

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISC. CAUSE NO. 242 OF 2017**

**DR. STELLA NYANZI..... APPLICANT**

**V**

**ATTORNEY GENERAL..... RESPONDENT**

**BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO**

**RULING**

**A. Introduction**

1. The Applicant Dr. Stella Nyanzi moved court under article 50 of the Constitution and Rule 3 of 2008 Judicature (Fundamental Rights and Freedoms) Enforcement Procedure Rules for a declaration that the following actions of the Respondent's officers threatened to infringe, infringed, and continue to infringe the fundamental human rights and freedoms of the Applicant and her children.
  - i) Secretly placing the Applicant's name on a 'no –fly list';
  - ii) Confiscating her passport;
  - iii) Blocking her from leaving Uganda on March 19, 2017;
  - iv) Ignoring her administrative complaint about her mistreatment at Entebbe International Airport.
  
2. The Applicant complains that the above actions violated the following articles of the Constitution:
  - i) Articles 21; 22; 24; 28;29(1) (b); 29(1) (d); 29(1) (e); 29(2) (b); 29(2) (c ); 33, 34, 40(2); 41 (1); 42; 44(a) ; 44 (c ); and 45 of the 1995 Constitution as amended.

3. The Applicant further sought the following orders:
  - i) Refund to the Applicant all the expenses incurred by the Applicant and her sponsors in relation to her botched trip, including transport expenses traveling to and from Entebbe International Airport, Schengen visa fees, return air ticket fees, and accommodation booking expenses;
  - ii) Special, general, and aggravated damages for the injury caused to the Applicant and her children;
  - iii) A permanent injunction restraining the Respondent from continuing to block the Applicant from leaving the country; and
  - iv) Costs of the cause.
4. The grounds of the motion are contained in the motion itself and the affidavit in support of the Applicant. The Respondent opposed the motion and relied on the affidavit in reply of Ndamuhaki Dickson Bill Assistant Superintendent of Police and Forensic Analyst attached to CID Headquarters.

## **B. Background Facts**

5. The Applicant describes herself in the affidavit in support as a journalist, a medical anthropologist, a post-doctoral researcher at Makerere Institute of Social Research (MISR), an author and a mother of three children of tender years.
6. The Applicant filed this application and affidavit in support on July 27, 2019, the Respondent filed affidavit in reply on September 12, 2017 and the Applicant filed affidavit in rejoinder on September 12, 2017. Parties filed a joint scheduling memorandum on February 18, 2019 that captures brief facts and agreed issues.
7. On February 18, 2019, ASP Ndamuhaki was cross examined by counsel for the Applicant and thereafter, a schedule for written submissions was

given. Counsel for the Applicant filed submissions on May 31, 2019 while the Respondent filed on September 10, 2019. Counsel for the Applicant filed submissions in rejoinder on September 30, 2019.

### **C. Undisputed Facts**

8. Having studied all pleadings and documents submitted in evidence, the following facts that are also captured in the joint scheduling memorandum emerged.
9. On March 19, 2017 at 2 a.m, the Applicant had checked in at Entebbe International Airport and while at immigration to get clearance for her flight to Amsterdam via Nairobi, she was informed by immigration officers that the Criminal Investigation Directorate had banned her from leaving the country and her passport and boarding passes were confiscated and she was unable to travel as evidenced by her written complaint to Mr Joseph Obwona, of CID Headquarters Kibuli dated March 20, 2017 (marked SN 2 attached to affidavit in support) in which she demands she be removed from the no fly list.
10. Earlier on March 7, 2017, the Applicant had interfaced with the CID Kibuli after she was summoned by letter dated March 2, 2017 through the Vice Chancellor of Makerere University (SN3). In the letter, the Applicant was informed the Police was investigating a possible offence of offensive communication and Cyber Harassment and she was required to assist police in their investigations.
11. Subsequently, on March 31, 2017, she was arrested at Mackinnon Suites Kampala and driven to Kira Divisional Police station and detained. On April 10, 2017, she was charged before the chief magistrate's court Buganda road with offensive communication and cyber harassment contrary to section 24(1) (a), 2(a) and section 25 of the Computer Misuse Act respectively.

