

UGANDA / JUDGMENT

Adiandu v Inspector General of Police and Another (Misc Cause 146 of 2022) [2024] UGHCCD 5 (3 January 2024)

[2024] UGHCCD 5

COURT

HC: Civil Division (Uganda)

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Misc Cause 146 of 2022

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

MISCELLANEOUS CAUSE NO. 146 OF 2022

ADIANDU JOHN ::: APPLICANT

VERSUS

1. INSPECTOR GENERAL OF POLICE

2. ATTORNEY GENERAL ::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA RULING

Introduction

- [1] The Applicant brought this application against the Respondents under Articles 20, 23, 28 and 43 of the Constitution of the Republic of Uganda as amended and Sections 1, 3, 4, 8, 9, 11, 14 and 15 of the Human Rights (Enforcement) Act 2019 seeking for;
- a) A declaration that the detention of the Applicant by the agents of the Respondents for a period exceeding 48 hours at Railway Grounds Police Station and Kabalagala Police Station without being released on bond or produced before a court of law, was in contravention of his right to protection of personal liberty guaranteed under the 1995 Constitution of Uganda.

- b) A declaration that the denial of the Applicant of access to his lawyers, next of kin and medical doctors of his choice during the time of the illegal detention constituted an egregious infringement of his right to protection of personal liberty guaranteed under the Constitution of Uganda.
- c) A declaration that the illegal seizure and/or confiscation and continued detention of the Applicant's phone by Corporal Jawiambe Colet, a servant or employee of the Respondents, constituted an egregious infringement of

his right to protection from deprivation of property guaranteed under the Constitution of Uganda.

- d) A declaration that the dismissal of the Applicant from the Uganda Police Force without first determining his appeal against his conviction and sentence was an egregious infringement and abuse of his non-derogable right to a fair hearing.
- e) An order for a public apology by the 1st Respondent for the illegal and oppressive acts of illegal detention and confiscation of property committed against the Applicant.
- f) An order directing the 1st Respondent to hand over to the Applicant his mobile phone that was illegally confiscated and detained.
- g) An order for payment of general, punitive and exemplary damages for the violation of the Applicant's aforementioned rights.
- h) An order for payment of the costs of the application.

[2] The grounds of the application are set out in the Notice of Motion and in the affidavit sworn in support of the application by **Adiandu John**, the Applicant. Briefly, the grounds are that the Applicant who was a member of the Uganda Police Force, previously attached to the Directorate of Information and Communication Technology, was arrested and detained at Railway Grounds Police Station from the 12th to 22nd February 2021. He was then transferred to Kabalagala Police Station where he was detained up to 15th March 2021 when he was released on bond. At the time of his arrest, the Applicant was in possession of an infinix Note 7 lite mobile phone which was confiscated by Corporal Jaiwambe Colet and has never been returned to him. While in detention at both Railway Grounds and Kabalagala Police Stations, which was beyond the mandatory 48 hours, he was denied access to medical treatment and subjected to horrendous and degrading treatment, inconvenience, mental anguish and emotional stress. The Applicant states that he was later arraigned before the disciplinary court of police, charged with scandalous behaviour/manner and was tried and convicted of the offence. He requested for the record of the proceedings and exhibits so as to make an appeal but the same was not availed despite numerous requests. Never the less, he lodged an appeal to the 1st Respondent as mandated under the law but the same has not been heard and determined. However, on 10th April 2022, before taking any steps over his appeal, he received a letter of dismissal from police service. The Applicant concluded that the conduct of the Respondents' servants from the time of arrest, detention and arraignment

before the police disciplinary court subjected him to horrendous and degrading treatment, mental anguish and emotional stress for which the Respondents are jointly and severally liable in damages.

