

UGANDA / JUDGMENT

Taremwa & 3 Others v Uganda
(Miscellaneous Application 32 of 2024)
[2024] UGHC 941 (7 October 2024)
[2024] UGHC 941

COURT

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Miscellaneous Application 32 of 2024

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MASAKA****MISCELLANEOUS APPLICATION NO. 32 OF 2024****(ARISING FROM SESSION CASE NO. 157 OF 2019)****(ARISING FROM CRIMINAL CASE NO. 277 OF 2018)**

- **1. TAREMWA HENRY**
- **2. MUGARURA ALEX JUNIOR**
- **3. NIYO EDSON ALIAS EDDIE**
- **4. KISUULE DICKSON:..... APPLICANTS**

VERSUS**UGANDA :..... RESPONDENTS****RULING*****Hon. Lady Justice Victoria N. N. Katamba***

BACKGROUND

This is an application brought under *Article 23(4), 28(1), 34(6), 43(2) (b), 44(c), & 50(1) of the Constitution of the Republic of Uganda, 1995 (as amended), Sections 88, 89(8), 91(5) & (6) of the Children Act Cap. 59 with its amendment of 2016, Sections 1(1), 3, 4(a), 8(1), 9, 11(2) (b), of The Human Rights (Enforcement) Act, 2019.*

The Applicants are seeking for declaratory orders that;

- a) The Applicants' bundle of non derogable rights and freedoms stipulated under the 1995 Constitution, statutes and all other enabling laws have been infringed upon by the Respondent, and or her agents, in the course of investigations, prosecution, charge, indictment before this Honourable Court.
- b) The fundamental guarantees accorded by the law to the First, Second and Fourth Applicants as juveniles at the time of their arrest and detention at Police, in arraignment in Court vide Criminal Case No. 277 of 2018 and remand to prison were breached by the Respondent and her agents rendering the subsequent trial a nullity.

- c) The proceedings in criminal case No. 277 of 2018 and criminal case No.157 of 2019 are tainted with multiple breaches of the Applicants' non –derogable human rights, statutory guarantees and the same be declared a nullity, discontinued and the Applicants be acquitted.

Representation

The Applicants were represented by *Mr. Sam Ssekyewa of M/s Ssekyewa, Matovu & Co. Advocates on private brief and Ms. Dorah Kimani of Justice Centres on state brief.*

The Respondent was represented by the *Chief State Attorney –Masaka; Mr. Noah Kunya*.

When this matter came up for hearing on 9th July 2024 Counsel for the Applicants made oral submissions. The Respondent was also given a timeline within which to file submissions in reply which directive was duly complied with.

DETERMINATION BY COURT.

I have carefully considered the pleadings of the parties and their submissions whose details are on record. I will refer to them from time to time as and when deemed necessary. Below are my findings on the issues disclosed by the Application.

Preliminary objection:

The prosecution objected to the Application stating that it is seeking to enforce civil remedies and yet Article *250(1) and (2) of the Constitution of Uganda of 1995* as amended provides that civil proceedings against the Government shall be instituted against the Attorney General. Counsel Kunya Noah, further argued that *Article 2* of the Constitution provides that the Constitution is the supreme law and that if any other law is inconsistent with a provision of the Constitution, the Constitution shall prevail.

In conclusion, Counsel argued that the Application is incompetent for seeking to enforce civil remedies in a suit where Uganda is the party and not the Attorney General.

In reply to this objection, Counsel for the Applicants submitted that courts handling criminal trials are vested with jurisdiction to nullify trials for a number of reasons including violations of fundamental human rights which are constitutionally protected. He further argued that Courts have

nullified trials on many occasions. He cited *Uganda vs. AWY Criminal Session No. 0422 of 2022, High Court of Uganda at Kampala Criminal Division*, as one such case in which a trial was nullified for violations of constitutional rights of minors.

Section 11(2) of the Human Rights (Enforcement) Act, 2019, provides that;

2)Whenever, in any criminal proceeding

a) it appears to the Judge or Magistrate presiding over a trial,

b) it is brought to the attention of the competent court; or

c) the competent court makes a finding that any of the accused person's non derogable rights and freedoms have been infringed upon, the Judge or Magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

The above Act was inspired by the Constitution. At page 4 of this Act of Parliament it is provided under the subtitle (the long title) of the Act thus;

"An Act to give effect to Article 50(4) of the Constitution of Uganda by providing for the procedure of enforcing human rights under Chapter Four of the Constitution; and for related matters."