12. The Respondent relied on a letter dated February 2, 2017 by the CID Kibuli addressed to the Chief of Joint Security, Entebbe International Airport directing anyone who comes in contact with the Applicant to 'apprehend' her and inform the CID for her collection to assist in police investigations. According to the deponent, this letter is the immediate reason for the arrest of the Applicant on March 19, at Entebbe International Airport.
13. While the arrest at the airport after the Applicant had checked in en route to Amsterdam is not disputed, what is disputed is whether her passport was returned to her to enable her reschedule her departure on the next flight.

#### **D. Issues Framed for Determination**

1. Whether the Respondent's conduct violated or threatened to violate the Applicant's rights protected by articles 21, 22, 24, 28, 29 (1) (a), 29(i) (b), 29(1) (d), 29(2) (b), 29 (2) (c ), 33, 34, 40(2), 40(1), 42, 44 (a) and ( c ) , 45 of the Constitution.
2. Whether the Respondent's conduct is justifiable under the circumstances.
3. Remedies

#### **E. The Evidence**

14. As a civil dispute, the legal burden of proof in this human rights violation dispute is on the Applicant to prove her case while proof of any fact is on the party who alleges its existence on a balance of probabilities. This principle was re-emphasized in **Supreme Court Constitutional Appeal No. 1 of 2018 Male Mabirizi and others v Attorney General**, in the dissent judgment of Tibatemwa Ekirikubinza JSC when she held that the substantiality test in election petitions does not depart from the legal principle that places the duty of proving a fact on the party who alleges its existence and that since the matter before the Supreme Court was a

civil dispute, albeit of a constitutional nature, the standard of proof applicable was the same as in other civil disputes.

15. According to the affidavit of Ndomuhaki, the Applicant's passport, Schengen visa and boarding passes were returned to her on the night of March 19, 2017 after she was cleared to travel yet on June 13, 2017 Centre for Legal Aid wrote to the resident state Attorney Buganda road chief magistrate's court to cause the removal of her passport from police custody and place it in court custody.
16. Earlier on March 20, 2017 the Applicant had written a protest letter to the CID Kibuli in which she alludes to a telephone conversation with the police spokesperson Kayima who had called her on March 20, 2017 at 1 p.m to proceed to the airport to catch the next flight but which request she declined.
17. It seems to me that while the police were ready to return her passport on March 20, 2017, less than 12 hours after it was confiscated, the Applicant did not respond to the gesture and instead applied for and acquired a new passport as averred in her affidavit in reply. Indeed, as a result of acquiring a new passport, she flew out of the country in mid-November 2017. To conclude on the issue whether she was returned her passport in time to reschedule her flight, the answer is the Applicant was availed an opportunity by the police to travel on the next flight which offer she turned down. Therefore, the confiscation of her passport per se was a temporary measure that lasted less than 12 hours and I am unable to find that the Respondent's agents withheld the Applicant's passport for an unreasonable length of time as suggested by counsel for the Applicant in his submissions.
18. Nevertheless, it has been established that on March 19, 2017, the Applicant was prevented from boarding a plane on account of a directive by one Kotyoto W.W acting on behalf of the director criminal

investigations directorate, Kibuli, a fact admitted in the affidavit of ASP Ndamuhaki yet she had been assigned a boarding pass by the airline.

## **F. The Law**

19. I agree with the submission of counsel for the Applicant that article 20 of the Constitution (2) confers a duty on all organs and agencies of government and on all persons to respect, uphold and promote the rights and freedoms of individuals and groups as enshrined in the Constitution. This means organs and agencies of government can be held vicariously liable for threats or actual violations of rights while individual persons can also be held personally liable.

20. I also agree with submissions of counsel for the Applicant that human rights are inherent, universal, indivisible, interdependent and interrelated as re-affirmed by the African Court of Human Rights in **Communication No. 241 of 2001 Purohit & Moore v The Gambia** wherein the **Vienna Declaration of Action of 1993** was cited as the source of this principle.

## **G. Issue No. 1: Whether the Respondent's conduct violated or threatened to violate the Applicant's rights protected by articles 21, 22, 24, 28, 29 (1) (a), 29(1) (b), 29 (1) (d), 29 (2) (b), 29 (2) (c ), 33, 34, 40 (2), 40 (1), 42, 44 (a), (c) and 45 of the Constitution**

21. It is virtually impossible to discuss allegations of violations of rights or threatened violations omnibus so I will discuss them in the same order as counsel for the Applicant did starting with article 29.

