

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 92 OF 2021

NIWABINE DAUDI ===== APPLICANT

VERSUS

ATTORNEY GENERAL ===== RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING

This application is by notice of motion under section 50(1) of the constitution, section 3, 4, 6 (2), (3) and 10 of the Human Rights Enforcement Act 2019, section 33 of the Judicature Act and Rules 3, 5(1) (a) and (d), (2), 7(1), 8, 9, 10 and 11 of the Judicature (Fundamental Rights and other Freedoms (enforcement procedure) Rules 2019 seeking for orders that; -

1. A declaration that the Respondent’s officers arresting, beating, kicking, torturing, blindfolding, and incommunicado detention of the Applicant from 19th November 2020 to 17th February 2021 constituted breach of the constitutionally guaranteed right to human dignity, and freedom from torture or cruel, inhuman or degrading treatment or punishment contrary to Articles 20, 22, 24 and 44(a) of the constitution of Uganda.
2. A declaration that the Respondents’ officer’s incommunicado detention of the applicant from 19th November 2020 to 17th February 2021 was illegal and violated his right to personal liberty and freedom of movement guaranteed under article 23(4)(b) and 29(2)(a) & (b) of the 1995 constitution of Uganda.
3. An order directing the Respondent to pay general damages for the human rights violation and transgressions, inconvenience and mental anguish.
4. An order directing the Respondent to pay punitive/exemplary damages for the high-handed, oppressive and unconstitutional conduct of its special investigation Division SID offices.
5. On order directing the Respondent to pay aggravated damages.

6. An order directing the Respondent to pay costs of the application.

The application is supported by the affidavit of **Niwabine Daudi** the applicant and **Babigumira Devis** his brother.

Niwabine Daudi in his affidavit briefly stated that; -

1. On 19th November 2020 I was arrested during the demonstration that followed Bobi Wine's arrest as I was leaving my workshop at 10:00am and put in drone car.
2. I was tortured by the officers who I found inside the car by making us lie flat facing down in the vehicle, beating, blindfolding my face, undressing us and kicking from the officers.
3. We were taken to a hall where we were told to wash our hands and eat food after they tied our hands with ropes from the back and we slept with the head masks on till the following day.
4. I was removed from the group and taken to the interrogation room where I found two gentlemen who asked me various questions including what my role was in the riot and the connection I have with people power movement.
5. On 12th February 2021, 2 days to Election Day, about 40 names were called out, mine inclusive and we were driven to a new place where we spend about 6 weeks.
6. On 17 February 2021 at about 2:00am I was moved to Kireka SID and interrogated after which I was released on bond.
7. I was driven to my residence at Wandegeya and handed over to my father.

Babigumira Devis in his supplementary affidavit in support briefly stated that;-

1. I was called by a stranger on 21st November 2020 and informed that my brother/the applicant herein had been arrested on 19th November 2020 in Kawempe around his workshop amidst demonstrations that were taking place in Kampala.
2. I sent another brother of mine called Kazoora Seth to check the police stations of Kawempe, Wandegeya, Nabweru, Nansana and Old Kampala but there was no record of the applicant.
3. We also checked Kitalya prison and we were told that the applicant was there but it was not visiting day.

4. I checked in Nabweru and Kasangati Chief Magistrates Courts but there was no record of the applicant.
5. I went to police headquarters in Naguru and met the Police Spokesperson Afande Enanga Fred, explained my issue and he called the CID Commander Central Police station instructing him to search for the applicant but the CID Commander said he had no record of the applicant.
6. I also checked in Mulago mortuary, casualty section 2B but there was no record. I reported to Uganda Human Rights Commission and Madam Lagosa Juliet called the OC who confirmed that the applicant was not at Kitalya.
7. Afande contacted the team leader of CCTV cameras, Mr. Ogwang who successfully obtained a footage from the scene of the applicant's arrested and we discovered that the care number plate was UAZ 462R which was in the names of Chatha investments but it was sold to Uganda Police Force.
8. The applicant continued in detention in unknown places without trial for 91 days till 17th February 2021 when he was released which was illegal, arbitrary, unconstitutional and the same amounted to both physical and psychological torture and degrading treatment of the Applicant.

