

RA 65008 W011 Atunga Bantu and 7 Others v Director Public Prosecutions and Story (Miscellaneous Cause No. 247 of 2017) [2021] UGHC 49 (24 June 2021)
[2021] UGHC 49

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

BEFORE HON. JUSTICE SSEKAANA MUSA**RULING**

The applicants allege that they were picked from different places, arrested by the military taken in military detention and tortured. They were later produced in court where they were charged with the offence of treason and concealment of treason and later remanded and denied bail. They were later on granted bail however the bail conditions were very stringent on the applicants.

The applicants filed this application seeking declarations as to the violation of their rights and freedoms under **Article 50(1) of the Constitution**.

The application was brought on the following grounds;

1. The applicants were indicted with treason contrary to section 23(1)(c) and (d) and concealment of treason contrary to section 25 of the penal Code Act in Criminal Session Case No. 0045 of 2012 arising from Buganda Road Court Capital Offence No. A.22 of 2011.
- 2. Before being charged and indicted, the applicants were illegally arrested and detained in ungazetted places where they were subjected to torture and brutalized.
- 3. The applicants were in illegal detention having been on remand beyond the period allowed by the constitution.
- 4. The applicants were granted bail and were supposed to appear in person once a month before the High Court of Uganda at Kampala.
- 5. The applicants stay far away from Kampala and were drastically strained by the monthly travels to Kampala.
- 6. The failure of the court to either try the applicants or for the DPP to withdraw the charges was an abuse of legal process.
- 7. On the 19th day of February 2018, the criminal charges against the applicants were withdrawn by the 1st respondent.

The 2nd respondent filed an affidavit in reply sworn by Nabasa Charity opposing the application stating that the arrest and subsequent detention of the applicants was on reasonable suspicion that the applicants was based on reasonable suspicion that the applicants engaged in unlawful activities. She further stated that the decision to continue or discontinue prosecution is entirely a constitutional prosecutorial discretion of the Director of Prosecutions which is exercised depending on whether there is cogent evidence to prosecute the matter.

The parties filed a joint scheduling memorandum wherein the following issues were agreed for determination by this court;

- *1. Whether the 1st respondent can be sued.*

- *2. Whether the decision of the 1st respondent in commencing and continuing prosecution in session case No. 0045 of 2012 arising from Buganda Road Court Capital Offence No. A.22 of 2011 was an abuse of legal process.*
- *3. Whether the applicants' constitutional guarantee to freedom from torture, cruel, inhuman and degrading treatment was violated by the respondents.*
- *4. Whether the applicants' constitutional guarantee to right to personal liberty was violated by the respondents.*
- *5. Whether the applicants' constitutional to a speedy trial was violated by the respondents.*
- *6. Whether the applicants' bail terms were very restrictive and unjust.*
- *7. Whether the applicants are entitled to the remedies sought.*

The applicants were represented by *Ladislaus Rwakafuuzi* while the respondent was represented by *Imelda Adong* (State Attorney)

The Written final submission were filed which have been considered by this court.

Issue 6 was overtaken by events and abandoned by the applicants.

Whether the 1st respondent can be sued?

The respondent in their submissions raised a preliminary objection as to the capacity of the DPP to sue or be sued which also doubles as issue 1 in the applicants' submissions.

Article 120 of the Constitution which provides for appointment and functions of the DPP does not establish it as a body Corporate. In *Charles Harry Twagira Vs Attorney General & Anor SCCA 4 of 2007* the Supreme Court held *inter alia* that the appellant should have proceeded only against the Attorney General and the 3rd respondent since the Director of Public Prosecutions is a government department but it is not a body corporate with powers to sue or be sued.

Therefore the case against the DPP is struck out.

The court shall proceed to determine the remaining issues.

Whether the decision of the 1st respondent in commencing and continuing prosecution in session case No. 0045 of 2012 arising from Buganda Road Court Capital Offence No. A.22 of 2011 was an abuse of legal process.

The applicants' counsel submitted that the DPP violated the applicants' right to liberty and right to a fair hearing guaranteed under the constitution when he commenced and continued their prosecution in criminal session case no. 45/12. Counsel submitted that this involved pre-trial and post-trial violations that is; the DPP was aware that the criminal proceedings against the applicants in that case were started by the military which arrested, detained in ungazetted areas and tortured therefore should not have sanctioned the charges.

