

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 247 OF 2016

AGABA KENNETH

=====

PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. WABWIRE ALLAN

3. KAMUKAMA

4. KIMULI

=====

DEFENDANTS

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff instituted this suit against the defendants for declaration that the defendants' actions to torture the plaintiff were unlawful, unlawful arrest and detention, and further claims to recover special, exemplary, general, aggravated damages for battery and costs for the suit.

On or about August 2015, the plaintiff was arrested by police officers attached to Kawempe Police Station purportedly for being in company of alleged murderer. While in the custody, the plaintiff was subjected to severe beatings sustaining multiple injuries and fractured limbs under the watch of the officer in charge of Kawempe Police Station a one ASP Pahani. He underwent several medical

examinations, treatment and still visits the hospital for further treatment and review.

The plaintiff tried to seek clarity on the particulars of the offence but could not be offered any by the administrators of Kawempe Police Station but was instead re-arrested and taken to Rukungiri Police Station. At Rukungiri Police Station he was released without formerly being charged before the Courts of Law as would be required of a murder suspect.

The defendant filed a defence denying all liability.

According to the joint scheduling memorandum, the parties agreed on the following issues to be resolved by this court;

1. Whether the Plaintiff was unlawfully arrested and detained?
2. Whether the plaintiff was tortured and battered by the 2nd 3rd and 4th defendants?
3. Whether the 1st defendant is vicariously responsible for the actions of the 2nd 3rd and 4th defendants?
4. Whether the plaintiff is entitled to the reliefs sought?

In regards to the 3rd issue, the 1st defendant did not deny liability nor did he make any submissions on it, I will therefore proceed to resolve the 1st, 2nd and 4th issues.

The defendant did not present any witnesses before this court hence the court proceeded under Order 17 Rule 4 to determine this suit.

The plaintiff in their final submissions discussed the issue of lawful arrest and detention with regard to this suit. Counsel cited the case of *Issa Wazembe vs AG H.C.C.S No. 154 of 2016* where-in I decided that;

“The person arrested and detained has a right to know the reason for detention right away at the time of arrest. The person effecting the 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 law and order. The fact that the plaintiff was never charged before any court of law coupled with failure to give reasons for his arrest, his arrest was unjustified and arbitrary.”

I associate myself with my earlier decision in *Issa Wazembe vs AG H.C.C.S No. 154 of 2016*, and will therefore proceed to determine the suit.

Issue 1

1. Whether the Plaintiff was unlawfully arrested and detained?

Counsel for the plaintiff, submitted in line with this issue that the arrest was made without a warrant which ought to have been done with due respect to the

law and individual rights to liberty enshrined in Articles 23, 24, 28(12), 44 and 221 of the 1991 Constitution of the Republic of Uganda as amended. He further submitted that **Article 23 of the Constitution of the Republic of Uganda** guarantees the right to personal liberty in that;

“no person shall be subjected to arbitrary arrest and detention,”

and that **Article 23(3)** requires that,

“a person arrested, restricted or detained should be informed immediately of the reason of his or her arrest and detention and of his or her right to a lawyer of his or her choice.”

Article 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.”

Plaintiff counsel quoted various cases to support his submissions and among them are *Gregory Kafuuzi vs AG [2000] KALR 743*, *Issa Wazembe vs AG H.C.C.S No. 154 of 2016*, *Lutaaya versus Attorney General H.C.C.S No. 461 of 1989*, which was used to define an arrest as an act that deprives one of one's liberty as a free person and is usually effected in relation to an investigation and /or prevention of crime. *Tims versus John Lewis & Co. [1951] 2 KB 459*, where it was stated that;

“the law does not grant to the person who has arrested a reasonable time in which to make up his mind what he is going to do; he has to take the person arrested before a justice or a superior police officer as quickly as he reasonably can.”

