

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

MISCELLANEOUS CAUSE NO. 008 OF 2023

KABULETA JOSEPH KIIZA ===== APPLICANT

VERSUS

ATTORNEY GENERAL OF UGANDA ===== RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING

Background.

The applicant filed this application for enforcement of human rights of 32 detainees charged at General Court Martial and remanded at Kitalya government prison. He prayed that the detainees be freed from detention and be adequately compensated.

The application.

This application is by notice of motion under article 23, 28, 50 and 126(2) of the Constitution of Uganda 1995, section 14(1) & (2)(c), 33, 39(2) & 48 (i) & (d) of the Judicature Act, section 3, 4 and 15 of the Human Rights (Enforcement) Act, 2019; section 141 of the Trial on Indictment Act, Cap 23, Section 190, 209 & 210 of the Uganda People's Defence Force Act, 2005, Regulation 5 of the Uganda Defence Forces (Rules of Procedure) Regulations SI 307-1 Seeking for orders that;-

1. The 32 detainees under criminal case No. UPDF/GCM/072/2021 be immediately freed from detention and custody.
2. A declaration that the continued detention of the detainees under Criminal Case No. UPDF/GCM/072/2021 from 14th August 2021 to date is unconstitutional, illegal, unlawful and a violation of their rights.
3. The denial of the detainees mandatory bail is a violation of their right to personal liberty.

4. This court orders for unconditional release of the detainees from custody and detention in respect of UPDF/GCM/072/2021
5. This court issues an injunction against re-arrest of the detainees.
6. The detainees be adequately compensated for the illegal detention.
7. Costs of this application.

The application is supported by the affidavit of **Kabuleta Joseph Kiiza** whose details are on record but briefly states that;-

1. Ssegujja Rashid aka Chairman, Ssekitoleko Yasin aka Machete, Rugumayo Robert Christopher, Mayiga Ronald, Kakooza Muhydin, Mwase Patrick, Kijambo Simon, Matovu Abdu, Nyombi Richard, Lutaya Olivia, Kijambo Ronald, Kalanzi Sharif, Muwonge Joseph, Kiwanuka Mesach, Kintu Abdalla, Kato Ema Umar, Kavuma Musa, Wandera Ibrahim, Nagwere Asbert, Musakulu Steven, Galukande Jimmy, Muwanguzi Paul, Kamanye Kenneth, Matovu Sharif, Ngobi Shafiq, Mafabi Davis, Gibusiwa Abdalla Hakim, Katushabe Kigozi Livingstone, Katabi Swaibu, Obalai Siraji Mudebo, Muganza Joseph and Lwanga Stanley were arrested between 10th May 2021 and 30th May 2021 and charged before the general court martial for being in possession of ammunition ordinarily the monopoly of the Defence forces.
2. The accused persons were remanded to Kitalya government prison and denied bail.
3. The continued detention of the accused persons is illegal and violates their right to personal liberty.

In reply, the Respondent opposed the application and in an affidavit sworn by **RO/10667 Lieutenant Colonel Raphael Mugisha** whose details are on record but briefly states that;-

1. There is no violation of the accused person's right since the accused person were charged with the offence of unlawful possession of ammunition C/S 3 (1) (a) and (2) (a) of the Firearms Act Cap 229.
2. Section 119 (1) (h) (i) of the UPDF Act 2005 bring the accused persons under the jurisdiction of the Court Martial.
3. The accused persons were charged and remanded to Kitalya, hearing of their case started and so far one witness testified.

4. The accused persons applied for bail and the court in its discretion denied them bail. They have also filed another application for bail and the same is fixed for hearing on 13th February 2023.
5. The applicant is not entitled to the remedies sought.

Legal Representation.

The applicant was represented by Mr. Remmy Bagenda of Nyanzi, Kiboneka & Mbabazi Advocates while the Respondent was represented by Namakula Elizabeth senior state attorney from the Attorney General's Chambers.

