

UGANDA / JUDGMENT

Besimira Moses v Attorney General (Complaint UHRC 204 of 2011) [2017] UGHRC 6 (4 December 2017) [2017] UGHRC 6

COURT

Uganda Human Rights Commission

BEFORE

Joseph A. A. Etima, Commissioner

CASE / FILE NUMBER

Complaint UHRC 204 of 2011

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**THE REPUBLIC OF UGANDA IN THE UGANDA HUMAN RIGHTS COMMISSION
(UHRC) TRIBUNAL HOLDEN AT KAMPALA COMPLAINT NO: UHRC/204/2011
BESIMIRA MOSES ::::::::::::::::::::::::::::::::::**

AND**ATTORNEY GENERAL::::::::::::::::::::::::::::::::****(BEFORE HON. COMMISSIONER JOSEPH A. A ETIMA)****DECISION**

The Complainant Besimira Moses lodged this complaint with the Commission on 13th December 2011 alleging that on 14th November 2011, he was arrested at a building site in Wandegaya by JATT operatives on orders of O. C Station Central police station (CPS) Kampala one Mugarura and Betty Ikiling a police woman. That he was taken to an underground cell in Kitante from where he was kicked, boxed and slapped. That he was later detained at Central police station Kampala until the 16th of November 2011 when he was transferred to Kireka SIU and detained for further interrogation. That due to the injuries sustained, he started vomiting and urinating blood which prompted the SIU officers to take him to Mulago Hospital where he was admitted from 17th November 2011 until the 27th November 2011.

The Complainant contended that the actions committed against him by the Respondent's agents amounted to a violation of his rights to personal liberty and freedom from torture or cruel, inhuman or degrading treatment or punishment of which he holds the Respondent vicariously liable.

The issues of contention to be determined by the Tribunal are;

- 1. Whether the Complainant's right of protection from torture, cruel, inhuman or degrading treatment or punishment was violated.
- 2. Whether the Complainant's right to personal liberty was violated
- 3. Whether the Complainant is entitled to any remedies.

In determining these issues, the burden of proof lies with the person asserting that his or her rights have been violated, who in this case is the Complainant. This is in line with Section 101 (1) of the Evidence Act, Cap 6 Laws of Uganda, which provides that;

"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist."

Section.102 of the Evidence Act further provides that;

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Before I proceed with resolving the issues, I wish to note that the Complainant's witness Barekye Jackson in the last hearing of this matter informed the tribunal that the Complainant had passed away. That notwithstanding the Tribunal will proceed to follow the rules of Natural justice in deciding the matter.

I now turn to the issues.

Issue one: Whether the Complainant's right to freedom from torture or cruel inhuman or degrading treatment or punishment was violated by the Respondent's agents

The Universal Declaration of Human Rights (UDHR), 1948 under Article 5 provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Likewise, Article 7 of the International Covenant on Civil and Political Rights (ICCPR), 1996 absolutely prohibits torture or cruel, inhuman or degrading treatment or punishment.

The African Charter on Human and Peoples' Rights (ACHPR) 1981 under Article 5 reiterates the total prohibition of violation of the same aforementioned right.

The Constitution of the Republic of Uganda 1995 under Article 24 prohibits subjection of anyone to any form of torture or cruel, inhuman or degrading treatment or punishment. This right is provided for as a non derogable right under Article 44(a) of the same constitution.

Torture is defined by the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, under Article 1 to mean

"...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

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The definition in Article 1 of the CAT has been applied by this Tribunal in the matter of Fred Tumuramye -and- Gerald Bwete & Others UHRC NO 264/1999, where Commissioner Aliro Omara spelt out the elements of torture as;

- a) An act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person
- b) For a purpose such as obtaining information, or a confession, punishment, intimidation, coercion or for any reason based on discrimination
- The act is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Besimira Moses testified that ⁹September 2011 he had gone to Kampala Central police station to report a theft case but instead he was arrested, asked for a log book and a land title and later detained in cells. The following day he was taken in one of the offices at CPS and still asked for the log book and land title. That his wife who used to work at CPS at that time as an ASP asked him why he had not given the police man the log book and the land title. He added that Ronald Mugarura had asked him to transfer 1 acre of land to him which he refused to do but later his wife came back and asked him to pay \$200,000/= so that he would be released on bond which he did and he was released. He was told that his lost truck had been found in Natete at Hass petrol station, on reaching that location he was rearrested and detained on ²⁸September 2011 for the same offence conspiracy to commit a felony. He was then taken to CPS in room 25 where he found a lady called Betty Ikiring who ordered he be handcuffed and detained. The following day the O. C asked him for his land title but he refused, he told his wife that she had connived with the O. C to steal his property since they had separated. When the Deputy O. C went to the cell, asked him why he was rearrested he narrated his story to him and the deputy O. C ordered for his release on bond. After issuing him with the bond, he informed his lawyer who advised him to put everything in writing with the IGP which he did. Again after two days of his release he was rearrested by Betty Ikiring and Mugarura on charges of threatening violence, the following day the deputy O. C found him in the cell and told him he was going to be released and

indeed he was. He later took the letter he wrote to the IGP's office. Three days later Mugarura Ronald called him and informed him that even though he reported him to his bosses nothing would be done to him.