One of the rules of Constitutional interpretation is the rule of wholeness. According to this rule, all constitutional provisions on a given subject matter must be read together not reading one in isolation of others before prematurely arriving at a conclusion that any provision of an Act of Parliament is unconstitutional. Bethat as it may, this is not the Constitutional Court to perform the tasks that Counsel for the Respondent is inviting it to do. Counsel ought to have made a reference to the Constitutional Court under *Article 137(3)* of the Constitution of Uganda for a finding that the provisions in the Children Act and the Human Rights Act under which the instant

Application was brought are unconstitutional. Moreover, Counsel for the Respondent has not cited any particular provision as contradictory to Article 250. It is not for this Court to guess the exact basis for the objection. The Application was clearly brought under provisions of the law which themselves are rooted in the Constitution of Uganda of 1995, as amended.

In a nutshell since both **Article 250 of the Constitution** under which the prosecution has based its objection and **Article 50(4) under which the Human Rights Enforcement Act, 2019** that empowers criminal trial courts to have jurisdiction to nullify trials over human rights violations are both Constitutional provisions, I find no merit in the objection. The objection is overruled.

Issues:

- **1. Whether the Applicants' non derogable rights and other statutory guarantees were breached by the Respondent and its agents?**
- **2. What remedies are available to the parties?**

I will resolve both issues jointly.

Counsel for the Applicants argued that the birth certificates and baptism cards attached to the 1st 2nd and 4th Applicants' affidavits in support of the Application demonstrate that they were Juveniles at the time of their arrest and eventual remand in prison. He further argues that the police and prosecution were aware that the said Applicants were Juveniles but instead remanded them in detention centers of Adults contrary to **Article 34(6)** of the Constitution and **Section 88(6) of the Children Act Cap.59.**

Counsel for the Applicants also argued that the Applicants were kept in police cells for over 48 hours without being produced in court contrary to **Article 23(4) (b) of the Constitution**. He also argued that there has been inordinate delay in hearing the criminal cases against the Applicants.

In conclusion, Counsel for the Applicants argued that as per the provisions of the law under which the Application was brought, the proceedings ought to be nullified and the Applicants acquitted.

In reply, Counsel for the Respondent conceded that the 1st Applicant's Uganda Certificate of Examination (UCE) result slip shows that his date of birth was 26th may 2001 and thus he would be under 18 years in November when he was arrested and arraigned before Court. Counsel, however, insisted that the 1st Applicant was examined on PF24 and found to be of majority age.

It was also submitted for the Respondent that, notwithstanding the contents of the belatedly procured birth certificates and baptism cards, the 2nd and 4th Applicants' UCE result slips whose information was submitted without anticipation of criminal prosecution, show that at the time of arrest and remand in November 2018, they were over 18 years old. The UCE result slip of the 2nd Applicant shows that he was born on 22nd October, 2000. This is corroborated by medical examination evidence PF24 dated 23rd November, 2018 which returned that the 2nd Applicant

was 18 years. The 4th Applicant's UCE result slip shows that he was born on the 25th March, 2000 and as such he was 18 years and 8 months by November, 2018. Counsel also argues that the evidence of PF24 attached to the Respondent's affidavit in reply as annexure D, shows that upon physical examination, the 4th Applicant was found to be 18 years.

Regarding the claims that the Applicants' right to be arraigned in court within 48 hours from the time of arrest was infringed upon, it was argued for the Respondent that the Applicants omitted to adduce any evidence as to their lockup or detention orders from police to prove the exact date on which they were detained at Police before their production in court.

In addition to the above, it was also submitted for the Respondent that whereas it has taken long to try the Applicants, Court should take Judicial Notice that this Application was filed when the trial of criminal session case No. 157 had long commenced and several witnesses had already testified for the prosecution.

In conclusion, Counsel for the Respondent also submitted that they are not responsible for the delay to fix and hear the criminal case. The prosecution was ready to prosecute the instant criminal session case by 30th May 2019, within six months, from the period of commission of the offence and arraignment of the Applicants in Court.

Analysis:

The Applicants complain that subsequent to their arrest they were only produced in court for the reading of the offences for which they were accused after a 16 days' lapse instead of within 48 hours as required by law.

Secondly, it is the Applicants complaint that the 1st, 2nd and 4th Applicants were juveniles at the time of their arrest yet since their remand and committal for trial, they have been illegally detained in prisons designated for adults. To prove that they were minor at the time of their arrest, they adduced birth certificates and baptism cards which, according to the Applicants, demonstrate that they were minors at the time of their arrest and detention.

Contrary to the information contained in the above certificates, the Respondent, through her affidavit in opposition to the Application has adduced in evidence, the 2nd and 4th Applicant's Uganda Certificate of Examination (UCE) pass slips which show their birth dates. As submitted by Counsel for the Respondent, this information was voluntarily submitted to Uganda National Examination Board (UNEB) without anticipation of any future criminal prosecution. According to these pass slips, the 2nd and 4th Respondents were adults at the time of their arrest because the UCE result slip of the 2nd Applicant shows that he was born on 22nd October, 2000 while the 4th Applicant's UCE result slip shows that he was born on the 25th March, 2000 and as such he was 18 years and 8 months by November, 2018.