Both parties agreed to file written submissions and court gave schedules within which to file. Although parties failed to follow the schedule. But for the interest of justice and the nature of this application, court decided to consider the same.

Counsel for the Respondent raised a preliminary point of law in the written submissions. However, it is nowhere on the record both in the affidavit in reply or during the hearing where it was intimated to court that a PO will be raised. For the interest of justice, Court will not consider the PO raised by Counsel for the Respondent but court will go directly to the merits of this application.

Submissions by counsel for the applicant.

Counsel for the applicant raised 3 issues in his written submissions to wit;-

1. *Whether the criminal proceedings and trial vide Criminal Case UPDF/GCM/072/2021 is valid, legal and lawful.*
2. *Whether the continued detention of the 32 detainees is lawful and legal;*
3. *What remedies are available to the applicant*

Issue 1

Whether the criminal proceedings and trial vide Criminal Case UPDF/GCM/072/2021 is valid, legal and lawful.

Counsel submitted that the crux of this application is to interpret section 190(3) of the UPDF Act, 2005 and enforce the same in the context of Human Rights Enforcement Act. He further submitted that the interpretation and application of

section 190(3) of the UPDF Act to the 32 detainees will help to determine the legality and lawfulness of the continued detention and trial of the 32 persons.

Counsel further submitted that the strict interpretation of section 190(3) of the UPDF Act, 2005 the detainees in this case would have been freed upon the expiry of 90 days from the date of arrest by the General Court Martial.

Issue 2

Whether the continued detention of the 32 detainees is lawful and legal;

Counsel submitted that section 15 of the human rights enforcement act provides for unconditional release of persons unreasonably detained, it states that;

(1) A person who has reason to believe that another person is being unreasonably detained in the circumstances prescribed in subsection (4) may petition the High Court for the unconditional release of such a person.

(4) In this section a person shall be taken to be unreasonably detained where;

e) the procedure leading to his or her detention was irregular or unlawful;

f) there are no justifiable reasons for his or her continued detention;

(g) his or her non derogable rights have been infringed upon;
or

(h) his or her continued detention amounts to a miscarriage of justice.

Counsel submitted that had the detainees been UPDF soldiers, they would have been released by the commanding officer on 14th day of August. That the strict construction of section 190(3) of the UPDF Act, 2005, since the detainees are not serving officers they as such do not have a commanding officer. But since they were charged with a service offence, and subjected to military law, the commanding officer in this case is the Court Martial and it ought to release them after 60 days which it didn't hence the continued detention of the 32 detainees was illegal.

Counsel concluded that the continued detention of the 32 detainees is unreasonable, unconstitutional, illegal and unlawful.

Issue 3

What remedies are available to the applicant.

Counsel referred to section 35 and 40(1) of the Judicature Act Cap 13 which confers jurisdiction on the High Court to give all such remedies as may have power to.

Counsel also referred to section 4 of the Human Rights Enforcement Act which confers jurisdiction onto the High Court to entertain applications of this nature.

He further referred to **section 9 of the Human Rights Enforcement Act 2019** which provides that;-

“Where the competent court determines that a fundamental right or freedom has been violated, unlawfully denied or should be enforced, the competent court shall issue orders it considers appropriate, including an order for compensation”.

Counsel concluded that this court be pleased to grant the detainees adequate compensation for the wrong they suffered and also order for their release from custody.

Submissions by counsel for the Respondent.

Issue 1

Whether the criminal proceedings and trial vide Criminal Case UPDF/GCM/072/2021 is valid, legal and lawful.

Counsel for the Respondent referred to the case of **Namugerwa Hadijah Versus Attorney General SCCA No. 4 of 2012** where court held that;

“Section 197 of the Act establishes a General Court Martial and confers on it, among other things, unlimited original jurisdiction to try offences “under this Act”. Offences under this Act include service offences under Section 179 of the Act committed by persons subject to military law. These persons, in my view, will include civilians subject to military law under Section 119(l)(g) and (h) of the UPDF Act. Section 2 of the Act defines a “service offence” as “an offence under this Act or any other Act for the time being in force committed by a person while subject to military law”. Therefore, in my view, any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act.

