THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. CAUSE NO. 42 OF 2019

(ARISING OUT OF CID HEADQUATERS GEF 130/2019)

1. **FELIX CUTHBERT ESOKO**
2. **GODLIVE NAYEBARE**
3. **KARUHANGA ROSALI**
4. **HIMBISA EMMANUEL:: APPLICANTS**

VERSUS

1. **ATTORNEY GENERAL**
2. **DIRECTOR PUBLIC PROSECUTIONS**
3. **LT. COL. EDITH NAKALEMA**
4. **DIRECTOR CID**
5. **OC KABALAGALA POLICE :: RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

BACKGROUND

This application was originally filed for and on by behalf of the applicants herein by Mr. Nicholas Ecimu under Article 50 (1) and (2) of the Constitution, 1995 and Rule 3(1) of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008 and Rule 2 of the Criminal Procedure Application Rules seeking orders/ declarations that:

1) The actions of the 3rd and 4th respondents herein enshrined in Art. 23(4) (b), 39, Art 43 (2) (b), Art 26, Art 27 (2), Art. 33 (3), Art 39, Art 43 (2) (b), Art

44(a) and (c) of the Constitution of the Republic of Uganda, 1995 (as amended)

2) The infringement upon the rights of the applicants herein merits redress by way of compensation of UGX.100, 000, 000/= each from the 3rd respondent to atone for the gravity and impact of the infringement on the plaintiffs' respective families.
3) The immediate release of the applicants from illegal detention and stay of investigations against the applicants by the 3rd respondent.
4) The 3rd respondent does compensate each of the applicants herein to a tune of UGX. 200,000,000/= to atone for the gravity and impact of infringement on their rights and freedoms
5) The continued incarceration of the applicants herein beyond the time of detention stipulated by law is an infringement on their rights and freedoms
6) A mandatory injunction doth issue restraining the respondents herein from further investigating the case(s) against the applicants herein.
7) The investigations against the applicants herein and their arrest over and about one and the same subject matter already being investigated by the IGG is unconstitutional, illegal and ultra vires.
8) The 3rd and 4th respondents herein are not clothed with jurisdiction to investigate arrest, interrogate let alone order the Uganda Police Force to incarcerate the applicants herein.
9) The mandate of the 4th respondent is only limited to receiving information relating to allegations of corruption and forwarding it to organs,

departments and agencies of government as by law established and mandated to handle corruption related cases.

10) The applicants herein are not accountable to the 3rd and 4th respondents over and above the Inspectorate of Government or at all.
11) The actions of the 3rd respondent in storming the offices of the applicants, confiscating vital documents from their offices infringe on their rights under the Constitution and are ultra vires the mandate of the 4th respondent.
12) A mandatory injunction doth issue against the 3rd respondent from further storming the offices of the applicants during the dependency of investigations by the IGG.
13) All manner of investigation howsoever commenced by the 3rd and 4th respondents herein against the applicants herein be quashed.
14) General, punitive and aggravated damages be made provision for.
15) Costs of the suit be provided for.

The reliefs sought herein above were stated in the pleadings and affidavit evidence of Mr. Nicholas Ecimu and the applicants.

The applicants were public servants serving Mbarara District Local government council where in the course of discharge of their mandate, the IGG investigated a complaint on how they dealt with public land under their purview. the complaints leveled by the 3rd respondent against the applicants herein for which she had them arrested and incarcerated yet the same matter was being investigated by the IGG. The IGG neither mandated nor delegated any 3rd party with any particular aspect(s) of its investigation(s). It was stated that the 3rd

respondent who is not a creature of any known legislation overstepped the purview of constitutional mandate of the IGG and set out in a frolic of her own to accuse the applicants herein, have them arrested and incarcerated in utter disregard of their rights and freedoms guaranteed under the Constitution of the Republic of Uganda. As a result, the applicants suffered an infringement of their rights.

