UGANDA / JUDGMENT

Bigabwa v Attorney General (compliant no. 49/2008) [2018] UGHRC 28 (12 April 2018)

[2018] UGHRC 28

COURT
Uganda Human Rights Commission

BEFORE
Stephen Basaliza - Commissioner

CASE / FILE NUMBER
compliant no. 49/2008

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THE REPUBLIC OF UGANDA THE UGANDA HUMAN RIGHTS COMMISSION TRIBUNAL AT HOIMA COMPLAINT NO: FPT/49/2008

BIGABWA EZEKIEL COMPLAINANT

-AND-

ATTORNEY GENERAL RESPONDENT

DECISION

{BEFORE HONOURABLE COMMISSIONER STEVEN BASALIZA}

The Complainant brought this complaint against the Respondent seeking compensation for alleged violation of his right to freedom from torture or cruel, inhuman and degrading treatment or punishment. He alleges that sometime in June 2006 while he was a convict at Kibaale Prison, a team from Uganda Human Rights Commission (UHRC) visited the prison and during the visit prisoners were asked to reveal the challenges they were facing. That the complainant stated that among other challenges he mentioned was inadequate food. That when the UHRC team left, he was beaten by a one Bruno Sembule a warder, who had been ordered by the Deputy Officer in Charge. That he was told to undress and beaten allover his body. He also alleges that he was ordered to ferry water, for all other prison staff, for neighboring hotels and fill two prison drums. The Complainant contended that the actions ofthe Prison warder were unlawful and amounted to the violation of his right to protection from torture or cruel, inhuman and degrading treatment or

punishment for which he holds the Respondents vicariously liable. The Complajjrtrfit prayed for compensation. \

The Respondent through its representative Madete Geoffrey denied liabili

ISSUES

The issues framed for determination and agreed upon by both parties where;

- **1. Whether the Respondent's agents violated the complainant's right to freedom from torture or cruel, inhuman and degrading treatment or punishment contrary to Article 24 of the Constitution of the Republic of Uganda 1995.**
- **2. Whether the Respondents are liable.**

3. Whether the Complainant is entitled to any remedies.

Before ^I resolve the issues ^I will briefly highlight the hearing of this complaint. This complaint came up for lsl time hearing on the 21sl May, 2014. Examination in chief and cross examination were carried out on the Complainant, **CW 1 Bigabwa Ezekiel and CW 2 Chrimas Kashaija** and the matter was adjourned for further hearing. On the 24th October, 2014 the complaint came up for further hearing and examination in chiefwas carried out on **CW 3 Dr. Bateganya George** and the matter was adjourned for summoning of more expert witnesses . On the 20lh March 2015, the matter came up for further hearing, examination in chief was carried out on **CW 4 Dr. Andama Joseph. The** matter was adjourned to allow Respondent counsel to cross examine the expert witness and also hear evidence of the expert witness from Mulago. On 17lh August 2016, **CW 4 Dr. Andama Joseph** was cross examined by the Counsel for Respondent Madete Geofrey.

The matter was adjourned for summoning of doctors from Mulago. On 06th December 2016, the complainant's case was closed having summoned and opened for defense, the expert witness having failed to appear. On 28th February 2017, Respondent Counsel Jane Francis Nanuvma representing Godffrey Madete Counsel in personal conduct asked tribunal to grant them an adjournment in order to prepare written submissions which prayer was granted with in a time of 30 days from the date of that hearing. However it should be noted that the Respondent did not file the submissions.

It is therefore against this background and in the interest ofjustice that thismattg^be decided. ' The fact that the Respondent has not produced any witnesses nor f}l«d^subrni|^^^^^s not in any way take away the Complainant's duty to prove his case on ^a Balance of pro^®ws.

Under S.101 (1) of the Evidence Act Cap 6;

"Whoever desires any court to givejudgment as to any legal right or liability dependent on the existence offacts which he or she asserts must prove that thefacts exist"

And under S.102 of the Evidence Act (supra);

' 'The burden ofproofin a suit or proceeding lies on that person who wouldfail if no evidence at all were given on either side."

¹ now turn to the issues.

Issue 1.

Whether the Complainant's right to freedom from torture, cruel, inhuman and degrading treatment was violated.

The term 'torture' is defined by the **Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment** (CAT), 1984 as;

"An 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 himfor an act he or a thirdperson has committed or suspected ofhaving committed or intimidating or coercing him or a third person for any reason based on discretion ofany kind, when such pain or suffering is inflicted by or at the instigation ofor with the consent or acquiescence ofa public official or any other person acting in an official capacity

From the definition of 'torture' above, the actions complained of must be deliberate and carry with them an aspect of intent and ill will or malice witl some sort.