- [3] The Respondents opposed the application through an affidavit in reply deposed by **D/SP Ozelle John Bosco**, a senior police officer working as a human resource officer at Naguru Police Head Quarters, who stated that the Applicant is a former police constable who was arrested and detained at Railway Grounds Police Station on suspicion of having committed a serious police disciplinary offence of scandalous manner which attracts a penalty of dismissal or reduction in rank upon conviction. The deponent stated that upon arrest, the Applicant was taken to the office of the Director CID Kibuli where he was requested to provide a password for his phone so that information could be extracted at the police forensic and analytical laboratory but the Applicant refused. The Applicant was further detained at Kabalagala Police Station. The Applicant failed to provide sureties so as to be released on bond. While in detention, he was examined by a police doctor and given adequate medical treatment. He was later presented before a well constituted police disciplinary court while in good health where he was charged with the offence of scandalous manner. He was tried, he defended himself and was found guilty, convicted and sentenced to a dismissal. The deponent concluded that the Applicant's phone is an exhibit pending extraction of evidential information and would be released within three days if he provides the password.
- [4] The Applicant made and filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

- [5] At the hearing, the Applicant was represented by **Mr. Lawrence Kabuye** from M/s Lukwago & Co. Advocates while the Respondents was represented by **Ms. Harriet Nalukenge**, a Senior State Attorney in the Attorney General's Chambers. Counsel agreed that the hearing proceeds by way of written submissions which were duly filed by both counsel and have been considered in the determination of the matter before Court.

Issues for Determination by the Court

- [6] Although both Counsel raised and argued the matter under four issues, the dispute between the parties boil down to two issues for determination by the Court, namely;
- a) Whether the named rights and freedoms of the Applicant were infringed by the actions of the Respondents' agents?
 - b) Whether the Applicant is entitled to any remedies?

Resolution of the Issues by the Court

Issue 1: Whether the named rights and freedoms of the Applicant were infringed by the actions of the Respondents' agents?

- [7] The allegation by the Applicant is that a number of his fundamental rights and freedoms were violated, namely; the right to personal liberty, the right to property and the right to a fair hearing. Fundamental rights and freedoms have been defined according to Osborn's Concise Law Dictionary, 9th Edition at page 196 as *"Rights and freedoms which every person is entitled to enjoy possibly deriving from natural law but more likely to be enforced in international law if founded on for example the United Nations Declaration of Human Rights of 1948"*. In **Zachary John Olum v Bongomin John Odora & Others*, HC Civil Application No. 120 of 2015*, Mubiru J. stated that a right has also been described as *"a liberty protected and enforced by law, which compels a specific person or persons to do or abstain from doing something. ... an ordinary right is any advantage or benefit conferred on a person by a rule of law. A right in that regard or sense is limited to the specific interest recognised and protected by law. Rights in this sense are considered as the reasonable claim of the individual which are accepted by society and approved by statute"*.
- [8] Article 20 of the Constitution of Uganda provides as follows;
- **1) Fundamental rights and freedoms of the individual are inherent and not granted by the state.**
 - **2) The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all agencies of government and all persons.**
- [9] Under Article 50(1) of the Constitution, *"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"*. Consequently, Section 3(1) of the Human Rights (Enforcement) Act 2019 provides that; *"In accordance with article 50 of the Constitution, a person or organisation who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened may, without prejudice to any other action with respect to the same matter that is lawfully available, apply for redress to a competent court in accordance with this Act"*.
- [10] With the above legal background, I will now proceed to investigate as to whether any of the named rights of the Applicant was violated as alleged.

The right to personal liberty

Submissions by Counsel for the Applicant

- [11] It was submitted by Counsel for the Applicant that the Applicant was arrested and detained at Railway Grounds Police Station for 10 days and at Kabalagala Police Station for 22 days; without being produced before a court of law or being released on bond, which period

exceeded the mandatory 48-hour requirement under Article 23(4) of the Constitution. Counsel also stated that during the said detention, the Applicant was denied access to his lawyers, next of kin and medical doctors of his own choice contrary to Article 23(5) (a), (b) and (c) of the Constitution. Counsel prayed that the Court finds that the Applicant's right to personal liberty was violated.