In reply, the respondents opposed the application and in an affidavit sworn by **Mark Odongo** the commandant of the Special Investigations Division at the Uganda Police Force briefly stated that; -

1. The Respondent's officers have never arrested, beaten, blindfolded or tortured the Applicant.
2. Upon reporting of the missing of the Applicant, the Respondent's officers assisted his family to conduct searches in all gazetted places of detention in and around Kampala including use of CCTV cameras.
3. The Uganda Police Force and the Uganda People's Defence Forces carried out thorough investigations into the whereabouts of the Applicant and established that he was not in their custody.
4. There was no evidence that the Applicant was ever arrested or detained by the Respondent officers.
5. The alleged violations if any were never committed by the officers of the Respondent.

Representation.

Counsel Namusoke Jacqueline together with Kusingura Anthony holding brief for Counsel Kiiza Eron represented the Applicant while Moses Mugisha together with Ocol Ambrose a state attorneys represented the Respondent.

At hearing parties agreed to file written submissions whose details are on record.

Counsel for the Applicant in his written submissions raised four issues for court's determination to wit; -

- 1. Whether the Respondent's Officers tortured, inhumanely treated or breached the dignity of the Applicant contrary to Article 20, 22, 24 & 44(a) of the Constitution.*
- 2. Whether the Respondent's officers incommunicado detention of the Applicant was illegal & violated the Applicant's personal liberty contrary to Article 23(4) (b) of the constitution.*
- 3. Whether the Respondent's officers conduct violated the Applicant's freedom of movement contrary to Article 29(2)(a) & (b) of the Constitution.*
- 4. Whether the remedies sought are available to the Applicant.*

Submissions by counsel for the Applicant.

Issue No. 1

Whether the Respondent's Officers tortured, inhumanely treated or breached the dignity of the Applicant contrary to Article 20, 22, 24 & 44(a) of the Constitution.

Counsel referred to Article 24 of the constitution which states that;

"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment".

Counsel defined torture according section 2(c) of the Prohibition and prevention of torture Act which states that;-

'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”.

Counsel referred to the case of **Uganda versus Mulooki Henry criminal session No. 093 of 2017**

Counsel submitted that according to paragraphs 3, 4, 6, 7, 8, 9 10 and 11 of the applicant’s affidavit in support, he stated that upon being arrested and put in a drone car, he was beaten, undressed, kicked, blindfolded by men clad in black uniform and masks on their heads. That even at the detention Centre, officers continued to beat them which actions amounted to torture.

Issue No. 2

Whether the Respondent’s officers incommunicado detention of the Applicant was illegal & violated the Applicant’s personal liberty contrary to Article 23(4) (b) of the constitution.

Counsel submitted that Article 23 of the constitution guarantees the protection of personal liberty and under Article 32(2) of the Constitution a person arrested, restricted and detained shall be kept in a place authorized by law.

Counsel referred to the case of **Joseph Tumushabe Vs AG [2005] KALR 768 quoted in Issa Wazembe Vs Attorney General CS No. 154 of 2016** in which case the plaintiff had been arrested and detained in a military custody, court found a violation of their right to liberty.

Counsel submitted that according to article 23(4) (b) and (5) states that a person arrested on suspicion of having committed an offence shall not be detained for more than 48 hours before being taken to court and he will have a right to inform his next of kin of the arrest failure of which amounts to violation of his right liberty.

Counsel submitted that according paragraphs 3, 5, 7, 8, 9, 10, 11, 12, 13, 15, 16 and 17 the applicant was arrested incommunicado for over 91 days which amounted to a violation of his right to liberty.

