

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF KAMPALA AT KAMPALA
CRIMINAL MISC. APPL. No. 15 of 2021
(Arising From High Court Cr Appeal No 455 of 2021)

1. RO 08576 CAPTAIN BUMALI
MANGENI a.k.a AKEEM
2. LUMU BENON
3. KISITU ANDREW

.....

APPLICANTS

Versus

UGANDA

.....

RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU
RULING

This application is brought under Articles 23 (4) (b), 28, 44 (a) & (c) and 49 (1) of the Constitution of the Republic of Uganda; Sections 11 (1) & (2) (b) of the Human Rights (Enforcement) Act 2019; Rules 5 (1) (a), 6 (1) (a) and 7 (1) of the Judicature (Fundamental and Other Rights and Freedoms) (Enforcement Procedure Rules) 2019.

The applicant seeks orders that:

1. A declaration that the detention of the applicants in police custody for 47 (forty seven), 49 (forty nine) and (39) thirty nine days respectively,

without being charged, was unlawful and in flagrant breach of their non-derogable constitutional rights to personal liberty and fair hearing.

2. A declaration that the subsequent criminal proceedings vide Criminal Session Case No. 455 of 2017 against the Applicants are a nullity and are void *ab initio*.
3. An Order quashing, in entirety, the proceedings in Criminal Session Case No. 455 of 2017.

The grounds on which the application is premised are set out in the Notice of Motion and well elaborated in the accompanying affidavits deposed by the applicants.

It is stated by the 1st applicant, **RO Captain 08576 Captain Bumali Mangeni a.k.a Akeem** that he stands charged with the offences of Kidnap with Intent to Murder c/s 243 (1) of the Penal Code Act; Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act; and Murder c/s 188 and 189 of the Penal Code Act. That he was arrested on the 14th of December 2016 and detained at the Central Police Station in Kampala. That on the 15th of December 2016 his home was searched without a warrant and his wife arrested. Her arrest left his three children, who are minors, without an attendant. That he was tied 'Kandooya' and taken to Nalufenya. On the 17th of December 2016 he was driven to Busia together with his co-accused and tortured to confess to the murder of an Eritrean. That he was driven to Kampala the next day – 18th of December 2016 – and taken to the Special Investigations Directorate in Kireka. That in all this time he was never given a meal but was tortured continuously as the police officers demanded that he confesses to the murder of the Eritrean. When he refused to confess he was beaten even more until he lost consciousness. When he regained consciousness the next day, he found that he was in Naguru hospital. He was transferred back to Kireka SID the same day. That he demanded to see his private doctor and lawyers so that he could be taken to Court. He demanded to see his wife

who was also in detention at time. All his requests were rejected. That on the 27th of December 2016 he was examined on PF 24 at a time when he had multiple injuries, wounds and severe pain. The police form is attached to the affidavit. That on the 28th of December 2016 he was taken to the then Inspector General of Police, General Kale Kayihura, who asked that he confesses but he refused. That he was beaten and told to sign a charge and caution statement but he refused. Later the applicants wife was produced and beaten in his and the IGPs presence. That seeing his wife beaten, he chose to sign the statement written by AIP Odyek Benedict. That he does not know the contents of the document. After he signed, his wife who had been held for 35 days, was released. He was then taken for an identification parade held at Kira Road Police station. The next day he was taken to Nalufenya Police Station and placed on treatment. Then on the 30th of January 2017 he was produced in Court and charged as earlier stated. That the conduct of the respondent infringed on his constitutional rights

The Second applicant, **Lumu Benon Duncan**, and a co accused of the other applicants, stated that he was arrested by the Uganda Police on the 12th of December 2016 from the Village Mall in Bugolobi, Kampala. He was informed the arrest was on suspicion of committing the offences of Kidnap with Intent to Murder c/s 243 (1) of the Penal Code Act; Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act; and Murder c/s 188 and 189 of the Penal Code Act. That he was held in solitary confinement and subjected to cruel, inhumane, violent and tormenting conditions. That he was kept handcuffed in solitary confinement in Nalufenya Police Station. The cell was filthy and the applicant doused with cold water. Lumu added that he was only produced before a magistrate on the 30th of January 2017, forty nine days after his arrest. That his torture included deprivation of food for a number of days, being handcuffed all day and night, physical torture, being denied visitation by

relatives as well as being denied access to a lawyer. That he suffered serious bodily injury, psychological trauma and emotional anguish. That he was taken to Busia in Kenya and forced to appear before cameras. That PW 11 in his testimony admitted that the applicants had been held in Police custody, without charge, for more than 50 days. That being denied access to a lawyer, family, subjected to such cruel treatment is a breach of his non-derogable constitutional rights to personal liberty and a fair hearing. That his arrest was arbitrary and there was no court order allowing his detention beyond forty eight hours. That despite these irregularities he has been tried in criminal session case No. 455 of 2017 on the above listed charges. That an objection on the ground that the trial was illegal, for lack of jurisdiction, as the offence was committed in Kenya, was raised at the commencement of the trial but overruled by the trial judge. That the proceedings are a nullity and ought to be quashed in their entirety.

