

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 295 OF 2018
TABISA EDISA NAKAZIBA::::::::::::::::::::::::::::::::::::: APPLICANT

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

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Tabisa Edisa Nakaziba (*hereinafter referred to as the “Applicant”*) brought this application against the Attorney General of the Republic of Uganda (*hereinafter referred to as the “Respondent”*) for the enforcement of her right of freedom from torture, inhuman and degrading treatment as guaranteed in Article 24 of the Constitution and right to liberty, as guaranteed under Article 23(1), (2), (3) and (4) (*supra*). The Applicant seeks compensatory and punitive damages and costs of this application.

The application is supported by the affidavit of the Applicant. The Respondent filed an affidavit of reply generally opposing the application. The gist of the application and the respective cases of

5 the parties put across in the affidavit in support and the affidavit in
reply thereto are stated in the case summaries as below stated.

The Applicant's case:

The Applicant's case is that on 12/10/2017 bout 6.00pm, while at her
home in Lugazi, Kikawula she was arrested by Policemen for no cause
10 at all. She was beaten, slapped, tortured and detained for over three
months in non-gazetted detention center. That she was beaten with
sticks some of which had nails sticking out which would tear into her
flesh and blood would ooze out. The Applicant would then be asked by
Police officers to clean and dry tiles of the cells that were wet with
15 blood. That whenever she was being beaten, her tormentors would
demand to know why she had borne a child with Minister
Namuganza's husband, and why she has a love affair with the said
Minister's husband. That she would tell them that she did not know
that Mr. Bakaaki Issa was a husband to the Minister.

20 Further, that the Police officers also extorted money worth UGX 3
million from the Applicant's mother who had to sell her residential
land in order to buy the Applicant's freedom. She adduced evidence of
her medical reports in a bid to prove the injuries she sustained; and

5 the sale agreement on which her mother sold her residential home to
pay for the for the Applicant's freedom.

The Respondent's case:

It is noted that the facts as stated by the Respondent in the affidavit in
reply are not specifically oppose facts as sworn to by the Applicant in
10 her affidavit in support of the application. Owing to that reason it is
therefore, not necessary to restated the scanty depositions of the
Respondent in this ruling. Counsel for the parties filed written
submissions to argue the case and framed the following issues framed
for determination;

15 ***1) Whether the Applicant's right to personal liberty was violated
by the Respondent.***

***2) Whether the Applicant's freedom from torture was violated by
the Respondent.***

3) Whether the Applicant is entitled to remedies sought.

20 Before delving into the merit of this application, court wishes to
observe that the affidavit in reply of the Respondent does not oppose
or controvert the specific averments in the affidavit in support and it
hence sets itself against provisions of Order 6 rule 10 of the Civil
Procedure Rules, which states as follows;

5 ***“When a party in any pleading denies an allegation of fact ofthe opposite party, he or she must not do it evasively but answer the point of substance.”***

It is further observed that the affidavit in reply is simply too generalized and just an evasive general denial. Actually, denies
10 nothing specifically in any of the depositions of the Applicant. That leaves the Applicant’s depositions largely not denied and uncontroverted, with the effect that they are presumed to be accepted as the truth. See: ***Massa vs. Achen [1978] HCB 297***. Be that as it may court will proceed to determine the issues on their merits.

15 ***Resolution of the issues:***

Issue No.1: Whether the Applicant’s right to personal liberty was violated by the Respondent.

20 Article 23 of the Constitution provides that no person shall be subjected to arbitrary arrest and detention, without reasonable cause. Article 23 (3) (supra) requires that a person arrested, restricted or detained shall be informed of the of the reasons for the arrest detention. The Applicant in her affidavit has shown that she was arrested and
25 detained by Police officers in Police camouflage (*madowadowa*) uniform who whisked away from her home in Lugazi Kikawula on Busabaga

5 Stage, without informing her of the reason of her arrest and detention
and they detained her in an ungazetted detention center. Article 23 (2)
(supra) prohibits detention of a person arrested in an unauthorized
and ungazetted detention center. The Applicant stated that she was
detained in a house which is not a detention center. This was a
10 violation of the Applicant's right in that regard and court finds so.

In addition, Article 23 (4) (b)(supra) requires that a person detained or
restricted on suspicion of having committed an offence must be taken
to court not later than 48 hours. The Applicant in this case has
demonstrated, in paragraph 8 of her affidavit, that she was detained
15 for three months without either being set free or taken to a court of
law. This was not specifically denied or rebutted by the Respondent.
Court finds that the Applicant's right in that regard was violated.

Further, Article 23 (5) (a) requires that upon arrest a person shall be
allowed to inform his next of kin, about the arrest. The Applicant, under
20 paragraph 11 of her affidavit, shows that for the three months she was
in detention, she was not allowed to communicate to any of her relatives
until when the Police officers wanted to grant her bond. The position of
the law in such cases was clarified in **Gregory Kafuuzi vs. Attorney
General [2000] KALR 743**. Court held that Article 23 (5) (a) (supra)

5 requires that an arrested person shall be allowed to inform his family that he has been arrested, failing which is a violation of his/her constitutional right. The denial of this right by the Respondent's agents invariably violated the Applicant's right in that regard.