Counsel for the defendants submitted that the 1st, 2nd, 3rd and 4th defendants lawfully arrested and detained the plaintiff as he was suspected of having murdered a policeman which is a capital offence and that the plaintiff being arrested and detained over the mandatory 48 hours at Kawempe and then Rukungiri police station without being charged was due to the fact that the plaintiff was under investigations which took some time.

Counsel further submitted that the plaintiff's being in the company of other suspects is a reasonable cause for suspicion that he was among the persons who had committed a criminal offence of murder. In regards to the arrest without a warrant or an order of Court, he cited; *Section 10 of the Criminal Procedure Code Act, Cap 116, Article 23(1)(b) and (c) of the Constitution of the Republic of Uganda and Section 23 of the Police Act Cap 303.*

He quoted the case of *African Court of Appeal in Fernandes vs Commercial Bank of Africa Ltd East and Another [1969] EA, 482* to determine what amounts to "reasonable cause" where it was observed that;

"The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bonafide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether this belief arises out of the recollection and memory of the accuser or out of information furnished to him by others."

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 police that arrested the plaintiff has never given any reason for his arrest nor charged him of any criminal offence before any court of the law. The plaintiff was detained in a police station cell for more than the legally accepted 48 hours. 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.

I will re-echo my earlier decision, "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 and engage services of a lawyer or inform their next of kin.

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 wrongful, unjustified and arbitrary.

This issue is resolved in the affirmative.

Issue 2

Whether the plaintiff was tortured and battered by the 2nd 3rd and 4th defendants?

The plaintiff's counsel submitted that 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 police officers. He showed court in exhibit P1 pictures of the injuries sustained on the knees, elbows, ruptured muscles and multiple joint swellings and pains (exhibit P4). Like we have submitted under issue 1, the defendants 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 provides;

"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 that he was tortured by police constable Wabwire Allan, Kamukama, Kimuli and Tumukunde.

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 sustained wounds on the knees, elbows, ruptured muscle and multiple joint swelling/ pains and a permanent incapacitation of 75%.

This issue is resolved in the affirmative.

Issue 4

Whether the plaintiff is entitled to the reliefs sought?

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.

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, special, exemplary, general, aggravated damages. Court seeks to restore the status quo by an award of damages.

The plaintiff/applicant must prove so as to be awarded the special damages. In the present case the plaintiff sustained wounds on the knees, elbows, ruptured muscle and multiple joint swelling/ pains and a permanent incapacitation of 75%.

For the sustained wounds on the knees, elbows, ruptured muscle and multiple joint swelling/ pains and a permanent incapacitation of 75% the plaintiff is entitled to the declarations that the defendants' actions to torture the plaintiff were unlawful, wrongful arrest and detention.

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 *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 sustained wounds on the knees, elbows, ruptured muscle and multiple joint swelling/ pains and a permanent incapacitation of 75%.

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 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.

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.”

With due consideration to the submissions of counsel and the above principles, I award the plaintiff a sum of **UGX 10.000.000** as special damages that arose from the medical bills as evidenced by the receipts adduced to court.

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 rights of citizens, to freedom and opportunity for personal achievement and progress.

It's on that basis that I award of UGX 90,000,000/= (Ninety Million) for the illegal detention and *or incommunicado* detention of 3 months.

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.

Section 10 of the Human Rights (Enforcement) Act 2019 provides for the ***Personal Liability for infringement of rights and freedoms.***

(1) A public officer who, individually or in association with others, violates or participates in the violation of a person's rights or freedoms shall be held personally liable for the violation notwithstanding the state being vicariously liable for his or her actions.

(2) Whenever the competent court orders for the payment of compensation or any other form of restitution to a victim of a human rights violation by the State, a public officer who is found by the competent court to have personally violated or participated in the violation of a person's human rights or freedoms shall pay a portion of the compensation or restitution so ordered as shall be determined by the competent court.

The damages should be shared between Attorney General on one side shall pay 50% and perpetrators (2nd, 3rd, & 4th defendants) shall pay the other 50% of the total award.

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

20th December 2019