The third applicant is **Kisitu Andrew**. He states that he was arrested on the 22nd of December 2016 when he went to visit the 2nd Applicant, Lumu Ben Duncan, who was then detained in Special Investigation Directorate in Kireka. A number of personal belongings were taken from him by the Police officers and have never been returned. That he was detained both at Kireka SID and Nalufenya Police Station, where police officers again beat him up seriously. That they were forcing him to confess to the murder of an Eritrean. They coerced him into signing documents after the beating. That he was later examined on PF 24. At the time he had multiple injuries and severe pain from the continuous torture. His examination form however, cannot be traced. That on the 30th of January 2017 he was produced in Court and charged with offences in which he did not participate. That he was never informed of the charges against him until the day he was produced in Court. That the conduct of the respondent amounts to an infringement of the applicant's non-derogable

rights. That he was detained beyond 48 hours. That the criminal proceedings against him are a nullity and ought to be quashed.

Appearance

Mr Macdusman Kabega appeared for all the applicants

Mr Jonathan Muwanganya, Chief State Attorney, for the Respondent

Submissions

Both parties have filed written submissions.

Preliminary Points

The respondent put up two questions of law namely,

1. That the application was filed in the wrong court
2. The suit is against the wrong party

It should be noted from the outset that this Court has not had the benefit of the applicants' response to these questions. The reason is that the respondent filed its submissions way out of time. That sort of conduct is unconscionable. In a letter to the Registrar of this Court, it was stated by the respondent that the delay was occasioned by ill health. The letter however, does not state who was ailing and how that affected the timelines. It appears the letter is an excuse for the dilatory conduct of the Respondents representative.

The above notwithstanding, it is my view that the questions raised go to the very root of the legality of this application and ought to be determined.

This application was commenced under Sections 11 (1) and (2) (b) of **the Human Rights Enforcement Act, 2019**.

The two cited Sections stipulate as follows,

(1) It is an offence for a person to derogate from a non-derogable right and freedom guaranteed under the Constitution.

(2) Whenever, in any criminal proceeding-

(a) ...

(b) it is brought to the attention of the competent court; or

(c) ...

that any of the accused person's non-derogable rights and freedoms have been infringed upon, the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

Sub Section (1) creates an offence. From the nature of this application, and from the orders and reliefs sought, it does appear that it was the intention of the applicants to enforce their non-derogable Human Rights as enshrined in the Constitution of the Republic of Uganda. For purposes of this application therefore, I shall deal mainly with Section 11 (2) (b) of the **Human Rights (Enforcement) Act, 2019**.

Firstly the mechanism for challenging criminal proceedings on the basis of infringement of fundamental is provided for in Section 11 above. Where the criminal proceedings are ongoing, such as in the instant case, then the proper procedure would be to inform the trial Court. For that reason, Section 11 stipulates that it is the Judge presiding to take a decision. It would imply that once an allegation of infringement has been raised, the presiding or trial Judge would hear the complaint, make a finding and issue orders accordingly. This is the Court that is trying the applicants and has heard the evidence, or will hear all the evidence regarding the indictment. The evaluation of the trial evidence includes making a determination on any allegations of infringement of constitutional rights arising out of the entire process, right from arrest to the conclusion of the trial. Bringing the complaint of allegations of

infringement before the trial court would avoid the absurdity and risk of contradictory findings if the matters were resolved by a different judicial officer. For this reason it is the trial Court that ought to investigate allegations of torture.

For this reason, Section 8 (1) of the **Human Rights (Enforcement) Act** stipulates that,

Where, in any proceeding in the High Court, a question arises as to the violation of a fundamental right or freedom, the presiding judge shall immediately stay the proceedings and determine the question raised.

The second broad mode of commencement of such applications is where a Miscellaneous Cause to vindicate Human Rights is filed. That ordinarily is a stand-alone application to commence an independent action. Chapter 4 of the Constitution establishes and provides for a broad range of Human Rights. **The 5th Edition of the Oxford Dictionary of Law** defines Human Rights as rights and freedoms to which every human being is entitled. Clearly human rights are private rights.