The administration of St Bernard Manyamba Secondary School, also availed this Honourable Court with the 1st Applicant's Uganda Certificate of Examination (UCE) Certificate of 2018. This certificate demonstrates that the 1st Applicant was 17 years old at the time he sat for the exams

and at the time of his arrest in November. This certificate effectively demonstrates that the 1st Applicant was a Juvenile at the time of his arrest and detention. It is also important to note that in both the statement made at Police and the Charge and Caution statement of the 1st Applicant attached to his affidavit in support, he categorically stated that he was 17years old. These documents have at all material time been in possession and custody of the prosecution/ Respondent.

Section 2 of the Children Act defines a child to be a person below the age of eighteen years.

Section 88(4) of the Children Act Cap. 59, provides that specialized protection for children under this Act shall apply to all children below the age of 18 years.

Both the Constitution and the *Children Act Cap. 59,* prohibit keeping a child offender in lawful custody with adults.

Article 34(6) of the Constitution of Uganda, 1995 as amended provides that a child offender who is kept in lawful custody or detention shall be kept separately from adult offenders.

Section 89(8) of the Children Act Cap. 59, provides in mandatory terms that no child shall be detained with an adult person.

Section 91(5) of the Children Act provides for a remand period of three months for an offence punishable by death and 45 days for a minor offence.

S. 99 of the Children Act provides that;

1) Every case shall be handled expeditiously and without unnecessary delay.

3) *Where owing to its seriousness, a case is heard by a court superior to the family and Children court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail*.

4) Where a case to which subsection (3) applies is not completed within 12months after the plea has been taken, the child shall be discharged and shall not be liable to any further proceeding for the same offence.

In the instant case, the 1st Applicant has been on remand for over 5 years contrary to the six months permissible. All this time has been spent in an adult's detention place.

I am persuaded by the dictum of the *Hon. Lady Justice Margaret Mutonyi in Uganda vs. AYW Criminal Session No. 0422 of 2022, High Court of Uganda at Kampala Criminal Division in which she held that the fact that S.109 criminalizes contravention of provisions of the Children Act demonstrates the seriousness with which they should be handled*.

Section 11(2) of the Human Rights (Enforcement) Act, 2019, provides that;

2)Whenever, in any criminal proceeding

a) it appears to the Judge or Magistrate presiding over a trial,

b) it is brought to the attention of the competent court; or

c) the competent court makes a finding that any of the accused person's non derogable rights and freedoms have been infringed upon, the Judge or Magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

It is apparent that the 1st Applicant who was a Juvenile at the time he was suspected to have committed the offence, was deprived of his right not to be detained in adult detention facilities contrary to the law (*Article 34(6) of the Constitution and S.88(6) of the Children Act*). The prosecution which was well aware that the 1st Applicant was a Juvenile omitted to entitle him to his right to be released on bail within 6months. As a result of this omission he has spent over 5 years on remand instead of the maximum duration of 3 months or at most 6months permissible under *S.91(5) and S.99(3) of the Children Act*.

I am further persuaded that the approach that was taken by my learned sister Judge in Uganda vs. AYW, supra, ought to be followed in the instant case with the result that the 1st Applicant who was a Juvenile at the time of his detention, having spent more than five years in an adult prison, which duration exceeds the maximum sentence a Juvenile may serve, it is directed that the proceedings against him are a nullity and are discontinued under *Section 17 of the Judicature Act and Section 11(2) of the Human Rights Enforcement Act, 2019* to avoid further abuse of his Constitutional rights. He should be released immediately.

This issue is answered in the affirmative in respect of the 1st Applicant only.

I agree with the prosecution that the 2nd, 3rd and 4th Applicants' claims that they were not afforded their constitutional right to be arraigned in court within 48 hours for the reading of the offences that the state has against them from the date of their arrest until 16 days had lapsed, are unsubstantiated. No evidence was adduced to prove these claims. They are hereby rejected.

Moreso, the 2nd and 4th Applicants claims do not fall within the Children Act Cap. 59 because they were not Juveniles at the time of their arrest in November 2018. The same are dismissed and the hearing of the main criminal case should proceed against them as well as against the 3rd Applicant.

I so order.

Declaratory orders;

- i) The fundamental guarantees accorded by the law to the 1st Applicant as a juvenile at the time of his arrest and detention at Police, arraignment in Court vide Criminal Case No. 277 of 2018 and remand to prison were breached by the Respondent and her agents thereby rendering the subsequent trial a nullity.

- ii) The proceedings in criminal case No. 277 of 2018 and criminal case No.157 of 2019 are tainted with breaches of the 1st Applicant's statutory guarantees and the same are declared a nullity, discontinued and the 1st Applicant is hereby discharged from custody unless lawfully held on some other charges.

Dated this 07th day of October, 2024.

VICTORIA NAKINTU NKWANGA KATAMBA

JUDGE.

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