The **Universal Declaration of Human Rights 1948** stai **3** | P a g e

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Similarly the **International Covenant on Civil and Political Rights (ICCPR) 1996** under Article 7, The **African Charter on Human and Peoples Rights (ACHPR), 1981** under Articles 4 and 5 is strictly forbid all forms oftorture.

Torture is outlawed by **Article 24 of the Constitution of the Republic of Uganda, 1995.** It is also emphasized in **ATTORNEY GENERAL VS SALVATORI ABUKI CONSTITUTIONAL APPEAL NO.1/1998** that freedoms enshrined under Article 44(a) of the Constitution are non-derogable which include freedom from torture or cruel, inhuman and degrading treatment or punishment.

The actions committed against the Complainant would constitute "torture" if the same were proved. As I resolve the issue under my consideration now, I shall take into account the definition of torture as provided under Article ¹ of the CAT that ^I have already cited above. ^I shall thereafter evaluate the evidence adduced with a view of determining whether the treatment that is alleged to have been meted out on to the complainant by the Respondent's agents amounted to the level ofseverity that constitutes what would be categorized as torture according to the definition of torture provided under Article ¹ of the CAT and also in line with the related conceptualization oftorture. If not, then ^I

shall determine whether the effects of the same actions amount to what is categorized as only cruel, inhuman and degrading treatment or punishment. In this respect therefore, I shall evaluate the evidence to determine whether the four important ingredients and contours that are identifiable in the CAT definition and the current international concept oftorture are proved by the evidence adduced. In order to determine whether the actions a person was subjected to amount to torture or not, four questions need to be answered in the affirmative.

er CrfO The definition of torture in Article ¹ of the Convention Against Torture aj Inhuman or Degrading Treatment or Punishment (CAT) 1984 as copapfises *d* ingredients namely; (i) actions of torture caused severe pain and\suffering to physical or mental, (ii) actions of torture were intentionally inflicted \n the victi Iportant

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was to obtain information, or for punishment, or intimidation or coercion, as for any reason based on the discriminating of the victim, and (iv) actions were committed by or at the instigation of a public official or another person acting in an official capacity. Also see **(FRED TUMURAMYE VS. GERALD BWETE AND OTHERS, UHRC/264/1999).**

It is the evidence of the Complainant CW1 Bigabwa Ezekiel that while a convict at Kibaale Prison, a team of five UHRC staff visited the prison and the inmates were asked about challenges they were facing while in prison. That the prison officials had instructed the inmates not to reveal any information. That he rose up and said that they do not get sufficient food.

He further stated that after narrating the situation of the prison to UHRC staff, he was given a telephone contact and that is why he was beaten.

He added as follows;

"Bruno *Ssembule the prison Warder with others started checking me and then found the contact number of UHRC staffwith me and started beating me. After 30 minutes, they used Eucalyptus and Cyprus big sticks. They beat me, the whole body, mainly the chest and back and could not breathe well. Atfirst Iwas beaten while naked in the presence of women prison warders. Then was taken to a room. Iwas later ordered to dress andfill two drums ofwater. I also fetched waterfor the staffanother 20 jerry cans and 6jerry can for the hotel. (46 jerry cans) until late in the evening. Earlier the beating took 2 hours and that is when lleft to fetch water".*

He also testified that;

"As I was being beaten the warders were saying that Ishould be beaten as a lesson not ever to reveal internal matters to visitors".

Upon **cross examination** by learned Respondent counsel Madete Geoffrey, **CW** Bruno Sembule a prison warder is the one who beat him. That it was D Bruno to do so. He stated that he developed back, chest pai testicles as a result of the beatings. He stated that he was beaten for talking^feS^l^hlJfe^^fei that visited.

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CW2 Kashaija Chrismas testified that in July 2006 on a day he does not recall while on remand, they were informed by the prison warders that they received some visitors from UHRC Fort Portal office. That the stuff were four in number. That they were gathered at one point outside and asked about the conditions in prison. He added that they kept quiet as they feared to be punished by the officers. That Ezekiel raised his hand and told them that they there was insufficient food and water. He added that they were returned to the cells and searched. That Ezekiel was retained as he was found with a piece of paper that contained contacts ofthe UHRC officials.