He further testified that on 14th November 2011, he was arrested by three people and taken to Kamwokya to an underground building where he was severely beaten all over the body, thrown in a room which had a very big snake. That on seeing the snake, he fell down and become unconscious. He regained his consciousness at Mulago in the parking outside a pharmacy where he had received treatment. After that they told him that they would take him back to be beaten by the snake if he did not tell them where the land title and log book were. He told them all his documents were in the bank, they again asked him for 1 million shillings which he gave them. They told him that they had been sent by Mugarura and later they took him to CPS in room 25 and was again beaten by Mugarura and Betty Ikiring, thereafter he was taken to the cells. He was

vomiting and urinating blood, the warder told them he would die from the cell but Mugarura told them he was going to be taken to RRU. The following day he was taken to RRU and from there he was taken to Mulago Hospital and admitted from 17th to 27th November 2017 when he was discharged.

During cross examination Besimira Moses stated that he was first arrested in September 2011. the second time was on 28th September 2011 and released on 3rd October 2011, the 3rd time was on 17/10/2011 and the 4th time was on 14/11/2011. The first time he spent 4 days, the 2nd time 6 days, the 3rd time 5 days, then the 4th time 2 days and he was arrested by the same people. He further confirmed that he was beaten by four people, and that Mugarura was one of them, he did not know the rest and that he was beaten because the O. C Mugarura wanted his land and vehicle. He also affirmed that after the torture, he was taken to Mulago by RRU officers where he was admitted.

Tweheyo Ian the Complainant's witness testified that on 14/11/2011, he was working as a porter at a site in Wandegeya when he saw three men, one dressed in a military uniform and the two in civilian clothes arrest Besimira and took him to a place he did not know. That after four days he learnt that Besimira was admitted in Mulago hospital and that when he went to see Besimira he observed that his body was swollen and that he looked weak.

During cross examination of Twehayo Ian, stated that he was self employed. He confirmed that he saw three people who arrested the Complainant though he did not know where they were coming from. He added that two were dressed in civilian clothes and the third one in military clothes and that he saw Besimira being put in a car and he saw him being whisked off.

Dr. Jackson Kakembo, testified that he was the author of police form 3 in respect to Besimira Moses, who reported to him in 2012. On examination his findings were, that the Complainant looked sick, had soft tissue tenderness of the entire chest, soft tissue tenderness of the umbilical area and lower part of the abdomen. He also had soft tissue tenderness of the entire scrotum.

The whole of his penile (penis) tissue was painful. He classified the injuries as grievous harm. He added that during his history taking, the Complainant informed him that he was tortured by being boxed and kicked. That he also mentioned being injected with dirty liquid in his urethra and that had occurred on 18th November 2011 and that he was admitted in Mulago hospital and discharged a week later on 25th November 2011. He also observed that on his medical form, he had been circumcised due to obstructive neuropathy that is because the urethra was not passing urine very well. That if the urethra is not properly managed or treated it can cause the bladder to swell and the kidney can also be damaged and can have an effect on his manhood. The police form 3 was admitted in evidence as an exhibit CX4.

The Complainant's witness Barekye Jackson stated that Besimira Moses called him while he was in Wandegeya and told him to find him at shell capital near CPS. When he reached there he saw a man dressed in an army uniform and the two in civilian clothes who allowed him to talk to Besimira. Besimira told him that he had given one million shillings to the people in the car. They

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were latter driven to CPS and taken to room 25 where they found three officers. Mugarura Ronald the O. C CPS came and asked Besimira to produce a land title and a log book. Besimira said they were under the custody of the bank, that Mugarura and another woman started beating Besimira with batons on his chest and private parts. That when he made an alarm, he was made to get out of the office but after he went to Besimira's lawyer to ask him about the way forward. Besimira was detained and on 18th November 2011 he received a call from Mulago hospital telling him there was a person who was brought in a critical condition and needed his help because he did not have a care taker. That he went to Mulago and found a police man and Besimira Moses, then one of the police men signed a medical document that he had brought Besimira to the hospital. After the police man told him to take care of Besimira at Mulago hospital who was admitted for one week and four days.