### **(i) Right to enter, leave and return to Uganda – article 29(2) (b)**

22. The Applicant complained that her right to enter, leave and return to Uganda was violated. It is not disputed that on March 19, 2017 at Entebbe international Airport, the Applicant was prevented from

boarding a plane to Amsterdam on account of a letter authored by Watyoto on behalf of CID Kibuli with instructions to apprehend (read arrest) the Applicant. Pursuant to this letter, the Applicant was prevented from traveling and she missed her flight.

23. In response to the submissions of counsel for the Applicant, counsel for the Respondent submitted that freedom of movement is not absolute and cited article 43 of the Constitution and **Supreme Court Constitutional Appeal No. 2 of 2002 Charles Onyango Obbo & Another v Attorney General** that reiterated the constitutional principle that limits to enjoyment of fundamental rights and freedoms should not go beyond what is acceptable is demonstrably justifiable in a free and democratic society.

24. The European Commission for Human Rights in **Application No. 13470 of 1987 Otto-Preminger-Institut v Austria** expounded on what constitutes justified interference with enjoyment of human rights that is acceptable in a free and democratic society to mean the following:

- i) The interference must be prescribed by law;
- ii) It is for a legitimate purpose; and
- iii) The interference is necessary in a free and democratic society.

*Prescribed by law*

25. As to whether the letter that authorised the interference was prescribed by law, counsel for the Respondent submitted that **section 21 (1) i) of the Police Act Cap 303 as amended** empowers a police officer to apprehend persons for whose apprehension sufficient grounds exist. No doubt a police officer may effect arrest upon reasonable suspicion that person has committed a cognisable offence (**section 10 (a) of the Criminal Procedure Act Cap 116**). Furthermore, under **section 12 of the Criminal Procedure Act**, a police officer in charge of a station may

require any officer subordinate to him or her to arrest without a warrant but such request shall be in writing naming the person to be arrested and the cause for which the arrest is made. Therefore, it follows that the impugned letter was prescribed by law.

*Legitimate purpose*

26. In the present case, by the time the instruction in the letter was executed on March 2017, the Applicant had already responded to a summons and interfaced with the CID Kibuli on March 7, 2017 regarding the same investigations into computer abuse and cyber harassment cited in the letter of February 10, 2017. It therefore follows that the February 10, 2017 letter addressed specifically to the Chief Joint Security, Entebbe International Airport had been overtaken by events since the Applicant had submitted herself to police authority by reporting in response to a summons sent to her through her boss, the Vice Chancellor of Makerere University.
27. While the impugned letter is prescribed by law (**section 12 of the Criminal Procedure Act**) the fact that it had been overtaken by events means it was unlawfully invoked to interfere with the Applicant's right to freely leave the country, a purpose that is not legitimate.

*Necessary in a free and democratic society*

28. Regarding the standard of necessity, the reason for preventing the Applicant from flying is to be found in the contents of the impugned letter which is that the police were investigating a case of offensive communication c/s 25 of the **Computer Misuse Act 2011** against His Excellency, The President. While I agree the offences were grave for the reason His Excellency is the Fountain of Honor, the Applicant had already made herself available to CID Kibuli and had been released without charge on March 7, 2017 therefore she was in plain view. Moreover, she was cleared to travel less than twelve hours after her

travel plan was interfered with which means the Respondent's officers were satisfied she was not fleeing the country to escape justice.

29. The subsequent charging of the Applicant on April 7, 2017 in the Chief Magistrates' court did not retrospectively justify the interference with the Applicant's right to leave the country. This means preventing her from leaving the country was an unnecessary interference with her right to enter and leave at will.

30. In conclusion, I find that while the impugned letter authorising arrest was per se within the law, it had been overtaken by the March 7, 2017 interface with the CID Police Kibuli. Therefore, the conduct of the Respondent's officers in preventing the Applicant from boarding the plane was not for a legitimate purpose and unnecessary as the Applicant had already interfaced with police, and constitutes a violation of the Applicant's right under article 29(2) (b) of the Constitution to enter, leave and return to Uganda.

**(ii) Continuous threat of infringement of article 29(2) (b) of the Constitution**

31. Counsel for the Applicant submitted that the February 10, 2017 impugned letter has never been revoked and therefore constitutes a continuous threat to the right of the Applicant to travel. Counsel for the Applicant submitted that the Respondent's failure to investigate the Applicant's complaint about its officers' conduct by her letter dated March 20, 2017 addressed to the CID Kibuli means the letter still holds, is without merit. The failure to investigate her complaint might have more to do with the rude tone of her letter than with the perceived intention of the police to continue to use the February 10, 2017 letter to her detriment.

