

UGANDA / JUDGMENT

Kabanda Isaac v Attorney General (Complaint UHRC 185 of 2009) [2023] UGHRC 6 (18 April 2023) [2023] UGHRC 6

COURT

Uganda Human Rights Commission

BEFORE

Mariam Wangadya - Chairperson, Stephen Basaliza
- Commissioner, Omara Apitta Lamex -
Commissioner, Shifrah Lukwago - Commissioner

CASE / FILE NUMBER

Complaint UHRC 185 of 2009

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THE REPUBLIC OF UGANDA

THE UGANDA HUMAN RIGHTS COMMISSION (UHRC) TRIBUNAL

HOLDEN AT KAMPALA

COMPLAINT NO: UHRC/CTR/185/2009

COMPLAINANT KABANDA ISAAC ::::::::::::::::::::

\$-AND-\$

RESPONDENT ATTORNEY GENERAL ::::::::::::::::::::

CORAM:

- 1. HON: MARIAM WANGADYA
- 2. HON: COL (RTD) STEPHEN BASALIZA
- 3. HON: OMARA APITTA LAMEX
- 4. HON: SHIFRAH LUKWAGO

DECISION

The complainant brought this complaint before the Commission alleging violation of his right to freedom from torture, cruel, inhuman or degrading treatment or punishment.

CW1, Kabanda Isaac, testified before the Tribunal as follows;

That he is a 24-year-old taxi tout at Mpererwe, Namere, Kawempe Division, Kampala District. That on 10th September, 2009 while at Bwaise at about 14.00 hours, four armed and uniformed police officers commanded him to close Kiwanuka Michael's shop, who was his friend. That he complied to the orders and closed the shop to go back home. He stated that on his way he received a phone call from his wife telling him not to go home as there were many policemen and sound of gunshots. That he did not go home and stayed at the stage with his friends, a one Sebaka Godfrey a taxi tout, and Kiwanuka Michael. That at around 5.00p.m. a Military fighter armored vehicle (locally known as Mamba) arrived at Sir Apollo Kaggwa Road and started firing bullets randomly.

He further testified that all people ran and he fell down and the person with whom he was, a one Mujuko, was shot from the head and the bullet came through the eye. That Mujuko fell and was heavy, so he used his left hand to push him. That in the process, his left arm was shot from the side and got shattered. He was also shot through his ribs and stayed down after the Mamba had left. The complainant also testified that he was supported by a one Kiwanuka Michael on to a bodaboda (motor bike) which took him to Mulago hospital. That on arrival at Mulago, he was put on a stretcher at Casualty Unit and taken to Ward 3B where he was admitted for four months.

Kabanda contended that he was unlawfully shot and holds the Attorney General vicariously liable therefor. He prayed for general damages. The Respondent through his representative Mr. Adrole Richard denied the allegations.

ISSUES:

The issues for determination before this Tribunal are:

- 1. Whether the Complainant's right to protection from cruel, inhuman or degrading treatment or punishment was violated by the respondent's agents.
- 2. Whether the respondent is liable.
- 3. Whether there is any remedy available to the Complainant.

This matter was heard by Hon. Commissioner Col. (Rtd) Stephen Basaliza and we based on his record of proceedings to make our decision.

The Tribunal notes that the complainant called three (3) witnesses to corroborate his testimony. However, Respondent's Counsel never called any defense witnesses but opted to file written submissions to rebut the complainant's allegations. All the same the complainant had a duty to prove his allegations against the respondent on a balance of probabilities.

Whether the Complainant's right to protection from torture or 1. cruel, inhuman or degrading treatment or punishment was violated by the respondent's agents

Article 24 of the Constitution provides that,

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

Article 44 of the Constitution makes the right to freedom from torture. cruel, inhuman and degrading treatment an absolute right.

Although '*torture*' is not defined by the Constitution, it is defined by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as –

"Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purpose as obtaining from him or a \$3^{rd}\$ person information or a confession. punishing him for an act he or a \$3^{rd}\$ person has committed or is suspected of having committed".

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 with the purpose of procuring compliance of some sort.

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The Universal Declaration of Human Rights 1948 provides under Article \$5\$ that:

"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 and the African Charter on Human and Peoples Rights (ACHPR), 1981 under Articles 4 and 5 strictly forbid all forms of torture.

The actions of the respondent's agents will amount to torture if the above ingredients are proven to have occurred to the complainant and if the tribunal is satisfied that the acts in issue were inflicted on the complainant by government agents.

