

UGANDA / JUDGMENT

Barihaihi & Anor v Director of Public Prosecutions (Misc. Cause No. 67 of 2011) [2012] UGHC 204 (5 October 2012)

[2012] UGHC 204

COURT
High Court of Uganda

BEFORE
Mwangusya, J

CASE / FILE NUMBER
Misc. Cause No. 67 of 2011

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO.67 OF 2011

1. BARIHAIHI GRACE PETER
2. FRED BIRYOMUMAIISO ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTION
2. ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

This application for judicial review was brought under Section 36 (1) (a), (b), (c) (2) &(3) of the Judicature Act and Rule 6 (1) of the Judicature (Judicial Review) Rules 2009 seeking the following reliefs and orders;

1. An order of certiorari that the proceedings in criminal case No.640/02 at Buganda Road Chief Magistrate Court be removed there from and into the High Court so that the same can be quashed
2. An order of prohibition that the Director of Public prosecutions is prohibited from further prosecuting of the applicants

3. A declaration that the criminal proceedings against the applicants are an abuse of court process
4. An award of damages to the applicant arising out of continued unlawful restraint and torture visited upon them when arrested
5. Costs of the application

The application is supported by the affidavits of Barihaihi Grace Peter and Fred Biryomumaiso and grounds enumerated in the notice of Motion as follows:-

1. That the applicants were jointly charged with treason in Criminal case No. 640/02 at Buganda Road court in 2002
2. That before being charged, they were kept in a safe house where they were tortured and brutalised
3. That the applicants have never been committed for trial
4. That on 9th May 2003 the applicants were granted bail at the Chief Magistrates Court at Buganda road and have since then been required to answer bail as such they have continued to be under restraint
5. That the applicants lost their jobs and cannot find alternative employment because of the treason charges that continue to burden their lives
6. That the applicants cannot find employment because of the treason charges that continue to burden their lives.
7. That the failure of the of the DPP to either commence trial of the applicants or withdraw the charges is an abuse of court process

It should be noted that this application was filed on 10.02.2011 and it was first called for hearing on 21.11.2011 when both counsel requested court to allow them file a joint conferencing memorandum which was filed on 20.12.2011. In this memorandum the following position was agreed:-

“The applicants have filed an application for orders of judicial review wherein they seek an order of certiorari to remove the proceedings in criminal case No. 640/02 from Buganda Road Court Magistrate’s Court to the High Court for purposes of quashing the same; an order of prohibition which prohibits the DPP from further prosecuting them; a declaration that the criminal proceedings are an abuse of court process and damages for unlawful restraint and torture meted upon them when arrested.

***The applicants were arrested in 2002 and charged with Treason at Buganda Road Court in Criminal Case No. 640/02. The applicants were remanded for one year at Kigo Prison and then released on bail on 9th May 2003. The applicants have been answering to bail for eight years. They either commence trial against them or withdraw the charges against them. The 1st**

respondent discontinued criminal proceedings against the applicant. The discontinuation of criminal proceedings against the applicants abates the applicants' application in so far as the prayers for certiorari and prohibition".*

I agree that following the discontinuation of the criminal proceedings against the applicants by the DPP the prerogative orders of certiorari and prohibition are no longer relevant. The only issue raised for resolution by the court is whether the applicants are entitled to damages for continued unlawful restraint and torture visited upon them when they were arrested. In addition to the above issue Mr. Rwakafuzi invited court to pronounce itself on the legality of an accused person continuing on bail indefinitely without an end of a trial in sight and invited court to declare that the act of the DPP in failing to commit the applicants for trial to the High Court or discontinuing the charges were an abuse of the court process.

He cited the case of **NAMUDDU HANIFA V THE RETURNING OFFICER OF KAMPALA DISTRICT & 2 ORS HIGH COURT MISC. CAUSE NO 69/ 06** for the proposition that the failure or refusal by the DPP to either continue the criminal proceedings against the applicants or to commit the applicants for trial for over nine years is irrational and there was no reasonable explanation for the same. The applicants further sought damages for the unlawful restraint on bail that continued for almost nine years. The 1st applicant stated in his affidavit that he lost his job with Luwero Industries and neither could he take his skills abroad since the charges against him continued to act as a restraint to his movement. The 2nd applicant on the other hand was a ballistic consultant who was not only abandoned by his wife but also remained unemployed as he would not be allowed to hold a licence in ballistic consultancy with such charges. Counsel thus invited court to award each of the applicants UGX 54 million as unearned income and UGX 200 million as general damages to the 2nd applicant.

That an accused is entitled to a speedy trial is not debatable. It is enshrined under Article 28 clause 1 of the Constitution of the Republic of Uganda as follows:-

"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".* *(underlining provided)*

Under Article 120 clause 5 of the same constitution it is provided that in exercising his powers under the Article, the DPP should have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process. It is also recognised that under Article 120 clause 5 the DPP in exercise of his/her power shall not be subject to the direction and control of any authority. However for anyone to face charges of Treason for close to ten years without any trial is no doubt an abuse of the court process and in contravention of Article 28 clause 1 of the constitution. It is beyond the comprehension of this court that after ten years of a pending criminal trial the charges are dropped and an innocent person (*everybody is presumed innocent till proven guilty)* is discharged without any compensation for the torture and trauma he/she has been through and it is for this reason that this court considers that this is a proper case for grant of damages provided for under Rule 8 of the Judicature (Judicial Review)

Rules 2009 which provides as under:-

“8. Claim for damages.

1. ***On an application for judicial review the court may, subject to sub rule (2) award damages to the applicant if-***
2. ***He or she has included in their motion in support of his or her application a claim for damages arising from any matter to which the application relates; and***
3. ***The court is satisfied that if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.***
4. ***Rules 1 to 5 of Order VI of the Civil**Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading.*****

In this case the claim for damages was made in the motion. By the time the charges against the two applicants were withdrawn by the DPP the damage for which the applicants seek for compensation was already done. What remains for this court to do is assess the damages.

As far as the 1st applicant is concerned, Mr. Rwakafuzi submitted that he was on permanent service earning a salary of shs 180.000= per month. He was aged 35 years when he lost his job and had a working life of 25 years before retirement at the age of 60 years which translates into a loss of shs 54.000.000= in unearned income. He also submitted on imponderables in life including a promotion that he would have earned him a better salary. In my view this formula for assessment of damages is purely speculative and it would mean that the applicant is going to earn in advance what he would have earned till he reaches the mandatory age of 60 years. I do not find this tenable. Likewise I am of the view that the formula for assessing the second applicant's damages based on the fact that he can no longer carry on his profession as a ballistic expert and consultant because the charge of treason against him is also not tenable.

Doing the best I can and given that most of the period when the trial was going on the applicants were on bail I will award a sum of shs 40.000.000 each as general damages, interest of 20% per annum on the said sum till payment in full and costs of this application.

I make orders accordingly

Eldad Mwangusya

J U D G E

05.10.2012

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