The applicants faulted the DPP stating that he had ample time to interrogate the evidence before committing them to trial and even after committal the DPP waited 8 years to withdraw the charges against the applicants. The applicants' counsel submitted that the DPP acted in abuse of the legal process when he kept the applicants on remand for 8 years an action which was not in public interest.

On the other hand the respondent's counsel submitted that the DPP was acting well within his mandate by prosecuting the applicants as empowered under **Article 120 (3) of the Constitution** which cannot be said to be abuse of legal process.

Counsel cited **Attorney General & Another vs James Kamoga and another SCCA No. 8 of 2004** where the Supreme Court held that *abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established.*

Counsel submitted that it had not been established in this case that the prosecution of the applicants was for an improper purpose.

In their rejoinder submissions, counsel for the applicants submitted that the DPP withdrew the charges without any explanation therefore the court should find that the DPP violated the applicants' rights and freedoms.

Analysis

The DPP is empowered under **Article 120 (3)(b)** which provides that the DPP has authority to institute criminal proceedings against any person or authority in any court with competent jurisdiction. **Article 120(5)** also provides that while executing their mandate, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

Abuse of process' or abuse of legal process has been defined in **Black's law dictionary (8th edition) p.11** to mean 'the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.

I have not found evidence proving that in prosecuting the applicants, the DPP acted in an improper and tortuous manner with an intention of obtaining an unlawful result.

Whether the applicants were tortured by both military and police personnel in violation of their right to freedom from torture, cruel, inhuman and degrading treatment.

Counsel for the applicants submitted that the applicants were tortured while in military custody but did not provide medical evidence of their alleged torture. However in that regard, counsel cited **Jennifer Muthoni Njoroge & 10 ors vs AG [2012] eKLR** where the High Court of Human Rights held *"...where one is arrested and tortured mercilessly, where is the opportunity to take photographs of torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eyewitnesses?"**

The respondent's counsel on the other hand submitted that the applicants did not lead any evidence to prove their allegations of torture. Counsel submitted that there was no medical report, pictures or even that the applicants were treated in any medical facility of the alleged injuries sustained if any from the alleged torture and there was no evidence corroborating the applicants the allegations of torture.

Counsel for the respondent cited **Businge Gerald vs Attorney General Civil Suit No. 38 of 2015** where court stated that **the plaintiff neither showed court any scars or other physical signs on his body nor produced similar evidence to prove severe pain or suffering afflicted on him or any pain or suffering at all and was not persuaded that the plaintiff was tortured or subjected to cruel inhuman treatment as alleged.** It was counsel's submission that the applicants did not prove the allegations of torture and court should dismiss the same.

Counsel for the applicants submitted in rejoinder that the applicants' allegations were on oath and no police or military officer involved in their arrest swore an affidavit denying the allegations hence counsel prayed that court finds that the applicants' averments of torture have been proved.

The applicants swore affidavits stating the details of torture while in custody of the security operatives who arrested and detained them.

The 1st applicant stated that he was sprayed with reddish chemicals which caused loss of the sense of smell. The 2nd applicant stated that he was undressed placed in cold water, hit on his legs and head using a black stick. The 3rd applicant stated that he was beaten with a rope made from hippopotamus skin and as a result spent one month without moving, was slapped in the ears and has a hearing problem till date. The 5th applicant stated that he was beaten in the ears, head and stomach and as a result has problems with his hearing senses as well as a kidney problem. The 6th applicant stated that he was hit with metals, subjected to electric shock, made to lie in cold water naked and as a result his right hand is no longer straight and has frequent chest pains. The 7th applicant stated that he was beaten on his legs and back with a black plastic stick, showered with cold water and made to sleep in a pool cold water, made to lie on his back facing strong flashing light, hit in the ears kept in solitary confinement and as a result lost his eye sight, cannot hear well, has kidney problems and was traumatized.

The applicants have a duty to prove the facts asserted exist as per **section 101 of the Evidence Act** . Under that duty, the applicants ought to satisfy this court the allegations that they were tortured by the security operatives.