He further testified;

"Isaw Bruno beat him with ^a medium sized walking stick while he was shirtless. We then saw Ezekiel taken away to a room and beaten further. And we could hear Ezekiel crying. We later saw him being led tofetch water. Hefilled the drums and went to staffquarters. He came back at around 6.40 p.m. Fie was in bad condition swollen, bruises on arms and back and could not squat. He had injuries. He told us how he was beaten after being undressed. He was taken to hospital after about a week. He was later transferred to Masindiprison "

Upon cross examination by Respondent counsel, **CW2** testified that he had seen Bruno punishing other prisoners before by doing hard labour. He also stated that Ezekiel started falling sick after being beaten.

During re-examination by Commission Counsel Nambi Jashmin Kasujja, **CW2 Kasaija Chrismas** stated that he had known the complainant for eight years but he was not sickly, he was a normal person.

CW3 Dr. Bateganya George who works as a medical superintendent and principle officer of Masindi General Hospital interpreted a series of medical documei different medical personnel who attended to the Complainant. He recogijj as those of Masindi District Local Government Hospital. ical authored y)y orm

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He added that MF5 (Medical Form) of Reg. no. 1870/06 indicated that Bigabwa Ezekel was attended to by a Clinician on 18th October 2006 and he had complaints of pain on left flank of the body and painful scrotum but with no swelling. That the Clinical Officer on examination found him in general good condition. Fie immediately came to a diagnosis of pancreatitis of epidydimistis. He concluded that it could be bacterial infection. He was given pain killer, antibiotics and flagyl tabs. The patient also complained about the eye but was advised to attend the eye clinic on 18th October 2006. This form was signed by the clinical officer.

On the same day 18th October 2006, he visited the hospital and was complaining of pain on the genital area. The author was a nursing assistant called Njanguzi who referred him to a clinical officer and did not give treatment.

The next visit by the Complainant was on 19lh October 2006. He was examined by a medical doctor and found to have blood pressure of Bp 130/100 MMttg which means he had hypertension. He was prescribed Indro and Eryhtroman tablets and advised to return after one month. The doctor signed.

The next visit was on 27th October 2006 by a clinical officer OPD/2792. The patient complained of pain in the testis, left rib and poor vision. The diagnosis was Orchitis- infection of testis, dry pleurisy. He mentioned that pleurisy means that membranes around the lungs had an infection. He gave antibiotics i.e. Cipro and Amoxillin. He also prescribed panadol and Magnesium. He however did not sign the document.

Another of 27th December 2006 No 3199 the clinical officer gave diagnosis right away of anemia. He gave drugs and antibiotic amoxylin and cortem Malaria panadol and propranol (high blood pressure). This is a clinical officer in Kiryadongo called Odong kar.

A laboratory investigation request on ¹⁹th / ¹⁰ / 06 by Dr . Mbabazi to conduct a urinalysis^ce the complaint was about pain in the urethral. The report revealed that the urine wa yellow, protein- nil, sugar- nil. lejy-van

The Complainant also visited Masindi Hospital Eye Clinic on 27th / ¹² / 2£06. am in and diagnosed with Ultraviolet maculopathy (Retina sensitive to lighj/fiifected) fft

retinal prednisone reduces rate of inflammation. He was advised to return after two weeks. The author signed the form.

Medical reports from Murchison Bay Hospital dated from July to August 2007 which were interpreted by **CW4 Dr. Andama** from where the Complainant received treatment indicate that he had conditions of cough, fever, night sweats, anorexia, vomiting and was on anti- T. B drugs . Upon cross examination, **CW 4 Dr. Andama** testified that there was no evidence of torture and that the eye sight problem could be lack of vitamin. All the medical documents were tendered in and marked as **Exhibit 2 (a)** respectively.

Having closely scrutinized all the evidence as adduced by the Complainant, In relation to torture ^I find that the medical evidence does not in any way point to torture. The medical experts who interpreted the medical documents testified as to the different diagnosis with conditions of epididymitis, Pancreatitis, hypertension, Orchitis- infection of testis, dry pleurisy also called peptic ulcers, Tuberculosis and anemia among others. Dr. Andama Joseph concluded that most of the problems are related to prison conditions. He could have acquired the above ailments as a result of being in prison which cannot be termed as amounting to torture. The conditions don't for sure reflect beating. The medical evidence on file does not reflect that the complainant was subjected to torture. I have decided to disregard the medical evidence. It is clear by the diagnosis that he was suffering from T. B by then and therefore the injuries of assault

could have become invisible by then and couldn't be detected through medical examination. ^I will therefore disregard this medical evidence all together and consider the oral evidence on record.