Submissions by Counsel for the Respondents

- [12] Counsel for the Respondents relied on the provisions of Article 23 of the Constitution and Section 3 of the Police Act to the effect that the police have power to arrest a person in presence of a reasonable suspicion that the person has or is about to commit an offence. Counsel stated that it was averred in the affidavit in reply that the Applicant was arrested and detained at Railway Grounds Police Station on suspicion of having committed an offence. Counsel concluded that there was sufficient justification to limit the Applicant's right to personal liberty and the actions by the Respondents' agents did not infringe the Applicant's right to personal liberty on account that they acted within the constitutional limitations permissible under the same right.

Determination by the Court

- [13] The lawfulness or not of an arrest and detention is governed by the provisions of the Constitution of the Republic of Uganda under Article 23 which makes provision for the protection of personal liberty. Article 23(1) gives exceptional circumstances under which a person may be deprived of his or her liberty. The relevant exception in the instant case is provided for under Article 23(1)(c) under which a person may be arrested and detained *for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda*.
- [14] When a person is so arrested, restricted or detained, he or she shall be kept in a place authorized by law (Article 23(2) of the Constitution). The person so arrested, restricted or detained shall be informed immediately of the reasons for the arrest, restriction or detention and his or her right to a lawyer of his choice (Article 23(3) thereof). When the person is arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, he/she shall, if not earlier released, be brought to court as soon possible but in any case not later than forty-eight hours from the time of his arrest (Article 23(4)(b) thereof). In addition, the person is entitled to be accessed by a next of kin, lawyer and a medical doctor or access to medical treatment (Article 23(5) thereof).
- [15] In the present case, the evidence by the Applicant is that he was detained at Railway Grounds Police Station from 12th to 22nd February 2021, a period of 10 days, and at Kabalagala Police Station from 22nd February to 15th March 2021, a period of 22 days; all totalling to 32 days before he was released on police bond and after appearing before the

Police Disciplinary Court. I find that the detention of the Applicant for 32 days without being released on bond or charged in any court was contrary to Article 23(4)(b) of the Constitution, section 25(1) of the Police Act and section 17(3) of the Criminal Procedure Act. It was argued for the Respondents that the Applicant could not be released on bond because he had failed to provide sureties. This allegation is controverted by the Applicant who insisted that he had, indeed, presented sureties. Be that as it may, the police holding such a person under detention is obliged to release the person on bond with or without sureties if they are unable to produce the person in court within the stated time. The allegation of absence of sureties cannot, therefore, provide lawful excuse.

[16] It was further alleged that the Applicant was denied access to a next of kin, his lawyers or medical doctors or treatment of his choice. In reply, it was stated by the Respondent that the Applicant was attended to by a medical officer from the Uganda Police while he was at Kabalagala Police Station. This fact is however denied by the Applicant. In absence of any medical documents by either side, and particularly by the Applicant who bore the burden of proof over the matter, I find this allegation unproved. The Respondents, however, did not lead any evidence to dispute the allegations of denial of access to a next of kin or lawyer of choice, in contravention of Article 23(5) of the Constitution. These allegations are thus taken as proved on a balance of probabilities.

[17] In all, therefore, on the allegation of breach of the Applicant's right to personal liberty, the Applicant has satisfied the Court on a balance of probabilities that his detention for a period totalling to 32 days without either releasing him on bond or producing him before any court, coupled with the denial of access to his next of kin and lawyers of his choice, were illegal. The Applicant's right to personal liberty was, therefore, violated in that regard.

The right to own property

Submissions by Counsel for the Applicant

[18] It was submitted by Counsel for the Applicant that the seizure and confiscation of the Applicant's Infinix Note 7 lite phone by the Respondents' agents upon his arrest to date infringed his right to ownership of property contrary to Article 26 of the Constitution of the Republic of Uganda. Counsel

disputed the contention that the phone was still an exhibit at police pending extraction of information and argued that the procedure for dealing with the seizure of a phone and extracting any information from any computer is well laid down under Section 28 of the Computer Misuse Act which was not followed. Counsel prayed for an order of release of the phone.