32. The impugned letter was overtaken by events when the Applicant interfaced with the CID on March 7, 2017 and it was further rendered

irrelevant when the Applicant was charged before the chief magistrate's court for the offenses she had been wanted. The import of this finding is that the impugned letter is worthless as of now and any officer who uses it to prevent the Applicant from travel shall be in contempt of this court. In conclusion, there is no threat to continue to infringe the Applicant's right to enter, leave and return to the country at will.

**(iii) Right to a passport or other travel document – article 29(2) (c )**

33. Counsel for the Applicant submitted that the Applicant's right to a passport was violated on account of the failure by the Respondent's police officers to return it to her. He relied on a letter to the Resident State Attorney dated June 13, 2017 as proof the Respondent had declined to return the Applicant's passport.
34. As observed elsewhere, the reason the Applicant did not get back her passport was that when she was requested to return to the airport to travel on March 20, 2017, she declined so she did not get back her passport then. Subsequently, her lawyer wrote to the Resident State Attorney to retrieve it from police on account of a court order and apparently this did not happen so she applied and was given a new passport.
35. The right procedure would have been for the lawyers to serve police directly with the court order and return to court for further orders if there was non-compliance. I therefore find that the Applicant sat on her right to seek redress from the chief magistrate's court and she cannot complain her right to a passport has been violated, moreover, she was given another passport by the authorities. I find that the Respondent did not violate the Applicant's right to a passport.

**(iv) Right of access to government-held information – article 41(1)**

36. In his submissions, counsel for the Applicant dwelt on the evidence already discussed above, i.e., failure to retrieve the Applicant's passport from the police but I find this evidence has nothing to do with the right of access to government held information. The mismatch of evidence and the right allegedly violated means the claim is misplaced.

**(v) Right to equal protection of the law – articles 21(1); Right to a fair hearing – article 28; Right to fair and just treatment by administrative bodies – article 42; and non-derogation of right to a fair hearing – article 44(c)**

37. Counsel for the Applicant dwells on the confiscation of the passport as grounds for the argument that this was done without due process and without giving the Applicant a hearing. Counsel also cites the February 10, 2017 impugned letter as evidence of unequal treatment before the law and the failure of the police to investigate her complaint dated March 20, 2017 cumulatively as proof the state organs failed in their responsibility to uphold the Applicant's rights.

38. As counsel for the Respondent rightly submitted in reliance on **Mafabi Richard v AG Constitutional petition No. 14 of 2012** where the court held that investigations are purely preliminary and the court will generally decline to accede to that person's submission that he or she is entitled to be heard at that stage. Furthermore, fairness is a standard that is hard to conceptualise at the stage of police investigations. I therefore find that the Applicant's rights under articles 21 (1), 28; 42; 44 (c) were not violated by the Respondent.

**(vi) Right to life – article 22; Right to freedom of speech and expression – article 29(1) (a); Right to freedom of thought, conscience and belief which shall include academic freedom in institutions of higher learning – article 29(1) (b); freedom to**

**assemble and to demonstrate together with others – article 29(1) (d); and freedom of association – article 29(1) (e)**

39. Counsel submitted that violation of one right can impact on other rights and cited **Priya Parameswaran Pillai v Union of India and others 2015 VII AD (Dehli) 10**, in support. It was counsel's submission the violation of the right to leave the country meant she missed out on the rights listed above since she was going to participate in a scholarly conference. I have observed elsewhere the Applicant was given an opportunity to travel the next day for the conference but she declined. This means she cannot justifiably complain her rights under articles 29 (1) (a), (b), (d), and (e) were violated. It would have been a different story if no such request was made. While I agree with counsel's submission the violation of one right may affect enjoyment of other rights, in the present case, the refusal to travel on the next available flight takes away the potential interference with freedom of expression, speech, assembly, thought and conscience that are prominent at scholarly conferences. In conclusion, I find that these rights were not violated when the Applicant was prevented from travel because she decided on her own not to travel the next day.

**(vii) Right not to be discriminated against – article 21; respect for human dignity and protection from inhuman treatment – article 24; and non-derogation from freedom from inhuman treatment – article 44(a)**

40. The only right that deserves discussion here is the right to human dignity and not to be subjected to degrading treatment. The Respondent did not dispute the averments in the Applicant's affidavit that she was separated from fellow travellers and informed of a police 'ban' to travel abroad. It goes without saying that she was embarrassed by this obviously degrading treatment that I have found was not for a legitimate purpose but rather to embarrass the Applicant because a few hours later, she was told she could now travel. The right not to be subjected

to degrading treatment is non-derogable therefore the Applicant's rights under article 24 and article 44 (d) were violated.