The position of case law is that one need not have medical evidence in order to prove assault. In the case of **FRED KAINAMURA AND ANOTHER vs ATTORNEY GENERAL,** 1994, KALR 92, in which Justice Okello held as follows:

'7/ *is not a requirement ofthe law that every allegation ofas evidence. If^a witness says "he boxed me and kicked me ", the You do not need medical evidence to prove that he was boxc helps to prove the gravity ofthe assault ",*

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The same principle is also stated in the case of **BLANDINA NSHAKIIRA vs KAMPALA CITY COUNCIL,** HCCS (248/02 (24/5/04 AT KAMPALA) in which Justice Yorokam Bamwine also held as follows:

A person can testify in court as to her injuries without the aid of an expert medical witness as long as the party describes the injuries clearly. —while it is prudent practice to seek expert opinion ofthe doctor on the nature ofsuch injuries, it by no means implies that absence ofsuch evidence would necessarily be fatal to the plaintiff's case. It must all depend on available evidence and its quality. Medical evidence is ofcourse helpful that it isfrom an expert. In its absence, other evidence may suffice.

CW1, the Complainant stated in his testimony as follows;

"Bruno Ssembule the prison Warder with others started checking me and then found the contact number of UHRC staffwith me and started beating me. After 30 minutes, they used Eucalyptus and Cyprus big sticks. They beat me, the whole body, mainly the chest and back and could not breathe well. Atfirst Iwas beaten while naked in the presence of women prison warders. Then was taken to a room. I was later ordered to dress andfill two drums ofwaler. I also fetched waterfor the staffanother 20 jerry cans and 6 jerry can for the hotel. (46 jerry cans) until late in the evening. Earlier the beating took 2 hours and that is when Ileft tofetch water".

CW2 Kashaija Chrismas testified that

*"Isaw Bruno beat him with a medium sized walking stick while he was shirtless. We then saw Ezekiel taken away to a room and beatenfurther. Andwe could hear Ezekiel cyfing. We later saw him being led tofetch water. Hefilled the drums and went to stiffquarters, He came at around 6.40 p.m. He was in bad condition swollen, bruise^ and could not squat. He had injuries. He told us how he/was undressed. He was taken to hospital after about ^a week". *

Accordingly, all that ^I need to do now is to assess how far the evidence so far evaluated in connection with the allegation of torture, proves the four ingredients in the aforementioned case of **FRED TUMURAMYE (supra)** that ^I listed above . The

Complainant also testified that they used Eucalyptus and Cyprus big sticks to beat him. That they beat him on the whole body mainly the chest and back and could not breathe well. He stated that at first he was beaten while naked in the presence of women prison warders. Then was taken to a room. That he was later ordered to dress and fill two drums of water. He added that also fetched water for the staff and another for the hotel. (46 jerry cans) until late in the evening. The act of forcefully fetching 46 jerry cans of water amounts to cruel, inhuman and degrading treatment or punishment. CW2 also testified that he saw Bruno beat the complainant with a medium sized walking stick while he was shirtless. That they then saw Ezekiel being taken away to a room and beaten further. That they could hear Ezekiel crying. That they later saw him being led to fetch water. He filled the drums and went to staff quarters. He came back at around 6.40 p.m. in bad condition swollen with bruises on arms, back and could not squat. That he had injuries. On the second ingredient on whether such pain and suffering the act has caused was intentionally inflicted on the victim, CW1 stated that

"As I was beaten the warders were saying that I should be beaten as a lesson not ever to reveal internal matters to visitors".

From the above testimony, conclusion can be drawn that the beating was carried out intentionally to punish the complainant for having disclosed information about the prison conditions which they had beenforbidden to.

On the third ingredient of whether the actions were inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in official capacity, CW1 stated During cross examination that Bruno Sembule a prison warder is the one who beat him and that it was Deputy O/C who ordered Bruno to do so.

From the following, ^I find that the complainant's right to freedom degrading treatment or punishment was violated by the Respon ingredients ofthe violation listed above have on a balance of probab

It is also worth mentioning that the Respondent did not file submissions nor produce any defense witnesses in order to weaken the Complainants evidence. In **ARAKIT MARY MARGARET VS THE ATTORNEY GENERAL HCCS 0699 OF 2003,** it was stated that when a party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof; that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. Similarly in the case of **GEORGE ASSIMWE VS ATTORNEY GENERAL HCCS NO.481/1997,** where the Plaintiff closed his case and the defendant offered no evidence, it was held by P. Magamba J. that the plaintiffs evidence was not controverted and had to be accepted as truth.