At the close of the Complainant's case the Respondent did not present any defence despite several adjournments for this purpose. The Complainant's witnesses Barekye Jackson and Dr. Jackson Kakembo were not cross examined so their evidence remained uncontroverted.

The Complainant's testimony and that of his witness Barekye Jackson were consistent in regard to the torture. Barekye stated that he saw his brother being beaten by the Respondent's agents, asking for alog book and land title.

There is no doubt that the beatings that the Complainant was subjected to by police and RRU operatives inflicted grave injuries which caused him very severe physical pain and mental anguish, to the extent that the expert witness Dr. Jackson Kakembo classified the injuries as grievous harm.

It is also no doubt that the Respondent's agents beat the Complainant deliberately and intentionally. In doing all these cruel, inhuman and barbaric acts they were seeking to obtain information about the alleged log book and land title. Their intention was to force the

Complainant to provide information and provide the land title and log book. The RRU operatives and police personnel from Central police station Kampala used intimidating and coercive methods to obtain such information from the Complainant. This therefore proves the second and third ingredients of torture that I mentioned earlier.

Finally, the Respondent's agents who arrested the Complainant and detained him at Kampala central police station were individually and severally carrying out their official duty of apprehending, investigating, interrogating and detaining suspected criminals after charging the complainant with the offence of conspiracy to commit an offence. They did this both in their official capacity and also with the consent or acquiescence of their superiors and their employer on whose behalf they were acting. This therefore proves the fourth ingredient of torture under the CAT. The Respondent's agents also neglected the Complainant's plea of investigating the matter after he had reported to the IGP; to determine the circumstances of the alleged acts, whether Mr. Mugarura Ronald and Ikiring Betty had private interests in torturing the Complainant using a public office.

The evidence that was adduced by the Complainant and his witness was intended to prove that the Complainant had actually been tortured. The evidence that was adduced by the complainant's side to prove the allegation of torture was not challenged by the Respondent. In the premises therefore, I have no other alternative but to accept wholly the evidence adduced by the Complainant's side to prove the allegation of violation of his right under consideration. I therefore find and hold that on balance that the Complainant's right of freedom from torture was violated by the Respondent's agents.

Issue Two: Whether the Complainant's right to personal liberty was violated

The right to personal liberty is a positive right protected by human rights law at International and Regional levels as well as the Constitution of the Republic of Uganda 1995.

The International Covenant on Civil and Political Rights (1966) under Article 9(1) provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

Further, Article 9(3) of the same Convention provides that everyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release

The African Charter on Human and People's Rights provides under Article 6 that every individual shall have the right to liberty and to the Security of person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law.

Article 23 of the Constitution of the Republic Uganda 1995 provides for the protection of personal liberty.

Article 23 (1), in particular, caters for circumstances under which a person can be deprived of the right to personal liberty. Article 23 (1) (c) specifically provides that a person's right to personal liberty may be deprived for 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.

Furthermore, Article 23(4) (a) and (b) of the Constitution are to the effect that a person arrested or detained for the purpose of bringing him or her before a court in execution of an order of court or upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall if not earlier on released be brought to court as soon as possible but in any case not later than 48 hours from the time of his arrest. This same legal requirement is explicitly stated under Section 25 of the Police Act Cap 303.

In *Makomberedze Vs. Minister of State (security)* [1987] LRC (Const) 504, the High Court of Zimbabwe described the right of the individual to liberty as one of the pillars of freedom in a democratic society

In *WintwerpVs The Netherlands* (1979 -80) 2 HRR 387 it was stated that no one shall be deprived of his or her liberty save in a limited number of circumstances which must be in accordance with a procedure prescribed by law.

The Complainant Besimira Moses testified that on 8th September 2011 he was detained at Central police station and charged with conspiracy to commit an offence. That he was released the following day on bond and after paying Ug.shs 200,000/= the police bond dated 9th September 2011 was admitted in evidence to prove the Complainant's detention.

The Complainant further testified that on 28th September 2011 he was again arrested and charged with the same offence of conspiracy to commit an offence. He alleged that he was released on 3rd October 2011 on police bond. The Complainant's release on bond dated 3rd October 2011 was admitted in evidence as an exhibit to prove the complainant's detention.

The Complainant further testified that he was again arrested on 14th November 2011 at a construction site in Wandegaya and taken to central police station and the following day he was taken to RRU offices where he was severely tortured and as a result he was taken to Mulago Hospital on 18th November 2011 where he was admitted and discharged on 25th November 2011.

The Complainant's witness Tweheyo Ian witnessed the arrest of 14th November while Barekye saw the Complainant with the arresting officers and went with him to Room 25 at CPS and while admitted at Mulago Hospital on 18th November 2011.