#### **H. Issue No. 2: Whether the Respondent's conduct is justifiable under the circumstances**

41. This issue has been canvassed under Issue No. 1 so I need not address it separately.

#### **I. Issue No. 3: Remedies**

42. Article 50 of the Constitution directs courts to award adequate compensation to victims of rights violations. Guided by the precedent of **John Kaggwa v Kotyoto & Attorney General HCCS NO. 273 of 2016** where the plaintiff was awarded 200m for high handed conduct of the Respondent's officers who confiscated the plaintiff's passport and other intrusions like refusing to release him from custody. Doing the best I can, I award the Applicant 50,000,000/ as compensation for the violation of her right to leave the country and the violation of her human dignity through degrading treatment but decline to award aggravated and punitive damages.

43. Regarding special damages for expenses on transport, visa fees, air ticket and hotel booking, counsel dropped them in his submissions.

44. Regarding a permanent injunction restraining the Respondent from ever preventing the Applicant from leaving the country, such an open ended order will constrain the police from performing their lawful mandate under the Constitution. However, I will make an order that the Respondent is restrained from invoking the impugned letter ever again to prevent the Applicant from leaving the country or embarrassing her at a port of entry or departure.

## **J. Costs**

45. As the applicant has been successful only partially, having proved violations with only article 29(2) (b), 24 and 44(d) of the Constitution out of thirteen substantive articles, she will recover only 40% of the taxed costs.

## **K. Summary of Findings**

1. The conduct of the Respondent's officers in preventing the Applicant from boarding the plane was not with a legitimate purpose and unnecessary as the Applicant had already interfaced with police, and constitutes a violation of the Applicant's right under article 29(2) (b) of the Constitution to enter, leave and return to Uganda.
2. There is no threat to continue to infringe the Applicant's right to enter, leave and return to the country at will because the impugned letter was overtaken by events when the Applicant interfaced with the CID on March 7, 2017 and it was further rendered irrelevant when the Applicant was charged before the chief magistrate's court for the offenses she had been wanted. The import of this finding is that the impugned letter is worthless as of now and any officer who uses it to prevent the Applicant from travel shall be in contempt of this court.
3. The Respondent's officers did not violate the Applicant's right to a passport protected by article 29 (2) (c) because she had been requested to proceed with her journey on March 20, 2017 less than twelve hours after she was stopped and her omission to respond to the request cannot be construed in her favour therefore her right to a passport under article 29 was not violated.

4. The mismatch of evidence and the right allegedly violated means the claim that the Applicant's right under Article 41 (4) to access government held information was violated is misplaced.
5. The Applicant's rights under articles 21 (1), 28; 42; 44 (c) regarding non-discrimination, fair hearing and fair treatment were not violated by the Respondent.
6. The Applicant's rights under articles 29(1) (a), (b), (d) and (e) rights were not violated when the Applicant was prevented from travel because she decided on her own not to travel the next day.
7. The right not to be subjected to degrading treatment is non-derogable therefore the Applicant's rights under article 24 and article 44 (d) were violated when she was separated from fellow travellers and prevented from traveling.
8. I award the Applicant 50,000,000/ as compensation for the violation of her right to leave the country and the violation of her human dignity through degrading treatment but decline to award aggravated and punitive damages.
9. The Applicant is entitled to an order restraining the Respondent from invoking the impugned letter ever again to prevent the Applicant from leaving the country or embarrassing her at a port of entry or departure.

## **L. Orders**

1. The Respondent shall pay the Applicant 50,000,000/ as compensation for the violation of her right to leave the country and the violation of her human dignity through degrading treatment but I decline to award aggravated and punitive damages.
2. The Respondent is restrained from invoking the impugned letter ever again to prevent the Applicant from leaving the country or embarrassing her at a port of entry or departure.
3. The Respondent shall pay the Applicant only 40% of the taxed costs of the application.

**DATED AT KAMPALA THIS 16<sup>TH</sup> DAY OF DECEMBER 2019**

**HON. LADY JUSTICE HENRIETTA WOLAYO**

### **Legal representation**

Centre for Legal Aid for the Applicant

Attorney General's chambers for the Respondent