CW1, Kabanda Isaac testified before this tribunal that on \$10^{th}\$ September 2009, while at Bwaise at about 14.00 hours, four armed police officers in white and blue uniforms ordered him to close Kiwanuka Michael's shop, who was his friend. That he complied, closed the shop and headed home. That on his way he received a phone call from his wife telling him not to go home as there were many policemen and sounds of gunshots. That he did not go home and stayed at the office stage with his friends, a one Sebaka Godfrey a taxi tout, and Kiwanuka Michael. That at

around 5.00p.m, a military fighter armored vehicle (locally known as Mamba) arrived at Sir Apollo Kaggwa Road and started firing bullets randomly.

He added as follows:

"We all ran and I fell down and the person with whom I was with a one Mujuko, was shot from the head and the bullet came through the eye. He fell on me and was heavy, so I used my left hand to remove him. My left arm was shot from the side and got shattered and I was also shot through my ribs and stayed down after the Mamba had left".

He further testified that Kiwanuka Michael supported him on a *boda-boda* and took him to Mulago hospital. That on arrival at Mulago, he was put on a stretcher at Casualty Unit and taken to Ward 3B where he was admitted for four months.

Upon cross-examination by Counsel for the Respondent Mr. Adrole Richard, CW1 stated that the bullets that injured him were fired from the armored vehicle belonging to UPDF. He stated that the shooting happened during a demonstration against blocking the Kabaka from going to Kayunga and was not sure whether the shooting was intentional or not. He further stated that he was shot on the ribs and another bullet broke his arm.

CW2, Sebaka Godfrey testified that Kabanda was shot while leaving his place of work on 10th September, 2009 at Bwaise during the "Kabaka riot". That he was later picked by a *boda-boda* man and taken to Mulago hospital. He also stated that the bullet was fired from the 'Mamba' vehicle at around 3:00pm and the complainant was hospitalized in Mulago for a long time.

CW3. Kiwanuka Michael testified that in October 2009 in the evening at about 5:00 pm while at Bwaise, during the "Kabaka riots", a 'Mamba' arrived firing bullets and that he saw a young man carrying Kabanda after being shot. That he put Kabanda on the 'boda-boda' and then took him to Mulago.

Upon cross examination, \$CW2\$ & 3 corroborated the complainant's testimony and stated that on the fateful day there was a riot and it was during the dispersal of the riot that Kabanda was shot at unintentionally.

CW4, Dr. Lubega Ronald, an expert witness and a holder of MBCHB, from Mbarara University of Science and Technology, 2010 working with the African Centre for Treatment and Rehabilitation of Torture Victims (ACTV) interpreted the medical report that was authored by Dr. Muwa Paul of ACTV and another report from CoRSU Rehabilitation Hospital, Entebbe. He stated that his duties included treating, examining,

investigating and documenting torture of "clients". He stated that the ACTV medical report. No.4733/09 was in the names of Kabanda Isaac. That this document was written by Dr. Muwa.

He testified as follows;

As per the report, during the 10th September 2009 city riots, the Complainant reported with a painful broken left arm with pus discharge, had inability to use his left upper limb and had complaints of a bullet lodged in the abdominal wall. On examination, it was discovered that the left forearm was deformed. It had abnormal movements and pus discharge with entry and exit wounds from gunshots. There was tenderness and reduced range of motion at the wrist joint of the same arm. When they examined the abdomen it was tender with swellings on the left side of the abdominal wall. The diagnosis was post-traumatic disorder, septic nonunion of fracture, left radius, and foreign body in the abdominal wall.

CW4 concluded that the consequences of the above were physical, psychological, and socio-economic impairment. That Kabanda was unable to use his left arm due to pain, infection, and fracture and the percentage of disability was rated at 36% (temporary). That the Complainant underwent surgery four times to treat the infected fracture and to remove the bullet in the abdominal wall.

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Further, CW4 interpreted the 2nd medical report from CoRSU hospital and stated that an examination was carried out and the results were fracture nonunion of radius with a foreign body in the abdominal wall being a bullet in the stomach. That reconstructive surgery to remove the bullet was done and treatment given. That surgery involved use of wires and screws to stabilize the hand while the bullet was removed as well through surgery. He added that the diagnosis done by ACTV was confirmed by CoRSU. The ACTV report was tendered in evidence and marked '*Exhibit* I \$.

The Respondent never called defense witnesses but opted to file written submissions. The Respondent's Counsel contended that the complainant was not subjected to torture or cruel, inhuman and degrading treatment or punishment. He argued that the act of shooting by the government's agents was not intentional. The Respondent's counsel relied on section 69 of the Penal Code Act Cap 120 which provides that police/security agencies can use force reasonable for overcoming such resistance or riots. That the shooting of the complainant was an act that falls within the acceptable limits of the law when the police are dispersing a riotous crowd.

He also contended that the test of determining whether actions of the in set out were torture Respondent's agents amount to

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UHRC/FPT/69/2003 Bindemeseze John Vs Attorney General in which the Presiding Commissioner listed the ingredients to be;

- Intentional infliction of pain and suffering on a person whether physical or mental

- For the purpose of obtaining information or confession from the person or a third person for the purposes of intimidation or punishment and;
- The act should be by government officials or agent or acts of the acting under instructions or with acquiescence of person government official or agent.

