

UGANDA / JUDGMENT

Turyamuhika Geofrey Tumwine v Attorney General (Miscellaneous Cause 308 of 2019)

[2023] UGHCCD 383 (22 September 2023)

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COURT

HC: Civil Division (Uganda)

BEFORE

Phillip Odoki, J

CASE / FILE NUMBER

Miscellaneous Cause 308 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION)

MISC. CAUSE NO. 308 OF 2019

TURYAMUHIKA GEOFFREY TUMWINE=====APPLICANT

-VERSUS-

ATTORNEY GENERAL=====RESPONDENT

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI RULING

Introduction:

- [1] The Applicants filed this application by Notice of Motion under Articles 23(7), 24, 44(c), 29(2), 40(2) and 50(1) of the Constitution of the Republic of Uganda, Article 9(5) of the International Covenant on Civil and Political Rights, Section 33 of the Judicature Act, Rule 3(1) of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules and Order 52 Rule 1&2 of the Civil Procedure Rules. He sought for declarations that Respondent violated his right to liberty; his right not to be subjected to torture, cruel, inhuman and degrading treatment or punishment; his right to practice his profession and carry out lawful occupation; his right to an order of habeas corpus; and his right to enjoy the best attainable state of physical and mental health. In addition, the Applicant sought for general, punitive/aggravated damages and costs of this application.

Applicant's case:

- [2] The Applicant's case was set out in the Notice of Motion and in the affidavit of the Applicant in support of the application and in rejoinder to the affidavit in reply. In summary, the Applicant's case is that he was employed as an economist in the Ministry of Finance, Planning and Economic Development. On the 27th of March, 2017 while executing his official duties, unknown people clad in civilian clothes stormed his office, blindfolded him and whisked him off at gunpoint and detained at Nalufenya in Jinja up to the 7th April, 2017 when he was produced before the Anti – Corruption Division of the High Court at Kololo and charged with the offence of corruption. According to the Applicant, during his arrest, he was forcibly handcuffed, blindfolded, escorted out of office at gun point before his junior officers and bundled in a waiting vehicle that sped off at break neck speed despite the fact that he was not armed and did not put up any resistance. During his arrest and subsequent detention at Nalufenya, he was not told of the reason of his arrest and detention, he only came to know the reason of his arrest when he was arraigned in court. He was denied the right to liberty and free movement, he was not granted access to his lawyer or personal physician and he was not given a chance to give prompt notification of his arrest to his next of kin. While in detention, he was subjected to severe mental pain, anguish and psychological torture by closing him off from his lawyer, personal physician and next of kin cruel. He was denied the right to practice his profession and carry out lawful occupation and the right to an order of habeas corpus. According to the Applicant, during the hearing of his criminal case at the Anti – Corruption Division of the High Court, the prosecution's witness, Superintendent of Police, Mugumya Henry, during cross-examination admitted that he (the Applicant) was subjected to arbitrary detention at Nalufenya.

The Respondent's case:

- [3] The Respondent's case was set out in the affidavit of Ms Jackline Amusugut, a State Attorney in the Attorney General's Chambers. In summary, she denied that the rights complained about by the Applicant were infringed. She averred that the Applicant was lawfully arrested for a just cause, he was charged and convicted with the offence of corruption and sentenced. She further averred that the Applicant accessed his lawyers during the hearing of the criminal case.

Issues:

- [4] The issues for the determination of the court are;
- 1. Whether the Applicant's right personal liberty was violated.
 - 2. Whether the Applicant's freedom not to be subjected to torture, cruel, inhuman and degrading treatment or punishment was violated.

- 3. Whether the Applicant's right to practice his profession and carry out lawful occupation was violated.
- 4. Whether the Applicant's right to an order of habeas corpus was violated.
- 5. Whether the Respondent is vicariously liable for the acts of those who violated the Applicants rights.
- 6. What remedies are available to the parties.

Legal representation:

- [5] At the hearing, the Applicant was represented by Mr. Bafiriwala Elisha of Signum Advocates, while the Respondent was represented by Charity Nabasa. The court gave counsel directives to file written submission, which directive was duly complied with. I have given the submissions the requisite consideration in the course of resolving the above-mentioned issues.

Burden and standard of proof:

- [6] The burden of proof in civil matters lies upon the person who asserts or alleges. Any person who, wishes the court to believe the existence of any particular fact or desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. (*See: section 101, 102 and 103 of the Evidence Act Cap 6 of the laws of Uganda*). The opposite part can only be called to dispute or rebut what has been proved by the other party (*See: Sebuliba versus Co-operative Bank (1982) HCB 129*). The standard of proof required is on the balance of probabilities. In *Miller versus Minister of Pensions (1947) 2 ALL ER 372* Lord Denning stated;

"That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."

Consideration and determination of the court:

Issue 1: Whether the applicant's right to personal liberty was violated.

- [7] The right to personal liberty is guaranteed under Article 23 of the Constitution which provides, among others, that a person arrested must be informed immediately of the reason for his arrest. Where he or she is arrested and detained, he must be brought to court as soon as possible and in any case not later than 48 hours, his or her next of kin must be informed as soon as practicable, at his or her request, of the restriction or detention. His or her next of kin, lawyer and personal doctor to be allowed reasonable access to him or her.