From the above cited provisions, it is clear to me that civilians in Uganda can become subject to military law and once they become subject to military law they will be tried by the General Court Martial. I am unable to see any exemption of civilians from the application of Section 179 of the Act once they become subject to military law under Section 119(l)(g) and (h) of the Act. Ordinarily civilians who are not involved in fighting wars should be tried by civilian courts, not military courts. Therefore, Section 119(l)(g) and (h) of the UPDF Act is rather unusual. However, the constitutionality of this Section was upheld by the Constitutional Court in Uganda Law Society vs. Attorney General (supra) and when its decision was appealed to this court the constitutionality of the section was not raised and argued by the cross- appellant (Uganda Law Society), and so this court did not address it”.

Counsel submitted that court reiterated its decision in **Constitutional Appeal No. 1 of 2006 Attorney General Vs Uganda Law Society** where it stated that;-

“for the offence of being in unlawful possession of firearms, it has to be shown that the accused persons being civilians, were subject to military law by, for example, showing in the charge sheet that the weapons they were alleged to have been found in possession of were ordinary monopoly of the defence forces”.

Counsel submitted that section 3(1) of the fire arms Act imposes restrictions on that offence and section 190(3) of the UPDF Act does not apply to the same offences whose sentences are above 10 years.

Issue 2

Whether the continued detention of the 32 detainees is lawful and legal;

Counsel for the Respondent submitted that the onus is on the applicant to prove that the detention was unlawful.

Counsel referred to section 15 of the Human Rights Enforcement Act which provides for release of persons unreasonably detained and stated that the applicant has not discharged the burden beyond mere allegations in the affidavit in support of proving that the detainees are being unreasonably detained as their detention is subject to section 190 (6) of the UPDF Act.

Issue 3

What remedies are available to the applicant.

Counsel submitted that the applicant is not entitled to the remedies sought and prayed that the application be dismissed.

Analysis of court on Issue No. 1&2

Whether the criminal proceedings and trial vide Criminal Case UPDF/GCM/072/2021 is valid, legal and lawful.

Whether the continued detention of the 32 detainees is lawful and legal;

Section 119 (1) (h) of the UPDF Act provides that;

The following persons shall be subject to military law,

(h) every person found in unlawful possession of—

(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces;

In the case of **Namugerwa Hadijah Vs Attorney General SCCA No. 04 of 2012** it was held that:-

“..... civilians in Uganda can become subject to military law and once they become subject to military law they will be tried by the General Court Martial”.

In the instant case, the accused persons were charge with the offence of being in unlawful possession of ammunition ordinarily being the monopoly of the Defence forces contrary to section 119 (1) (h) of the UPDF Act an offence triable by the General Court Martial as per the charge sheet dated 8th June 2021 and attached to the affidavit in reply and marked annexure “A”.

It is clear from the charge sheet above that the detainees were charged with the offence of being in unlawful possession of ammunition which is a monopoly of the defence forces, hence becoming subject to military law and once they become subject to military law, they will be tried by the General Court Martial.

It is also an established fact that the detainees are under trial and some witnesses have since testified against them, this makes the provisions of section 190(3) of the UPDF Act not applicable.

Basing on the case **Namugerwa Hadijah *supra*** and considering the application before this court, I entirely agree with the position of law as stated by the supreme court in the above case that civilians can be subjected to military law as it is in this instant case.

Issue No. 3

What remedies are available to the applicant

Since the applicant has failed to prove to this court that the detention of the 32 detainees is unlawful and illegal. He is not entitled to the remedies sought in this application.

Conclusion.

In the final result, this application fails with the following orders

- 1. The application is hereby dismissed.**
- 2. Given the nature and circumstance of this case, no order as to costs.**

Dated, signed, sealed and delivered by email on this **11th** day of **April 2023**.

Emmanuel Baguma

Judge