It was therefore the Counsel's contention that the allegation of the complainant that the respondent subjected him to acts of torture or cruel, inhuman and degrading treatment or punishment is untenable. That further, the act of shooting was unintentional which fact the complainant acknowledged during cross-examination.

The learned Counsel for the Respondent therefore prayed that the tribunal finds that the respondent did not violate the complainant's right to freedom from torture or cruel, inhuman and degrading treatment or punishment. That since his disability to use the left arm due to pain, infection and fractures was put to a temporary disability of 36%, he prayed

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in the alternative that the complainant be compensated for the injuries with UGX 5,000,000/= (Five million Uganda shillings).

This tribunal agrees with respondent's submission to the effect that the shooting was unintentional and thus accidental on the part of State agents.

For one to prove torture, all the ingredients of torture as submitted by the respondent's counsel need to be present.

The respondent agents' actions do not therefore constitute the violation of the complainant's right to freedom from torture or cruel, inhuman or punishment Kabanda degrading treatment \$
\overline{or}\$ since shot \$was\$ unintentionally and not with a purpose of obtaining from him information or a confession or intimidating or punishing him. Therefore, the question as to whether the respondent's actions amounted to torture is answered in the negative.

It is the finding of this Tribunal however, that the Respondent's agents' actions constituted violation of the complainant's right to security of the person.

The UN General Comment No 35 on the International Covenant on Civil and Political Rights provides that the right to personal security

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obliges State parties to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors. Security Officers violate the right to personal security when they unjustifiably inflict bodily injury. In **Anthony Leehong Vs. Jamaica Human Rights Committee** Communication No 613/1995, Anthony Leehong while walking down a street, was shot from behind by the Police, without any warning. The Committee held that this was a breach of Article 9 of the ICCPR with respect to his right to security of the person.

The evidence on record from the CW1, CW2, & CW3 indicate that the "mamba" was firing bullets randomly. There was no indication that the state agents cared to protect human lives. The actions carried out by the respondent's agent amounted to infringement of Kabanda's right to security of person. In fact the Respondent's agent Mr. Adrole impliedly conceded to this fact when he offered to pay the complainant UGX 5 Million as compensation.

Whether the respondent is liable therefor \$2.\$

The law is that once the actions or omissions of the servant have been proved, then they render the master liable, even though the same actions or omissions were carried out contrary to the orders or instructions of the master, and even if the servant acted deliberately, wantonly, criminally, negligently, or contrary to the specific instructions or orders of the master. (See *Muwonge Vs Attorney General (1967), (EA) 17*). We hold that the respondent is vicariously liable for the actions of the state agents who shot the complainant.

Whether there is any remedy available to the Complainant \$3.\$

Having held that the Respondent's agents violated the complainant's right to security of the person, it follows that he is entitled to compensation by the respondent by way of damages.

The principle governing the assessment of damages is that the injured party should be awarded such a sum of money as will put that party in the same position as the party would have been in if the party had not sustained the injuries see: **Robert Coussens Vs. Attorney General: SCCA No.8 of 1999**; Businge David and Attorney General & Asiimwe Yasin **UHRC/FP/13/2006**.

We will also take into account the consequences of the injuries sustained. One of the socio-economic consequences of the injuries is loss of gainful employment. He spent quite some time without working due to these injuries and Kabanda's hand to date does not function as before. His disability was placed at 36% though temporary. He suffered severe physical and psychological pain.

In Okello James vs. Attorney General in HCCS No. 574 of 2003 the plaintiff was caught by a bullet in the buttocks which had been fired by Policemen who were trying to disperse a group of demonstrators around Uganda House on Kampala Road. The plaintiff was operated upon to remove the bullet and was awarded UGX \$15,000,000/= as general damages.

Given the facts and circumstances of this particular case, we deem a figure of UGX 15,000,000 /= (Fifteen million shillings) adequate compensation to the complainant.

ORDERS

- 1. The complaint is allowed.
- 2. The Respondent is ordered to pay the Complainant a sum of UGX \$15,000,000\$ /= (Fifteen Million Shillings Only) as general damages for the violation of his right to security of the person.

- 3. The general damages shall attract interest at court rate from the date of this decision till payment in full.
- 4. Each party shall bear their own costs.

Either party not satisfied with this decision may appeal to the High Court of Uganda within 30 days from the date hereof.

Dated at KAMPALA this

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HON. MARIAM WANGADYA **CHAIRPERSON**

HON. COL (RTD) STEPHEN BASALIZA **MEMBER**

HON. OMARA APITTA LAMEX **MEMBER**

HON. SHIFRAH LUKWAGO

MEMBER

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