Submissions by Counsel for the Respondents

[19] In reply, Counsel for the Respondents cited the provisions of Section 29 of the Police Act Cap 330 which gives a police officer powers to seize anything if there are reasonable grounds to believe that it might be used as an exhibit in relation to an offence he or she is investigating or that its necessary to prevent it from being concealed, lost, tampered with or destroyed. Counsel submitted that the offence of abuse of office and unauthorised disclosure of official information to an unauthorised person required seizure of the phone from him in order to be successfully prosecuted. Counsel further submitted that the police force is willing to release the Applicant's phone within three days if he provided the password for information to be extracted. Counsel concluded that the actions by the Respondents' agents did not infringe on the Applicants right to own property since they were done within their powers under the Police Act.

Determination by the Court

[20] The right to own property is guaranteed under Article 26 of the Constitution of Uganda and a person may only be deprived of his or her property under special circumstances provided under the Constitution, which includes being satisfied that the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; as per article 26(2)(a) of the Constitution. Under Section 29(1) of the Police Act, a "police officer who is lawfully on any premises or any other place may seize anything there if he or she has reasonable grounds to believe — (a) that the thing might be used as an*

exhibit in relation to an offence which he or she is investigating; and (b) that it is necessary to seize that thing in order to prevent it from being concealed, lost, tampered with or destroyed". This provision fits within the exception of taking possession of property in the interest of public safety and/or public order within the provision under article 26(2)(a) of the Constitution.

[21] It was argued for the Applicant that since the property seized fitted the description of a computer within the meaning of the Computer Misuse Act, the Respondents' agents were bound to comply with the provisions of Section 28 of the said Act, which they did not. Counsel argued that the policed officers needed to obtain a court order and a warrant of seizure before taking the said phone and, in any case, they had to return the phone within 72 hours unless they secured an extension of time from court.

[22] Section 28(1) of the Computer Misuse Act No. 2 of 2011 provides that;

"Where a Magistrate is satisfied by information given by a police officer that there are reasonable grounds for believing —*

(a) that an offence under this Act has been or is about to be committed in any premises; and

(b) that evidence that such an offence has been or is about to be committed is in those premises,

the Magistrate may issue a warrant authorising a police officer to enter and search the premises, using such reasonable force as is necessary".

[23] According to the rules of statutory interpretation, a provision of a specific statute overrides that of a general statute. It would follow, therefore, that the provision under section 28 of the Computer Misuse Act would take precedence over section 29 of the Police Act on the subject of seizure of computer items. However, upon scrutiny, it is clear to me that the provisions under section 28 of the Computer Misuse Act are applicable where *"there are reasonable grounds* *for believing ... that an offence under this Act has been or is about to be committed in any premises"*. The strict application of those provisions, therefore, is in regard to investigation of a matter concerning offences under the Act. In my view, where the police are exercising their general powers of investigation of criminal or disciplinary offences, they cannot be subjected to the strict provisions of the Computer Misuse Act. In the course of such investigation and upon invoking the provision under section 29 of the Police Act, if any property seized or confiscated happens to be a computer item, their action cannot be vitiated by the mere fact that they did not follow the provisions of the Computer Misuse Act. Their action would only be affected if they were investigating an offence under the Computer Misuse Act.

[24] In the present case, the evidence is that the Applicant's phone was seized upon arrest and is still in possession of the Respondents' agents or servants allegedly as an exhibit pending extraction of information relevant to the offences that were suspected to have been committed by the Applicant. The Respondents' agents or servants were investigating a disciplinary offence of involvement in scandalous manner or behaviour. The Applicant was asked to provide the password to his phone which he declined. The Respondents' agents or servants retained the phone until such a time as the Applicant would provide the necessary assistance to enable the investigation. In my view, the provisions under section 28 of the Computer Misuse Act were not applicable to the present circumstances before the Court. The Applicant was bound to cooperate with the investigations or bear the attendant consequences. The Respondents' agents or servants cannot, therefore, be faulted for seizing and retaining the phone up to the time of trial, conviction and sentence of the Applicant.