The Tribunal having analyzed all the evidence on file finds that the oral evidence of CW1 and CW2 testimonies is consistent as well as corroborative. ^I find on a balance of probabilities that the Complainant's right to protection from torture, cruel, inhuman and degrading treatment or punishment was violated.

Issue 2

Whether the Respondent is liable for the violation of the Complainant's right to freedom from torture or cruel, inhuman and degrading treatment or punishment contrary to Article 24 of the Constitution of the Republic of Uganda 1995.

According **to Article 119(4) (c) of the Constitution and section 10 of the Government Proceedings Act,** the role of the Attorney General is to represent Government in any civil proceedings to which Government is party and this is what is called vicarious liability. In relation to the law on vicarious liability it is clear that it is immaterial if the acts done by the servant are erroneous or unlawful or done without authority. The master will still be held liable as stated in **Muwonge Vs A. G (1967) EA 17.** It is thus irrelevant whether the acts done by the e officers were unjustified or unauthorized as long as they did such acts in the cou; employment. Similarly in the case of **Jones Vs Tower Boots Co. Ltd 1997** court held that an act is within the course of employment if it is either; (1) a wrongful act authorized by the employer, or of their e

^CV^O

(2) a wrongful and unauthorized mode of doing some act authorize y the employer^ qv'

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The prison officials implicated in the violation are employees of Uganda Prison Service which is government institution. It is right to say that the prison warder(Bruno Sembule) who was ordered to beat the complainant was at all material times acting on the orders of his superior(Deputy O/C) when he did so and was executing his duties therefore rendering the Attorney General liable for his actions. The issue is also answered in the affirmative.

Issue 3

Whether the Complainant is entitled to any remedies

Under Article 50 of the Constitution of the Republic of Uganda, 1995:-

"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."

Further under Article 53(2) ofthe Constitution:-

"The Commission may, if satisfied that there has been an infringement of a human right or freedom order -

- (a)
- (b) payment of compensation; or
- (c) any other legal remedy or redress."

The basic purpose of damages is to put the victim in the position he would have been had he not *V K.* **10/193,** in which His Lordship Justice Odoki JSC held that: However, ^I shall also take into consideration the principle that was u **MATIYA BYABALEMA AND OTHERS vs UGANDA TRANSP** suffered the wrong. *(DR. DENIS LWAMAFA* -K- *ATTORNEY GENERAL C/S NO.79/1983; GEORGE PAUL EMENYU & ANOTHER -V- ATTORNEY GENERAL* in the ca of *9/19*

into accoun Courts ought to assess the amount of damages tak'i value ofthe money in terms ofwhat goods and services il\an pi

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In addition, Commissioner Joseph A. A Etima in **CHANDIA PAUL AND ATTORNEY GENERAL UHRC/FP/037/2006** held that in assessing the amount of damages which a complainant should be awarded as a result of the violation of his right to freedom from torture or cruel, inhuman and degrading treatment or punishment the following factors have to be taken into consideration; - that freedom from torture or cruel, inhuman and degrading treatment or punishment is an absolute right, the nature and extent of the torture and/or cruelty, the nature and the extent of injuries resulting from the torture or cruelty.

In the instant case, the Complainant was indeed subjected to torture which is a nonderogable freedom and right and though he might have gotten ill with time and started suffering from numerous conditions of which Tuberculosis is one of them, ^I find that gravity of the torture meted out on to the Complainant has not been established and that there is no link between the beatings and the numerous conditions he suffered from. Despite this the Complainant's rights should never have been violated. There ^I find that indeed the Complainant was subjected to acts of torture or cruel, inhuman and degrading treatment or punishment.

Wherefore, ^I deem a figure of **Ug. Shs.5, 000,000/= (Uganda Shillings Five Million)** to be paid to the Complainant by the Respondent as general damages for the violation of his right to protection from torture or cruel, inhuman and degrading treatment or punishment which is an absolute right under Article 44(1) of the Constitution of the Republic of Uganda, 1995 which right must be respected by all agents, bodies and organs of government.

ORDER:

- (i) The complaint is allowed.
- (ii) The Respondent is ordered to pay the Complainant a sum of **Ug. Shs (Uganda Shillings Five Million** as general damages for the violjtiGn of his right\o protection from torture or cruel, inhuman and degrading treat **f 000,W)0/=** nent.

(iii) The total sum of **Ug. Shs 5,000,000=** (Uganda Shillin at court rate from the date hereof until payment in full.

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Any party dissatisfied with this decision or any part thereof may appeal to the High Court of Uganda within 30 days from the date hereof.

DATED at Hoima this 2018.

Signed:

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