The applicants sought to have Mr. Nicholas Ecimu who instituted this action against the respondents be substituted by the said victims as set out in the pleadings which was granted by court under Order 1, Rule 10 (2) of the Civil Procedure Rules.

The applicants in their evidence both in chief and cross examination complained that while in detention endured taunts and stress because of the torture, inhuman and degrading treatment they were subjected to immediately upon the arrest in Mbarara and detention in Kabalagala police on the 22nd February 2019 until they were finally arraigned in court at Anti Corruption Kololo on the 28th February 2019.

For the respondents, it was submitted by the 1st respondent that he appears for and on behalf of the second to the sixth respondents in accordance with Article 119 (4) (c) of the 1995 Constitution since the latter are parties that cannot be sued in these civil proceedings as they are all part of government and are in this suit as result of their employment as government officials.

The 1st respondent further conceded that all the applicants were incarcerated on the 22nd February, 2019 and produced in court on the 28th February 2019 having

been detained at Kabalagala police station for a period of five days beyond the constitutionally mandated period in accordance with Article 23 (4) of the 1995 Constitution.

The applicants were represented by Mr. Frank Kanduho and Mr. Julius Ojok whereas the respondents were represented by Mr. George Kalemella and the 2nd respondent by Mr. Joseph Kyomuhendo.

The matter was set down for hearing on two issues only being;

1. ***Whether the fundamental rights and freedoms of the applicants were infringed upon by the respondents.***
2. ***What remedies are available to the parties?***

The parties were ordered to file written submissions and accordingly filed the same. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the fundamental rights and freedoms of the applicants were infringed upon by the respondents.

Submissions

Counsel for the applicants submitted that while the respondents conceded to the fact that the applicants' detention was far beyond the 48 hours provided for and prescribed for detention under Article 23 (4) of the Constitution, court ought to do an in depth inquiry into the nature, extent and gravity of mal treatment the applicants herein endured as they underwent an illegal and unconstitutional

term of detention. It was submitted that the applicants were not accorded room to communicate to their immediate family, next of kin and lawyers about their arrest which right is conferred onto them by under Article 23 (5) of the Constitution. The plaintiff was injured as a result of use of deadly force by a law enforcement officer in circumstances where the same was not at all warranted.

The applicants also testified that they were never granted an opportunity to consult their lawyers of their choice nor were they allowed an opportunity to access medication while in detention irrespective of their numerous pleas over the same. The 3rd applicant had chronicle illness which was brought to the attention of the 6th respondent but she was left unattended to. Failure to get medication caused her health complications as stated in her evidence.

The 1st applicant further avers that he was forced to write his statement without the assistance of his lawyer even when he had requested that he is allowed access to his lawyer. Counsel stated that Article 24 of the Constitution guarantees freedom from torture, cruel, inhuman or degrading treatment or punishment. He relied on the evidence of Rosalia Karuhanga and the 2nd and 3rd applicants where they testified that they personally requested for sanitary ware to take care of their menstrual periods but the police just laughed them off causing them trauma.

There is uncontroverted evidence that the applicants herein were subjected not only to torture but to cruel inhuman and degrading treatment which inflicted mental and physical anguish on them in ways espoused in their evidence. Counsel relied on section 2 of the Prevention and Prohibition of Torture Act to

define torture as any act or omission by which severe pain or suffering is intentionally inflicted on a person. He went forth to state that freedom of torture is one of the most universally recognized human rights and stated that it is seen as the enemy of mankind. ***(See; Issa Wazemba v AG Civil Suit No. 154/ 206, Ireland v United Kingdom ECHR Application No. 5310/71)***.Counsel therefore submitted that the applicants proved the existence of the infringements complained of and are entitled to the reliefs sought in their application.