Issue No. 3

Whether the Respondent's officers conduct violated the Applicant's freedom of movement contrary to Article 29(2)(a) & (b) of the Constitution

Counsel submitted that article 29(2) (a) & (b) of the constitution guarantees freedom to move freely throughout in any part of Uganda.

Counsel submitted that the applicant was unjustifiably arrested and detained incommunicado for six weeks at the Special Investigations Unit in Kireka and later in another unauthorized places of detention by the respondent's security personnel before he was released as proved by paragraphs 3, 8, 9, 10, 11, 12, 13, 15, 16 and 17 of the applicant's affidavit in support.

Issue 4

Whether the remedies sought are available to the Applicant.

Counsel referred to article 126 (c) of the constitution which provides for adequate compensation.

Counsel referred to the case of **Issa Wazembe Vs Attorney General CS 154 OF 2016** and prayed that this court be pleased to compensate the applicants for his violated rights.

Submissions by counsel for the Respondent.

Issue No. 1

Whether Respondent's Officers tortured, inhumanely treated or breached the dignity of the Applicant contrary to Article 20, 22, 24 & 44(a) of the Constitution.

Counsel referred to Article 44(a) of the Constitution which provides for none derogation from freedom from torture and cruel, in human or degrading treatment or punishment.

Counsel defined torture according to section 2 of the Prevention and Prohibition of Torture Act, 2012 which defined 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”.

Counsel contented that the applicant was not tortured by Uganda Police Force or officials of the Government, UPDF as alleged. The application is a mere conjecture not based on any credible evidence.

He submitted that for any act to amount to torture, not only must there be evidence of a certain severity in pain and suffering, but the treatment must also be intentionally inflicted for the prohibited purpose. that courts should apply a more strict test when considering whether there has been a breach of an individual’s right.

Counsel submitted that much as the applicant bares the burden to prove the same under section 101 and 103 of the Evidence Act, Cap 6, he adduced no evidence to prove the same.

Issue No. 2 &3

Whether the Respondent’s officers incommunicado detention of the Applicant was illegal & violated the Applicant’s personal liberty contrary to Article 23(4) (b) of the constitution.

Whether the Respondent’s officers conduct violated the Applicant’s freedom of movement contrary to Article 29(2)(a) & (b) of the Constitution.

Counsel submitted that the applicant was never held incommunicado by the Respondent, and as a result, his rights to freedom of movement was never curtailed. That according to paragraphs 3, 4 and 5 of the affidavit in reply deponed by Mark Odongo the applicant was never arrested by the agents of the Respondent.

Counsel submitted that the applicant has not adduced any corroborative evidence which can assist court to establish if he was arrested and where he was detained. It is our submission that the alleged violations are speculative and were not committed by the agents of the Respondent.

Issue No. 4

Whether the Remedies sought are available to the Applicant.

Counsel referred to article 50(1) of the constitution and stated that much a person whose rights have been violated can be compensated for damages, in the instant case the applicant has not made out a case to prove the alleged violations if any and that the same were committed by the agents of the Respondent. He is accordingly not entitled to the remedies prayed for.

Counsel prayed that the application be dismissed with costs to the Respondent.

Analysis of court.

Issue No. 1

Whether the Respondent's Officers tortured, inhumanely treated or breached the dignity of the Applicant contrary to Article 20, 22, 24 & 44(a) of the Constitution.

I have very carefully considered the affidavits filed by both parties and the written submissions thereof. I have also addressed myself to the provisions of the law as considered here below; -

Article 44 of The Constitution of the Republic of Uganda provides for prohibition from derogation from particular human rights and freedoms and the same article states that; -

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

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.”