[25] However, after conviction and sentence, no justification has been laid before the Court as to why the Respondents' agents or servants kept hold of the phone. As an exhibit, the phone had served its purpose. The Applicant had already been sentenced to a dismissal and the sentence had been executed. His appeal has not been attended to according to his evidence. No reason has been given by the Respondents as to why the Applicant's appeal has not been attended to. Neither has any reason been assigned as to why the phone was not released upon the conviction, sentence and actual dismissal of the Applicant. In the circumstances, although the seizure and retention of the said phone was lawful up to the time of conviction and sentence of the Applicant, the continued holding of the same since then to date is unlawful. To that extent, therefore, the Applicant's right to ownership of his property was infringed upon by the Respondents' agents or servants.

The right to a fair hearing

Submissions by Counsel for the Applicant

[26] Counsel referred the Court to paragraphs 13-17 of the affidavit in support of the application to the effect that upon being tried and convicted of the offence of scandalous behaviour/manner, the Applicant lodged an appeal to the Inspector General of Police but to his surprise, he was dismissed before the hearing and determination of the appeal. Counsel submitted that the dismissal of the Applicant from the Uganda Police Force without first determining his appeal violated his right to a fair hearing and compromised the rules of natural justice contrary to Article 28 of the Constitution.

Submissions by Counsel for the Respondents

[27] In reply, it was submitted by Counsel for the Respondents that the Applicant was charged and tried by the police disciplinary court that found him guilty and sentenced him to dismissal from the force. Counsel argued that the Applicant only states that he was dismissed without hearing his appeal but does not show that he was not given an opportunity to present his case before the police disciplinary court.

Determination by the Court

- [28] Article 28(1) of the Constitution provides that; *"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law"*. Under article 28(6) of the Constitution, a *"person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law"*.
- [29] The complaint by the Applicant herein does not concern the hearing of the case by the police disciplinary court. Rather, it concerns refusal by the said court to provide the Applicant with a record of proceedings and its judgment. It appears that Counsel for the Applicant was under the impression that the provision under article 28(6) of the Constitution was applicable to the present matter. It is, however, clear to me that the said provision applies to a person who has been charged with and tried for any criminal offence. A disciplinary offence is not a criminal offence and trial for a disciplinary offence cannot invoke the above cited constitutional provision with equal force. As such, failure to provide a record of proceedings to the Applicant in the present case cannot constitute violation of his right to a fair hearing. That failure, coupled with the failure to schedule his appeal for hearing, can only constitute a procedural impropriety that could only be properly challenged by way of judicial review. It cannot amount to infringement of a given right so as to invoke the provisions of the Constitution and the Human Rights (Enforcement) Act. In the circumstances, the Applicant has not proved the allegation of violation of his right to a fair hearing on the case before the Court.

Issue 2: Whether the Applicant is entitled to any remedies?