The 1st respondent on behalf of the 2nd 3rd ,4th, 5th, and 6th respondent stated that in assessing the compensation sought in breach of the detainment beyond the constitutionally mandated period of detention , court should take cognizance of the affidavit evidence of Mr. Benard Ochaya at paragraphs 12 and 13 which illustrate that he tried with all reasonable diligence to obtain the file from the DPP but this was only possible on the 28th February 2019 and whereupon the applicants were immediately produced in court. He further states that court should accept the evidence of Ms. Alice Komuhangi Khauka stating that all steps were taken to charge the applicants in time however, given the unique nature of the offences, the approval of the DPP himself had to be sought and this eventually resulted in the unintentional breach of Article 23 (4) of the constitution.

Counsel as to the right under Article 23 (5) of the constitution submits that the evidence on record illustrates that the 1st applicant was in touch with his brother who is a lawyer and even had the opportunity to file this application before this court. He stated that clearly, the 1st applicant had an opportunity to regularly meet both his next of kin and his lawyer. He stated that the affidavit of Mr.

George Omony is instructive in this regard on how applicants were allowed to see their lawyers, family and friends.

Counsel also submitted that the 2nd and 3rd applicant and by their statement of admission were found with two mobile phones on their person which was contrary to the rules of custody.

On the applicants' contention that they were denied access to medication, the evidence of ASP George Omony together with the outpatient register that was adduced in evidence as D1 illustrates that the 2nd,3rd and 4th applicants visited Kabalagala clinic and were registered as patients. The locus visit to the Kabalagala police station clearly established that there's a fully functional medical clinic with a permanent qualified medical personnel.

In respect of Article 24, the right to human dignity and protection of inhuman treatment, it is the respondents' case that none of the applicants were subjected to any kind of torture, cruel, inhuman or degrading treatment as no cogent evidence was adduced to establish these allegations and it is the respondents' submission that these allegation should be dismissed.

The applicants aver that they were denied the right to food and drinks, access to sunshine and toilet facilities. The evidence of ASP George Omony by way of affidavit clearly rebuts this allegation as the applicants were kept in a clean and decent place and given two meals a day together with an option of having home cooked meals. The applicants also had constant running of water in their areas of detention and with flashing toilets and liquid soap.

In respect of rights of women under Article 33, the 2nd and 3rd applicants aver that they experienced menstruation periods and were not allowed access to sanitary wear and had to make with pieces of their clothing. ASP George Omony's affidavit evidence informs court that there were no reports of females without sanitary wear during the detention of the 2nd and 3rd applicant as it's always kept in the clinic at the station and always made available to the female inmates upon demand. The respondents therefore stated that the applicants failed to adduce evidence to support their allegations and these averments should be dismissed.

Under Article 39 which ensures a right to a clean and healthy environment, it's the respondents' case that the applicants were all detained in a clean and healthy environment with running water in their cells and these are cleaned every day without fail. The locus visit actually confirmed that the police cells are very clean and a healthy environment, the respondents therefore stated that the applicants' allegations are made without substance and should be dismissed.

Counsel therefore submitted that it is the respondents' contention that save for the admission on the breach of Article 23(4) of the constitution, the evidence very clearly illustrates that there were no other rights and freedoms that were breached by the respondent. He also stated that in all civil matters, the plaintiff bears the burden to prove his/ her case on a balance of probabilities which standard the applicants failed to discharge in this application. Counsel stated that all allegations regarding the breaches of human rights of the applications were laid to rest following the locus visit to Kabalagala police station and it is

unfortunate that senior public servants chose to engage in clear falsehoods regarding the alleged violations of human rights.

Determination

I have analyzed the evidence before this court and the submissions of counsel in regard to this issue.

The respondent's counsel conceded that all the applicants were incarcerated on the 22nd February, 2019 and produced in court on the 28th February 2019 having been detained at Kabalagala police station for a period of five days beyond the constitutionally mandated period in accordance with Article 23 (4) of the 1995 Constitution. This was indeed a violation of their constitutional right under **Article 23 (4) (b)** of the Constitution which 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 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).*** 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 affecting 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 court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved. If a person is placed under detention without trial, the court should protect the individual from such violation at every cost.