10 The Applicant in paragraph 12, of the affidavit in support, shows that the Policemen who detained her approached her mother and asked for UGX.3 million in exchange for the Applicant's freedom. That the Applicant's mother had no choice but to sell her land on which she resided and had buried her husband who was the Applicant's father. As proof, the Applicant attached a copy of the sale agreement of the said
15 land marked "*Agreement*" to her affidavit in support. This was not denied or specifically rebutted by evidence of the Respondent or at all. Certainly without doubt, extorting of money from the Applicant's mother in exchange for the Applicant's freedom was not only criminal bordering on impunity but also a violation of the Applicant's constitutional right to
20 own property.

It is noted that the right to personal liberty is not absolute and the right under Article 23(supra) is not one of the non derogable rights. Under certain justifications provided for under Article 43 (1) of the

5 Constitution the rights to liberty can be restricted. However, in the instant case, the Respondent did not plead any justification. The Applicant could not therefore speculate that may be, her arrest and detention was justified. Court finds that without justification, the arrest and detention was arbitrary and abuse of power of Police which is
10 enjoined in Article 21(2) to preserve law and order and under Article 20 (1) to protect rule of law, good governance and human right.

Counsel for the Respondent, in the submissions, advanced the view that although the Applicant alleges that she was detained for a period of about three months, there is no evidence to this effect. That a copy
15 of her Police Bond, issued by Kireka Police Station does not give any the period of time she was in custody. Upon evaluation of the evidence, the Respondent's argument lacks merit. Firstly, Police could not have given someone bond who is not in their detention. Secondly, the Applicant only needed to prove that she had been in custody, which
20 she proved by the adducing in evidence Police Bond signed on 17/12/2017. Thirdly, it was upon the Respondent to rebut the Applicant's assertion that she had been in custody since 12/10/2017 and that while there she was not tortured. The Respondent did not show when they received the Applicant before releasing her on Police

5 Bond. The only logical inference is that the Applicant's right of freedom from torture as guaranteed under Article 24 and 44(a) of the Constitution, was infringed on by the Respondent's agents

Court wishes to emphasize that that preservation of personal liberty is a very crucial aspect of the Constitution and derogation from it has to
10 be a matter only of unavoidable necessity and the Constitution ensures that such derogation is temporary and not indefinite. Further, the Constitution has mechanisms where the enjoyment of the right that has been temporarily interrupted can be reclaimed through the right to the order of habeas corpus which is inviolable and cannot be
15 suspended. This position was re-affirmed in ***Hon. Sam Kuteesa & 2 others vs. Attorney General Constitutional Reference No. 54 of 2011.***

It has been shown that the Applicant in the instant case was never charged in any court of law. She was just released on a Police Bond.
20 When this is coupled with failure to give lawful reasons for her arrest, it renders the Applicant's arrest and detention unjustified and arbitrary. Court thus finds and declares that the arrest and detention of the Applicant is a violation of her right to liberty. *Issue No.1* is

5 therefore answered in the affirmative.

Issue No.2: Whether the Applicant's freedom from torture was violated by the Respondent.

Article 24 of the Constitution guarantees freedom from torture, cruel,
inhuman or degrading treatment or punishment. This guarantee is
10 absolute and in fact prohibitory as per Article 44 (a) of the
Constitution. Consequently, under Article 24 Parliament enacted the
Prevention and Prohibition of Torture Act 2012, under which Section 2
(1) defines torture as any act or omission by which severe pain or
suffering whether physical or mental, is intentionally inflicted on a
15 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. Further, Section 3 (supra) provides for
prohibition of torture and the enjoyment of the right to freedom from
torture shall be non derogable.

20 The Applicant has shown that she was beaten and slapped while she
was being arrested by Police officers. She was *beaten* with sticks
which had nails which would tear into her flesh and blood would ooze.
She would also be ordered to clean the tiles that were wet with her
own blood and that this happened regularly for three months. She

5 would only be served a plate of posho and beans at 4. 00p.m only once
a day. In addition, by the time she was released on Police Bond, the
Applicant could not walk. The then Inspector General of Police Gen.
Kayihura, had to offer her treatment at Police cost; and he
immediately sent an ambulance which took her to the Iran Medical
10 Centre at Naguru she was admitted for one week. Medical documents
relating to the Applicant's treatment are proof of these deposition.
Article 44 of the Constitution provides that;

***“Notwithstanding anything in this constitution there shall be
no derogation from enjoyments of the following rights and
15 freedoms;***

***(a) Freedom from torture and cruel, inhuman or
degrading treatment or punishment. Freedom from
torture is a non derogable right under the
constitution.”***

20 Section 2 of the Prevention and Prohibition of Torture Act (supra)
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 whether a public official or other person acting in an official
or private capacity for such purposes as; obtaining information or

5 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 to have committed or 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
10 a certain severity in pain and suffering, but the treatment must also
be intentionally inflicted for a prohibited purpose.