- [30] From the foregoing, the Applicant is entitled to a declaration that his rights to personal liberty and to ownership of property were violated by the Respondent's agents or servants in the terms set out herein above. Since it is not disputed that the police officers who committed the said acts were agents or servants of the Respondents, and that they were acting in the course of their employment, the principle of vicarious liability applies. The Respondents are therefore liable for the acts that have been proven. The Applicant is further entitled to an order of release of his mobile phone and to damages.
- [31] The Applicant prayed for general, punitive and exemplary damages arising out of being subjected to horrendous and degrading treatment, mental anguish and emotional stress. As I have stated before elsewhere, there is no category of damages termed as punitive damages. "Punitive" is an object of exemplary damages. It is, therefore, improper for a party to seek both punitive and exemplary damages as the two refer to the same thing. The correct term for this category of damages, therefore, is exemplary damages. I will first deal with the claim for general damages.
- [32] The settled position of the law is that general damages are a direct natural or probable consequence of the act complained of and are awarded at the discretion of the Court. The purpose of the damages is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: **Hadley v Baxendale (1894) 9 Exch 341*; *Charles Acire v M. Engola, H. C. Civil Suit No. 143 of 1993** and **Kibimba Rice Ltd v Umar Salim, SC Civil Appeal No. 17 of 1992**. In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: **Uganda Commercial bank v. Kigozi [2002] 1* EA 305**. Under the law, general damages are implied in every breach of contract and every infringement of a given right. In a personal injuries claim, general damages will include anticipated future loss as well as damages for pain and suffering, inconvenience and loss of amenity.
- [33] In assessing damages arising out of a constitutional violation, although infringement of a person's liberty per se imputes damage, a plaintiff needs to prove some damage suffered beyond the mere fact of unlawful arrest or detention; otherwise, the mere breach may only entitle a plaintiff to nominal damages. In **Ochwa v Attorney General HCCS No. 41 of 2012**, the court held that *"it would trivialize Article 23(4)(b) of the Constitution of the Republic of Uganda to hold that detentions under these conditions, even for a few hours beyond the 48 hours, is always actionable no matter how unlikely it was that the person was exposed to the risk of ill treatment, torture and cruel, inhuman or degrading treatment by such detention"*.
- [34] In that regard, the Court has to determine the extent of harm occasioned to the Applicant and come to a proper assessment of damages to be awarded to the Applicant. While attempting to arrive at a decision on the sum that constitutes fair and reasonable compensation, I take cognisance of the fact that damages for mental anguish and emotional

stress present serious difficulty in assessment with any degree of precision. I am equally aware that comparing the magnitude of pain and suffering in concrete terms with comparable past cases is sometimes difficult to assess on the strength of monetary awards. Nevertheless, in view of the present circumstances, the Applicant was illegally detained not slightly beyond 48 hours but way above a period of one month. This tends towards gross abuse of his right to personal liberty. However, in absence of evidence of actual injury suffered, I find a sum of UGX 10,000,000/= (Uganda Shillings Ten Million only) appropriate and I award the same to the Applicant as general damages.

[35] The Applicant also claimed for an award of exemplary damages. According to the dictum by **Lord McCardie J** in **Butterworth v Butterworth & Englefield* [1920] P 126, "Simply put, the expression exemplary damages means damages for examples sake."* **Lord Devlin** in the landmark case of **Rookes v Barnard* [1946] ALLER 367 at 410, 411* stated that there are only three categories of cases in which exemplary damages may be awarded, namely;

- a) Where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government;
- b) Where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or
- c) Where some law for the time being in force authorises the award of exemplary damages.

[36] The above authority also enjoins the court to exercise restraint before making an award of exemplary damages. On the case before me, although some constitutional violations have been established against the Respondents, I have not found compelling circumstances that warrant grant of an award of exemplary damages. In the circumstances I decline to award any exemplary damages as I am convinced that the award of general damages will suffice to meet the ends of justice in the circumstances.

[37] Regarding the costs of the application, since the application has substantially succeeded, the Applicant is awarded costs of the suit.

[38] All in all, the application succeeds with the following declarations and orders;

- a) A declaration that the detention of the Applicant by the Respondents' agents or servants at Railway Grounds Police Station and Kabalagala Police Station from 12th February to 15th March 2021 without being formally brought before court or released on bond, coupled with the denial of access to his next of kin and lawyers of his choice, contravened the Applicant's right to personal liberty under Article 23 of the Constitution.
- b) A declaration that the continued retention of the Applicant's Infinix Note 7 lite phone contravened his right to protection from deprivation of property guaranteed under Article 26 of the Constitution.
- c) Orders that;

- i) The Applicant's mobile phone be handed over to him within thirty (30) days from the date of this order.
- ii) The Respondents pay a sum of UGX 10,000,000/= (Uganda Shillings Ten million only) as general damages to the Applicant.
- iii) The costs of the application shall be paid to the Applicant by the Respondents.

It is so ordered.

Dated, signed and delivered by email this 3rd day of January 2024.

Boniface Wamala JUDGE

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