The applicants were in custody for a period of five days without being set free or taken to court which was therefore a violation of their right to liberty under the Constitution.

In respect of the right guaranteed under **Article 23 (5)** of the Constitution, the applicants in this matter gave evidence that they were not accorded room to communicate to their immediate family, next of kin and lawyers about their arrest.

Article 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 defense 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.

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***

The respondents however led evidence rebutting the allegations made by the applicants as to not being in touch with their family or lawyers about their arrest. Counsel's submission as to the right under Article 23 (5) of the Constitution contended that the evidence on record illustrates that the 1st applicant was in touch with his brother who is a lawyer and even had the opportunity to file this application before this court. He stated that clearly, the 1st applicant had an opportunity to regularly meet both his next of kin and his lawyer. He stated that the affidavit of Mr. George Omony is instructive in this regard on how applicants were allowed to see their lawyers, family and friends. It was further submitted that the 2nd and 3rd applicant and by their statement of admission were found with two mobile phones on their person which was contrary to the rules of custody which they used to communicate to their family.

Having considered all the evidence on record, it is hard to believe that the applicants were not allowed access to their family, next of kin or lawyers since it is evident that this application was brought on their behalf by Mr. Nicholas Ecimu, a lawyer and brother to the 1st applicant who could have only gotten

acquainted with the facts in the matter through accessing the applicants. Further, the 2nd and 3rd applicant did not controvert the fact that they were in a possession of a mobile phone that they used to contact their family. In the circumstances, I find that the applicants failed to prove this issue in respect of violation of their rights under Article 23 (5) of the Constitution on a balance of probabilities hence it is in resolved in the negative. The mere statements made were not satisfactory to this court.

In respect of freedom from torture, cruel, inhuman or degrading treatment or punishment of the applicants under Article 24, 33, 39, 43 and 44 of the constitution, counsel relied on the evidence of Rosalia Karuhanga and the 2nd and 3rd applicants where they testified that they personally requested for sanitary ware to take care of their menstrual periods but the police just laughed them off causing them trauma. The applicants also testified before court that they were denied access to food and drinks, toilet facilities, access to sunshine and a clean and healthy environment.

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, inhuman or degrading treatment or punishment."

Freedom from torture is a non-derogable right under our Constitution. 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.

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;*

i) obtaining information or a confession from the person or any other person;

ii) 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

iii) 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, but the treatment must also be intentionally inflicted for the prohibited purpose.

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 the worst examples are likely to satisfy the test. There are no exceptional circumstances whatsoever to justify torture.

The applicants stated that they were denied access to food and drinks, access to sunshine and toilet facilities while in detention for several days. However, the respondents denied any of the applicants being subjected to any kind of torture, cruel, inhuman or degrading treatment. The respondents led evidence by way of affidavit sworn by ASP George Omony stating that the applicants were kept in a clean and decent place and given two meals a day together with an option of having home cooked meals. The applicants also had constant running of water in their areas of detention and with flashing toilets and liquid soap.

This evidence was corroborated by the applicants during their cross examination where Ms. Rosalia Karuhanga told court that she ate food brought to her by Mr. Esoku as there was nobody to bring her food. She further stated that she did not

remember the number of times she ate food. She also told court that there was a toilet at the station. The 4th applicant during cross examination told this court that the inmates were given a meal which was served by Mr. Esoku. He further stated that there was a structure like a bowel and non-functional and all prisoners were using it. He also stated that there was water on some occasions. The 2nd applicant testified in court and stated that he was given food about twice or three times.

Court made an inspection at the police station of Kabalagala where it observed that there are two main cells, a toilet with running water, some mattresses and bed sheets. This was inconsistent with the statements made by the applicants as to the absence of a toilet and water for the prisoners. The allegation of using buckets fall by the way side.