[8] In the instant case, the Applicant deponed that he was arrested on the 27th of March, 2017 and detained at Nalufenya in Jinja up to the 7th April, 2017 when he was produced before the Anti – Corruption Division of the High Court at Kololo and charged with the offence of corruption. According to the Applicant, during his arrest and subsequent detention at Nalufenya, he was not told of the reason of his arrest and detention, he only came to know the reason of his arrest when he was arraigned in court. He was not granted access to his lawyer or personal physician and he was not given a chance to give prompt notification of his arrest to his next of kin. Respondents did not adduce any evidence to rebut the averment of the Applicant. Much as Ms Jackline Amusugut swore an affidavit in reply, she made no response to the allegation that the Applicant was in custody from the 27th of March, 2017 - 7th April, 2017 long beyond the 48-hour Constitutional requirement. She was not at scene and could not therefore depone positively on whether the Applicant was told of the reason of his arrest immediately after his arrest, whether he was granted access to his lawyer or personal physician or his next of kin was informed. The allegations of the Applicant in his affidavit was therefore unrebutted. It is a settled position of the law that where facts are sworn in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted by them (See: *Massa versus Acen (1978) HCB 297*). I find that the Applicant proved on the balance of probabilities that his right to liberty was violated by those who arrested and detained him.

Issue 2: Whether the Applicant's freedom not to be subjected to torture, cruel, inhuman and degrading treatment or punishment was violated.

[9] Article 24 of the Constitution guarantees the right not to be subjected to any form of torture or cruel, inhumane or degrading treatment. The Prevention and Prohibition of Torture Act, 2012 which is the Act of Parliament enacted to give effect to Articles 24 and 44(a) of the Constitution, in Section 2(1) it defines torture as follows:

(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—

- *(a) obtaining information or a confession from the person or any other person;*
- *(b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or*

(c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act."

[10] Section 2(3) of the Act provides that;

"Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule."

[11] In the 2nd schedule to the Act, mental or psychological torture includes:

(a) blindfolding;

(b) threatening the victim or his or her family with bodily harm, execution or other wrongful acts;

(c) confining a victim incommunicado, in a secret detention place or other form of detention;

(d) confining the victim in a solitary cell or in a cell put up in a public place;

(e) confining the victim in a solitary cell against his or her will or without prejudice to his or her security;

(f) prolonged interrogation of the victim so as to deny him or her normal length of sleep or rest;

(g) maltreating a member of the victim's family;

(h) witnessing the torture sessions by the victim's family or relatives; (i) denial of sleep or rest;

(j) shame infliction such as stripping the victim naked, parading the victim in a public place, shaving the head of the victim, or putting a mark on the body of the victim against his or her will;

[12] Section 7(2) states that;

"For the purposes of determining what amounts to cruel, inhuman or degrading treatment or punishment, the court or any other body considering the matter shall have regard to the definition of torture as set out in section 2 and the circumstances of the case."

[13] In the instant case, the Applicant deponed that during his arrest, he was forcibly handcuffed, blindfolded, escorted out of office at gun point before his junior officers and bundled in a waiting vehicle that sped off at break neck speed despite the fact that he was not unarmed and did not put up any resistance. He was subjected to severe mental pain, anguish and psychological torture by closing him off from his lawyer, personal physician and next of kin. Counsel for the Respondent argued that because the Applicant did not adduce medical evidence or documentation to prove that he was tortured, the court should disregard his allegations. The Court of Appeal in **Paul Wanyoto and another versus Sgt Ouma Joshua and Another* Court of Appeal Civil Appeal No. 91 of 2021* at page 14, held that:

*"The requirement for medical evidence to prove torture has no legal basis. It should be noted that it is rare to have direct evidence of torture because of the nature of the crime. Most of the torture cases are carried out in secret while the"

*victim is in detention making it difficult to obtain a medical report. The High Court of Kenya in *Jennifer Muthoni Njoroge v The Attorney General* (supra) was alive to these challenges. Lenaola J, upon reviewing the holding in *Azanian Peoples Organisation (AZAPO) and Others v President of The Republic of South Africa and others* (1996) ZACC 16 stated:*

11. The above holding is attractive to me because it addresses the difficulties that suspects have in bringing forth the usual evidential material expected of them in trials. When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses?

12. One James Opiyo has been named as the leader of the of the torture squad at Nyayo House at the material times. Would it be expected that the Petitioners should politely call Opiyo and ask him to call his juniors to testify of their actions? Obviously not..."

[14] The Court of Appeal further observed at page 15 that:

"[31] In the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/25/60 4th March 2014 by Juan E. Mendez at page 8 while discussing the burden of proof on the admissibility of material obtained by torture in courts, it was stated:

In this context, it is necessary to have due regard for the special difficulties in proving allegations of torture, which is often practiced in secret, by experienced interrogators who are skilled at ensuring that no visible signs are left on the victim. In addition, all too frequently those who are charged with ensuring that torture or other ill-treatment does not occur are complicit in its concealment."

