 1967 Constitution, the High Court had discretion to hear the application under Art 22(1) and also had discretion to award redress. The constitution provided that court could consider to let the grievance be addressed under a different set of laws.

For example in an action against violation of the right to liberty, court had the discretion to merely order for the release of the applicant or in addition court could order the payment of damages, or court could order that the action be entertained as the tort of false imprisonment.

But the 1995 Constitution in **Art.50 (1)** court does not exercise any discretion in determining an action before it. A person who claims and proves that his fundamental right or freedom has been violated, he is entitled to full relief i.e. redress, which may include compensation.

In ***Osotraco Ltd vs AG HCCS 1380/86 [2002] KALR 519***, Justice Egonda Ntende held as follows:-

“s.5(1) Government Proceedings Act precludes court from granting an order of eviction against government. This section must be read subject to the 1995 Constitution. Art.26 guarantees the right to property. Art.50(1) of the Constitution enjoins court to give effective redress for the breach of rights guaranteed in the Constitution a declaratory judgment envisaged under s.15(1) of the Government Proceedings Act was not effective redress which court was enjoined to give under Art.50(1) of the Constitution.”

Osotraco was appealed to the Court of Appeal which affirmed the High Court holding.

Therefore under **Art.50(1)** of the Constitution the applicant is entitled as of right to full enjoyment of the bill of rights in Chapter 4 of the Constitution by being awarded full redress.

In the present case, the plaintiff is entitled to all the reliefs he seeks, including declaration, punitive damages and compensatory damages. For compensatory damages the plaintiff/applicant must prove loss, because compensatory damages are restitutorial. Court seeks to restore the status quo by an award of damages.

The plaintiff/applicant must prove loss. In the present case the plaintiff lost his leg which made him less able to work and to enjoy the fruits of life. For the loss of leg the plaintiff is entitled to an award though it will not bring back his leg but will help him have some welfare which he is not now able to have for himself due to the loss of his leg. Ush 200 million is not adequate but in the circumstances it will help the situation. The plaintiff is also entitled to Ush 100 million being the value of his business which he pleaded and proved plus Ush 30 million being the value of his house which his father sold and gave the money to the military

The plaintiff other than the physical loss, he was detained for nine months in safe houses. Redress under **Art.50(1)** means that the victim's right to liberty be vindicated by an award of damages. The plaintiff was also subjected to drinking human urine, electroshock, being kept naked, being beaten, starved. The plaintiff's freedom from torture was violated. Beyond physical loss for which court can make an assessment of loss being subjected to inhuman treatment cannot be assessed in terms of loss but it is the Constitution that has been violated for which court is enjoined to vindicate the violated freedoms by an award of damages, not compensatory but punitive against the violators and deterrent against future violations.

In **Jennifer Muthoni & 10 ors vs Ag of Kenya [2012] eKLR**, a case for enforcement of rights and freedoms court cited Pilkington, Damages as a Remedy or Infringement of the Canadian Charter and Freedoms [1984] 62 Canada Bar Review 517

"it is said that the purpose of awarding damages in constitutional matters should not be limited to simple compensation. Such an award, ought in proper cases to be made with a view to deterring a repetition of breach or punishing these

responsible for it or even securing effective policing of the constitutionality enshrined rights by rewarding those who expose breach of them with substantial damages.”

Art.50(1) enjoins court to award redress which may include compensation. Compensatory damages may be assessed on the proved loss. But where the victim of violation has not only suffered assessable physical loss, but has also suffered loss of dignity, intrusion on his bodily integrity, shame and inhuman treatment, such as not the kind of loss compensable by assessable loss, damages awardable as redress are to vindicate the right or freedom violated, and to deter future violation.

In the present case, while court is able to assess the loss of a leg, business and house and thereby be able to award compensatory damages in a form of restitution, court cannot assess the kind of suffering the plaintiff suffered living on “possible death any minute” constantly beaten and electro shocked. That is an instance by which court needs to award damages for the vindication of the freedom from torture, cruel and inhuman treatment.