Also 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”.*

The right to freedom from torture, inhuman and degrading treatment is also provided for in the Universal Declaration of Human Rights under Article 5 thereof which provides;

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

The right to freedom from torture is also envisaged in the International Covenant on Civil and Political Rights, Article 7 thereof provides;

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Further, the African Charter on Human and People’s Rights provides for freedom from torture, inhuman and degrading treatment under Article 5 which states;

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

This includes not only actions which cause serious physical and psychological suffering, but which humiliate the individual or force him or her to act against his/her will or conscience. **See International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998).**

In the case of 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.

From the above cited provisions of the law, it is clear that torture is a serious allegation that must be proved by cogent evidence. Mere averments in affidavits are not enough to establish torture claims. In some cases courts have applied a strict a very strict test when considering whether there has been a breach of the individual's right to freedom from torture or inhuman or degrading treatment.

It is my finding that in cases of violation of rights through torture, the parties make all manner of allegations of torture and the same usually remain extremely controversial since it is the 'case of your word against my word'. The court will need to have cogent and credible evidence before it arrives at the decision that a person was tortured or subjected to inhumane and degrading treatment. **See Nsereko Musa Versus Attorney General & 15 others Miscellaneous Cause No. 386 of 2020.**

In the instant case, the applicant has not adduced cogent evidence to prove that he was tortured. Apart from his allegations in the affidavit in support, there is no evidence adduced to substantiate his claims. Court was not helped to establish that indeed the applicant tortured.

This court cannot rely on the bare averments of the applicant in his affidavits in support to prove torture in the absence of cogent and corroborative evidence.

This issue is resolved in the negative.

Issue No.2 & 3

Whether the Respondent's officers incommunicado detention of the Applicant was illegal & violated the Applicant's personal liberty contrary to Article 23(4) (b) of the constitution.

Whether the Respondent's officers conduct violated the Applicant's freedom of movement contrary to Article 29(2)(a) & (b) of the Constitution.

I have looked at issue No. 2 and 3 and I have decided to resolve them jointly they all concern the detention of the applicant.

From the evidence on record, it shows the applicant was arrested on 19th November 2020 and detained in unknown police places which is confirmed by the orders for the issue of a writ of habeus corpus ad subjiciendum issued by this court on 22nd

December 2020 and 28th December 2020 all attached on the applicant's affidavit in support and marked A & B respectively.

This was followed by a release order by this court dated 31st December 2020 ordering the Respondent to release the applicant who was taken by persons in a Motor Vehicle UAZ 642R belonging to Uganda Police.

The above detention can further be established from a letter dated 19th January 2021 by Uganda Police Force written by the Inspector General of Police to the Director Criminal Investigations requiring him to comply with the court orders.

The applicant adduced evidence that he was released on police bond on 17th February 2021 by Kawempe Police Station after being in unknown places from 19th November 2020. He attached a copy of the police bond. This evidence destroys the Respondent's denial in the affidavit in reply that they are not the ones who arrested and detained the applicant.

The above evidence is corroborated by the evidence of his brother Babigumira Davis who stated that the applicant was detained on 19th November 2020 and efforts to know his whereabouts were unfruitful till 17th February 2021 when he was released.

Basing on the above evidence, I find that the detention of the applicant was a violation of his right to personal liberty and freedom of movement.

Issue No. 2 and 3 are resolved in the affirmative.

Issue 4.

Whether the Remedies sought are available to the applicant.

Since the applicant has proved to this court that his right to personal liberty and freedom of movement were violated. He is entitled to the relief in issue No. 2 and 3.

In the final result, this application partially succeeds with the following orders; -

1. The applicant is awarded 20,000,000/= (Twenty Million Shillings) for the violation of his right to personal liberty and freedom of movement.
2. The applicant is awarded punitive damages of 1,000,000/= (One million shillings)

3. The applicant is awarded interest at a rate of 15% from the date of ruling until payment in full on 1 & 2.
4. The applicant is awarded costs of this application.

Dated, signed, sealed and delivered by email on this **9th day of November 2023**

Emmanuel Baguma

Judge.