Evidence of the Applicant has shown that all the ingredients of torture
were available during her unlawful arrest and illegal detention.
Evidence of torture was not challenged. Medical forms from the Iran
15 Uganda Medical Centre was also not disputed by the Respondent.
They show that the bill customer name is the office of the IGP. No
reason was assigned as to why the office of the IGP would foot the bills
if what the Applicant states is not true.

Also to note is that in arriving a decision whether certain treatment
20 amounts to torture, the court takes into account factors of each
individual case, such as the duration of the treatment, its physical
and mental effects, age, sex, health and vulnerability of the victim.
Courts apply a very strict test when considering whether there has
been a breach of an individual's right and freedom from torture or

5 inhuman degrading treatment. There are no exceptional
circumstances to justify torture. Besides, 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 inhumane treatment of both the detainee and the family of the
10 concerned. In the persuasive case of ***Ireland vs. United Kingdom***
ECHR Application No. 5310 of 2017; court explained the distinction
between torture and inhumane and degrading treatment lies in the
difference in intensity of suffering inflicted.

Also to underscore is the fact that freedom from torture is one of the
15 most universally recognized human right and the ban on torture is
found in a number of international treaties to which Uganda is a state
party. In the instant application the Applicant has shown that she was
never allowed to communicate to any of her relatives except when the
Police wanted to release her and they approached her mother for
20 money allegedly UGX. 3,000,000 before releasing her. There is no
doubt that the Applicant in this matter was held incommunicado,
which also manifests further torture. *Issue No. 2* is answered in
affirmative.

5 ***Issue No.3: Whether the Applicant is entitled to remedies sought.***

Article 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 which may award redress to the applicant which may include compensation. To note is that redress is wider than
10 compensation. Redress includes punitive damages which are meant to punish the violator for violation of the Constitution. Article 23 (7) provides that any person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of
15 the State or other person or authority. In case of general damages, these are damages which are presumed to natural or probable consequence of the wrong complained of, with the results that the plaintiff is required only to assert that such damage has been suffered.

In ***Kampala District Land Board & George Mitala vs. Venansio Babweyaka Civil Appeal No. 2 of 2007***, it was held that damages
20 are the direct probable consequences of the acts complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Also in ***Uganda Commercial Bank vs. Kigozi [2002] 1 EA 305***, it was held that a plaintiff who

5 suffers damage due to the wrongful act of a defendant must be put in the position he or she would have been in had she or he not suffered wrong.

In the present application, the Applicant is entitled to all reliefs she sought including punitive and compensatory damages.

10 The Applicant has shown that before her unlawful arrest, illegal detention and torture she was a happy woman earning enough for her children through contracts to sew school uniforms but due to the illegal detention she lost all her machines and materials because she left her house open thus her tailoring business ended. Court takes those factors
15 into account. These are facts to consider in arriving at the redress.

Besides the Applicant lost land on which she had a house and where her father was buried which was sold to raise money given to Police officers by the Applicant's mother in exchange for the Applicant's freedom. This too has to be considered.

20 Also to consider is the fact that the Applicant was tortured upon her arrest and during her illegal detention. She was also detained for three months in a non-gazetted place. Beyond physical loss for which court can make assessment of loss being subjected to inhuman treatment cannot be assessed in terms of loss. However, it is the Constitution

5 that was violated for which court is enjoined to vindicate the violated
freedom and deterrent against future violators. In the persuasive case
of ***Jennifer Muthoni & 10 Others vs. Attorney General of Kenya***
[2012] E KLR, a case for enforcement of rights and freedoms, court
held that the purpose of awarding damages in constitutional matters
10 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 punishment these responsible for or even securing effective
policing of the constitutionality enshrined rights by rewarding those
who expose breach of them with substantial damages. Basing on the
15 same principle, the Applicant in the instant application is awarded
compensatory damages of UGX 100 Million. Regarding exemplary
damages, in ***Deylon Johnson Wilson & Others vs. Attorney***
General H.C.C.S. 0027 of 2010, court held that these can be
awarded where there has been oppressive, arbitrary or
20 unconstitutional action by the servants of Government. Taking all the
oppressive, arbitrary and unconstitutional actions by Police as have
been portrayed in this case into account, the Applicant is awarded
punitive damages of UGX.100million.

5 Section 27 (1) of the Civil Procedure Act provides that costs shall be
follow the event unless court shall for good reason otherwise order.
The Applicant is the successful party and there is no good reason to
deny her costs of this application, which are awarded to her.

BASHAIJA K. ANDREW

JUDGE

07/02/2020.

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