In ***Jasper Natukunda vs AG & Anor (Kabale) HCCS 1/14*** Justice Kazibwe Kawumi in a case where the plaintiff claimed to have been tortured in police custody to the extent of the plaintiff developing urinary incontinence, court awarded him Ush 270 million as the global award, i.e. compensatory damages combined with deterrent and policing. In the present case, the plaintiff lost his leg which was amputated because of the gangrene, was kept in safe houses for 9 months, was electro shocked, starved and made to drink urine, court would be fair if it awarded the plaintiff at least Ush 600 million as a global ward to combine all the violations.

Resolution

Article 50 (1) of the constitution provides that;

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.

With regard to my findings on issue 1 and 2, the plaintiff is entitled to redress for violation of his constitutional rights.

Freedom from torture is a non derogable right under our Constitution which however was violated by the defendant. Uganda is also a signatory to African

Charter on Human and Peoples' Rights, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as treaties on the prevention and punishment of torture and other forms of cruel, inhuman or degrading treatment or punishment. The prohibition against torture is a bedrock principle of international law.

Whereas there is a comprehensive legal regime that prevents and prohibits torture, it's evident that the violation of the right to freedom in the form of torture and cruel, inhuman and degrading treatment or punishment are still rampant in Uganda.

According to an annual report published by the commission from 2015 to 2018, torture in Uganda has been ranked as the highest violation of human rights. The report states that that out the 3,008 complaints of human violation registered 1,027 were of torture. In addition to the above, last year (2018) alone, the highest number of complaints of human right violation registered by the commission were allegations of torture, cruelty, inhuman or degrading treatments totaling to 346 out of 746 cases reported.

There is no specific formula or detail of how the damages are worked out in cases of torture or inhuman and degrading treatment; generally it is not a pecuniary loss but a loss of dignity or suffering or injury. The principal heads of damage would appear to be injury and liability, loss of time considered primarily from a non-pecuniary view-point and injury to feelings i.e the indignity, mental suffering, distress and humiliation with any attendant loss of social status. ***See Mc Gregor on damages, 14th Edition.***

In other words the whole process of assessing damages where they are "at large" is essentially a matter of impression and not addition. Per Lord Hailsham, LC in ***Cassell v Broome [1972] 1 All ER 801 at 825***

The awards reflect society's discomfiture of the wrongdoer's deprivation of the man's liberty and society's sympathy to the plight of the innocent victim. The awards, therefore are based on impression.

With due consideration to the submissions of counsel and the above principles, I award the plaintiff a sum of **UGX 120.000.000** (One hundred Twenty million Uganda Shillings) as compensation for violation of his constitutional rights against torture and cruel and inhuman and degrading treatment since he lost his limb due to the torture and all the other circumstances of the case.

The ignominy of this case lies in the magnanimity in which public officials disregarded the Constitutional provisions and legal avenues available to justify the incarceration or release of the plaintiff.

It would appear to every average man that it is irresponsible to detain a person for 9 months beyond what is expected of a government which runs its affairs including security in a manner which it should and not will-nilly interfere with the basic right of citizens, to freedom and opportunity for personal achievement and progress.

The plaintiff is awarded UGX **50,000,000/=** (Fifty Million) for the illegal detention and *or incommunicado* detention of 10 months from November 2007-August 2008.

The plaintiff is also awarded **UGX 15.000.000 (Fifteen million Uganda Shillings)** as punitive damages against the defendant for the gross violation of Human Rights and the Constitution as well as to deter security agencies from repeating this conduct against the citizenry.

The plaintiff is awarded interest at a rate of 15% from the date of Judgment until payment in full.

The plaintiff is awarded costs of the suit.
I so order.

SSEKAANA MUSA

JUDGE

19th August 2019