In this instant case the applicants allege that they were all physically tortured and kept in detention for periods of between 37 and 45 days beyond the Constitutional deadline of 48 hours. They state it was an infringement of their right to liberty. On the basis of those allegations they seek orders of Court to declare this trial a nullity.

It was contended that it was the police that arrested the applicants and kept them in detention in Kireka Special Investigation Directorate. That they were also kept in Nalufenya Police Station. In this time the Police is also said to have beaten and tortured them. Therefore, it would be right to conclude that this is a claim against the police for the infringement of the Human Rights of the applicants.

Under Articles 250 (1) and (2) of the Constitution stipulates,

(1) Where a person has a claim against the Government, that claim may be enforced as a right by proceedings taken against the Government for that purpose.

(2) Civil proceedings by or against the Government shall be instituted by or against the Attorney General; and all documents required to be served on the Government for the purpose of or in connection with those proceedings shall be served on the Attorney General.

As the police are an agency of the Government then the right party to sue here was the Attorney General. Even where it comes to enforcement any orders envisaged, it must be the Attorney General liable.

I also note that under Section 15 of the **Human right Enforcement Act**, where a person has been detained beyond 48 hours or whose non-derogable rights have been infringed, then that person is said to have been unreasonably detained. In that case where the Court determines that such a person was indeed unreasonably detained then the Court orders are enforceable against the Attorney General. There can be no enforceable civil remedy against Uganda. Under Art 250 (4),

(4) In the title of any criminal proceedings, the prosecution shall be designated by the word "Uganda".

A case in the name of Uganda like this instant case would be criminal in nature and cannot vindicate private rights. The following quotation made sums it up. It is from **Civil Procedure and Practice In Uganda By Ssekaana and Ssekaana Law Africa** 1st Edition pg 5 is apt in these circumstances.

The trial process governed by the civil procedural law in the words of Sir Jacob constitutes the machinery for obtaining what Lord Brougham called;

‘Justice between man and man. It manifests the political will of the state that civil remedies be provided for civil rights and claims, and that civil wrongs whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good so far as practicable by compensation and satisfaction or restrained if necessary by appropriate relief ...’

The **Human Rights Enforcement Act** also states in Section 17 that,

The Civil procedure Act and the rules made thereunder may, with the necessary modifications, apply to the enforcement of rights and freedoms under this Act.

The **Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019** are the rules which regulate the procedure under the Act. The objective of the rules are given in Rule 3, in which Rule 3 (a) states that,

The objectives of these Rules are to promote the right of any person to institute court action where he or she believes that a fundamental right or other human right or freedom under Chapter Four of the Constitution has been violated, or that there is a threat that it is likely to be violated;

Rule 9 of stipulates,

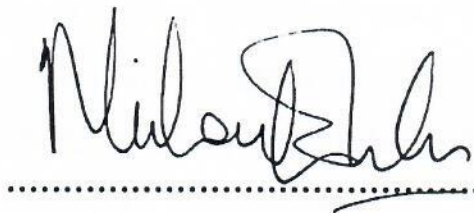
Where these Rules do not sufficiently provide for any service of process, **procedure** or other related matter in an action brought under these Rules, **the Civil Procedure Act and the Civil Procedure Rules** shall apply with necessary modifications.

Therefore formal applications under the Act are civil proceedings commenced against the Attorney General and the procedure to regulate the action is the Civil Procedure Act.

In view of the above the manner in which this application was commenced is improper. It is true that a claim for vindication of human rights is urgent in nature and must take precedence over others. This Court is also cognisant of Art 126 (2) (e) of the Constitution that enjoins this Court to do substantive justice. In spite of the above, this Court is also guided by the decision in **Athanasius Kivumbu Lule vs Hon. Emmanuel Pinto Constitutional Petition No 5 Of 1997** where the Constitutional Court held that a failure to bring a petition under the correct article of the Constitution through the correct procedural rule is not a mere technicality. It went ahead to sustain a preliminary objection on that basis.

Considering all the above, this Court finds that this application is fatally defective. It is against the wrong party, commenced under the wrong procedure and is therefore incurable.

In the result the application is dismissed.

A handwritten signature in black ink, appearing to read 'Michael Elubu', is written over a horizontal dotted line.

Michael Elubu

Judge

7.5.2021

Ruling delivered in the presence of:

1. MR. Muwaganya Jonathan (CSA), for the Respondent/State.
2. The Applicants/Accused persons.

Court Clerk - Mr. Sebide Yaqoub.


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Festo Nsenga –
Deputy Registrar

10/05/2021 – 10:50 a/m