The applicants put forward detailed account of their torture but did not lead any other evidence to corroborate their personal statements and accounts. Owing to the intensity of their allegations, there should have been residue evidence even without immediate medical reports indicating that they were tortured. Photographs showing scars, medicals evidence showing the post torture effects as well as corroborating statements from friends or relatives among others would have sufficiently proved their case.

In absence of corroborating evidence, the applicants have failed to prove on a balance of probabilities that they were tortured thereby violating their rights and freedoms against torture as provided for under the Constitution. It is not sufficient to allege torture and think the statements made even in an affidavit to be believed or taken as 'gospel' truth. The applicant's lawyers must do more than making statements which may be weighed against the prevailing circumstances. The gravity of allegations of torture should have required some medical documents to satisfy court on balance of probabilities not mere statements of torture.

Whether the applicants' constitutional guarantee to right to personal liberty was violated by the respondents.

Counsel for the applicants submitted that all the precepts guaranteeing the right to liberty were violated. Counsel submitted that all the applicants alleged that they were arrested and kept in safe houses and others in military barracks. Counsel submitted that the functions of the military under **Article 209 of the Constitution** do not include arresting civilians for civil offences. Counsel further submitted that **S.16 (1) of the Criminal Procedure Code** demands that the arrested person must be handed over to police as soon as practicable.

The applicants alleged that they were kept in military custody for periods ranging from 7 days to 29 days. **Article 23(2)** demands that a person arrested must be detained in an authorized place. **Article 221** demands that all security organs must observe and respect human rights and freedoms in performance of their functions.

Counsel for the respondent submitted that the applicants did not adduce evidence to show that they were ever detained in military detention, safe house, Chieftaincy of Military intelligence headquarters, JATT Mbuya or any police station for the alleged number of days. There was no evidence of any station diary number or any lock up register or evidence of an application for habeas corpus or any other like document to demonstrate that the applicants were illegally detained and the duration of the detention.

Counsel submitted that the applicants were legally remanded by court after they were charged in Criminal Case No. A.22 of 2011; Uganda -Vs- RA 65008 WO II Atunga Bantu and 7 others. Counsel prayed that the court should not consider the same as the applicants have not adduced any evidence that they were illegally detained.

In rejoinder counsel for the applicants submitted that the applicants' evidence of being imprisoned in ungazetted places for several weeks without trial was not traversed by any contrary evidence as well as staying on remand for eight years was inordinate and amounted to imprisonment without trial prohibited by **Article 43(2)(b)** which court should find had no basis.

Article 43(2) of the Constitution provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest hence shall not permit detention without trial.

Preceding the applicants' committal to high court, the applicants allege that they were detained in military safe houses without being handed over to police or taken before a court of competent jurisdiction. They allege that they were detained for several weeks in these ungazetted areas.

Analysis

The applicants asserted for a fact that they were detained in military detention and yet they are not army officers. This assertion was not specifically rebutted by the respondent. I take it that it was admitted that indeed they were held under a military establishment and yet the law enjoins that they are detained in a civilian establishment beyond the mandatory period of 48 hours.

The detention of the applicants in ungazetted places beyond the mandatory period of 48 hours amounted to a violation of their constitutional rights guaranteed under the Constitution.

Whenever there is necessity of detention beyond 48 hours it is only

possible under judicial order of custody. Whenever, there is failure to produce the arrested person before the nearest court within 48 hours it would make the arrest illegal.

The state has a duty to ensure that by the time suspected criminals are arrested, they ought to be arraigned before the courts of law which is usually an orderly way of doing things instead of arresting and later delay to produce the suspects before the court. The state should have what is termed as *"holding charges"* upon which any suspect can be arraigned before the court. The charge sheet may be amended when the investigations are complete so that proper charges are preferred against the suspects. This would limit and avoid detention beyond 48 hours of suspected criminals.

The applicants rights under Article 23(2) of the Constitution and detention beyond 48 hours was violated.

Whether the applicants are entitled to the remedies sought

The applicants have succeeded on one issue of violation of their right to personal liberty of the applicants. The applicants have stated the specific days they remained in illegal detention before they were produced in court. I would award all the applicants 10,000,000/= as damages for the violation of their personal liberty.

The applicants are awarded costs of the case.

I so order.

SSEKAANA MUSA JUDGE 24 th June 2021

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