The Respondent did not adduce evidence to rebut that adduced by the Complainant in regard to the days of illegal detention.

It is therefore my finding that there is a gap in the evidence of the Complainant's detention for the third arrest he alleges for 17th October 2011. The date of his release is not mentioned. The tribunal therefore finds that the Complainant was arrested and detained from 28th September 2011 to 3rd October 2011 and from 14th November 2011 to 18th November 2011 without being produced in court. Consequently by virtue of the provisions of Article 23(4)(b) of the Constitution, his detention was excessive and therefore a violation of his right to personal liberty.

According to Article 119 of the Constitution, the function of the Attorney General among others is to represent the Government in court or any other legal proceedings to which the government is a party.

This complaint implicates the Uganda Police Force, an agent of government as the violator of the Complainant's rights. The Respondent is vicariously liable for the actions of the Police Officers who in the course of their duty to detect and investigate crime, arrest and detain suspected criminals violated the Complainant's right to personal liberty.

Wherefore according to the above findings, I hold that the Respondent's agents violated the Complainant's rights and hence the Respondent is vicariously liable for the violation.

Issue No. 3: Whether the Complainant is entitled to any remedies.

Art 53(2) (b) of the 1995 Constitution is to the effect that the Commission, if satisfied that there has been an infringement of a human right or freedom, shall order for redress which may include compensation.

In Christopher Ssajabi Nsereko Vs Attorney General UHRC No.112/99 Commissioner F. Mariam Wangadya observed that indeed human rights and freedoms would serve no purpose if their violations did not attract redress to the victims.

Furthermore, taking into account the case of Matiya Byabalema and others Vs Uganda Transport Company SCCA No 10 of 1993 where it was stated that "courts (in this case, the tribunal) ought to assess the amount of damages taking into account the current value of money in terms of what goods and services it can purchase at present"

a) Violation of the right to personal liberty

In order to determine the suitable quantum of damages to be awarded for the violation, I will take into consideration, the number of days in illegal detention and previous awards in complaints similar to the instant one and assess the amount of damages taking into account the current value of money in terms of what goods and services it can purchase at present.

In *Bakaliraku Vincent & Anorther -and- Attorney General* Complaint No. UHRC 316/2004, it was held that it is the practice of this tribunal, referring to precedents of High Court, to award complainants U. Shs 2,000,000= (Two million Uganda Shillings) for illegal detention of every seven \$(7)\$ days.

From the above findings, it is proved that the Complainant was detained from 28th September 2011 to 3rd October 2011 and from 14th November 2011 to 18th November 2011 and hence spent 12 days in custody. Taking into consideration that two of these days are covered under the Constitutional 48 hour rule already explained above, the Complainant was in illegal detention for ten days.

Therefore, with regard to all the circumstances of this case, I deem a figure of Ug. Shs 5,000,000 (Five million Uganda Shillings) adequate compensation to the Complainant. I so award.

b) Violation of the right of freedom from torture or cruel, inhuman or degrading treatment or punishment

In respect to this issue, the Complainant has also proved to the satisfaction of the Tribunal that on balance, his right of freedom from torture, cruel and inhuman treatment or punishment was violated by the Respondent's agents. He is therefore also entitled to recover from the Respondent compensation by way of damages.

Regarding the magnitude of the injuries suffered, I award Ug.shs 12,000,000 only (Twelve Million Uganda Shillings) as compensation for the violation of the Complainant's right to freedom from torture or cruel, inhuman or degrading treatment or punishment.

As already noted, the Complainant's witness Barekye Jackson during the last hearing of this matter informed the tribunal that the Complainant had passed away. This award should therefore be paid to the estate of the deceased.

ORDER

- 1. The complaint is allowed.
- 2. The Attorney General (the Respondent) is ordered to pay to the Estate of the late Besimira Moses a total of Shs. \$17,000,000/\$ = (Shillings seventeen million) as damages broken down as follows:
 - a) General damages for the violation of Besimira Moses' right to personal liberty -Ug. Shs. 5,000,000/ \$=\$.
 - b) General damages for the violation of Besimira Moses' right of freedom from torture or cruel, inhuman or degrading treatment or punishment – Ug. Shs. 12,000,000/= $\frac{1}{2}$ \$

- 3. Interest at rate of 10% per annum to be paid on the total amount of Ug. Shs.17,000,000/= (Shillings seventeen million only), calculated from the date of this decision until payment in full.
- 4. Each party to meet their own costs.

Either party may appeal to the High Court of Uganda within thirty (30) days from the date of this decision if not satisfied with the decision of this Tribunal.

\$\mathcal{L}\$ DAY OF DATED AT KAMPALA ON THIS.

JOSEPH A. A ETIMA PRESIDING COMMISSIONER

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