In respect of rights of women, the 2nd and 3rd applicants stated that there were denied access to sanitary ware that they had to use their clothes during their menstrual periods. The applicants also testified that they were denied access to medical facilities. This was however rebutted by the evidence of ASP George Omony who stated that the applicants were listed under the prison's outpatient book as having attended to the clinic. He further denied the allegations that the 2nd and 3rd respondents were denied access to sanitary ware and stated that this is kept in the clinic where all female prisoners can access it.

I have considered all the evidence before court and I am therefore inclined to believe the evidence of the respondents since the applicants did not lead sufficient evidence to prove that their constitutional rights under Articles 24, 26,

27 (2), 33 (3), 39, 43 (2) (b) and 44 were violated while in custody on a balance of probabilities hence it is in resolved in the negative. The mere statements made were not satisfactory to this court. These were serious allegations made against the respondents and court expected serious and cogent evidence to prove them on the balance of probabilities.

Issue 1 is resolved in the affirmative in respect of the applicants constitutional right as to the detention and dismissed in respect of claims of violate.

Issue 1 therefore succeeds in part. The applicants' constitutional rights under Article 23(4) were violated. I however did not find any violation of the applicants' freedom from torture and cruel, inhuman or degrading treatment or punishment under Article 24 and rights of women under Articles 26, 27 (2), 33 (3), 39, 43 (2) (b) and 44 of the Constitution.

Issue 2

What remedies are available to the parties?

Counsel for the applicants submitted that the applicants were subjected to inhuman or degrading treatment which is beyond physical loss for which court can make an assessment of loss. Counsel stated that court is enjoined to vindicate the violated freedoms by an award of damages not compensatory in nature but rather punitive against the violators and deterrent against future violations. *(**See; Jeniffer Muthoni & 10 Ors v Ag of Kenya [2012] eKLR .***

He stated that court cannot assess the kind of suffering the applicants suffered and that court needs to award damages for the vindication of freedom from

torture, cruel and inhuman treatment. He therefore submitted that it is imperative for court to award the damages prayed for to atone the torture, inhuman and degrading treatment visited unto the applicants by the respondents.

For the respondents, counsel submitted that having failed to adduce any evidence to prove any allegations save for one admitted to by the respondent, the applicants do not qualify to be granted any of the remedies being prayed for in the application.

He also submitted on the applicants contention that this court should not allow their prosecution to continue as a result of their varied allegations of breaches under the law, counsel stated that it is not legally proper for this court sitting in a civil matter to bar the proceedings in a criminal trial of the applicants yet whatever defenses raised by them can be properly handled by the criminal court. ***(See; ACP Bakaleke Siraj v AG Misc. Cause No.212/2018).*** He prayed that the applicants be sent back to the Anti-corruption division of the High court for determination of their cases and the rest of their prayers save for the admissions be dismissed with costs.

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 issues 1 in respect of Article 23(4), the applicants are entitled to redress for violation of their constitutional rights.

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 deprival 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."

An award of compensation for established infringement of the indefeasible rights guaranteed under the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein rights and interests shall be protected and preserved.

With due consideration to the submissions of counsel and the above principles, I award the applicants a sum of UGX 10.000.000/= each for the illegal detention.

The applicants are also awarded UGX 2.000.000/= (Five million Uganda Shillings) as punitive damages against the 1st respondent for the gross violation of Human Rights and the Constitution as well as to deter security agencies from repeating this conduct against the citizenry.

This court however concurs with the submission of the respondents' counsel as to the stop the applicants' prosecution from continuing as a result of their varied allegations of breaches under the law. This is not legally proper for this court sitting in a civil matter to bar the proceedings in a criminal trial of the applicants yet whatever defenses raised by them can be properly handled by the criminal court. See ***ACP Bakaleke Siraj v AG*** This prayer is therefore rejected by this court.

This application therefore succeeds in part as to the violation of Article 23(4) of the Constitution. The applicants are awarded interest at a rate of 15% from the date of Judgment until payment in full.

The applicants are awarded costs of the suit.

I so order.

Dated, signed and delivered be email at Kampala this 30th day of April 2020

SSEKAANA MUSA
JUDGE