[15] I find that the fact that the Applicant was blindfolded and kept incommunicado (denied communication with his next of kin, lawyer and doctor) amounts to mental and psychological torture. I am however unable to find that the manner of the arrest of the Applicant constituted cruel and inhumane treatment. To qualify as cruel or inhuman treatment, an act must cause suffering of a serious nature. It must go beyond mere degradation or humiliation.

Issue 3: Whether the Applicant's right to practice his profession and carry out lawful occupation was violated.

[16] Article 40(2) of the constitution provides that every person has the right to practice his or her own profession and to carry on any lawful occupation, trade or business. Counsel for the Applicant argued that the Applicant's unlawful arrest and detention prevented him from carrying on his lawful occupation. Counsel for the Applicant relied on the case of **David Martin Nyende versus Institute of Certified Public Accountants of Uganda, HCMC No. 033 of 2014.** I am not persuaded by the argument of counsel for the Applicant. In my view, the case of **David Martin Nyende** was cited out of context. In that case, the applicant had been denied a practicing certificate necessary for him to practice his profession. In the instant

case, the Applicant was arrested for having committed an offence. Secondly, even if the Applicant had not been kept in detention for more than 48 hours, he would not have continued to practice his occupation. He would have been presented to court, convicted and sentenced. My finding therefore is that the Applicant failed to prove that his right to practice his profession and carry out lawful occupation was violated.

Issue 4: Whether the Applicant's right to an order of habeas corpus was violated.

[17] Article 23(9) provides that the right of an order of habeas corpus shall be inviolable and shall not be suspended. Article 44(d) the Constitution provides that there shall be no derogation from the right to an order of habeas corpus. In the instant case, the Applicant failed to prove how his right to apply for habeas corpus was violated. Under Section 34 the Judicature Act, Cap 13 and The Judicature (Habeas Corpus) Rules, S1 13-6, the application could have been made on his behalf.

Issue 5: Whether the Respondent is vicariously liable for the acts of those who violated the Applicants rights.

[18] The Applicant deponed that he was arrested by unknown people who, according to him, were State operatives. He was detained at Nalufenya. He adduced the record of proceedings of the criminal trial at the Anti – Corruption Division of the High Court where the prosecution's witness, Superintendent of Police, Mugumya Henry narrated how on the 27th March 2017 he arrested the Applicant together with other 5 police officers. The arrest was upon a complaint that the Applicant, together with others, solicited for a bribe of USD 300,000 from a Chinese company. The matter had already been reported to the President of the Republic of Uganda and the complainants were advised to report the matter to police. Upon arrest of the Applicant, he was taken to Nalufenya where he was detained. From the said record of proceedings, it is very clear that Superintendent of Police, Mugumya Henry and the other police officers were in course of their employment when they arrested and detained the Applicant. This makes the Respondent liable for their actions (See: *Muwonge versus Attorney General [1967] EA 17*).

[19] The above legal position notwithstanding, Article 23(7) of the Constitution provides that:

"(7) A person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority."* Underlined for emphasis.

[20] In addition, Section 10 Human Rights (Enforcement) Act, 2019 provides for personal liability of public officers for violation of human rights. It provides that:

"*10. Personal liability for infringement of rights and freedoms (1) A public officer who, individually or in association with others, violates or participates in the violation of a person's rights or freedoms shall be held* *personally liable for the violation notwithstanding the state being vicariously liable for his or her actions."*

- [21] Therefore, much as the Respondent is vicarious liable for the actions of the police officers, the police officers are also personally liable for violating the Applicant's rights. Unfortunately, the Applicant did not join the police officers as parties to this application.

Issue 5: What remedies are available to the parties.

- [22] As I have already stated in paragraph 19 above, article 23(7) gives the right to any person who has been unlawfully arrested, restricted or detained by any other person or authority to claim compensation. Article 50(1) of the Constitution also gives the right to any person who claims that his fundamental right or other rights or freedoms guaranteed under the constitution has been infringed or threatened to apply to a competent court for redress which may include compensation.
- [23] In this application, the Applicant sought for general, punitive/aggravated damages and costs of this application. The position of the law is that damages are awarded at the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission (See **James Fredrick Nsubuga v. Attorney General*, H. C. C. S No. 13 of 1993*). The objective of awarding damages is that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had he or she not suffered the wrong (See **Charles Acire v. Myaana Engola*, H. C. C. S No. 143 of 1993; *Kibimba Rice Ltd. v. Umar Salim*, S. C. C. A. No.17 of 1992*). In assessing the quantum of damages, courts are mainly guided, **inter alia,** by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach (See **Uganda Commercial Bank v. Kigozi* [2002] 1 EA. 305*).
- [24] General damages are a monetary recovery in a lawsuit for injuries suffered such as pain, suffering, inability to perform certain functions for which there is no exact value which can be calculated. These damages are traceable to and are the probable and necessary result of the injury complained of or which are presumed by or implied in law to have resulted therefrom (See **Bagenda Dyabe Tommy versus Pioneer Easy Bus Limited* HCCS No. 36 of 2016*).
- [25] Exemplary/punitive damages are requested for and awarded when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. The rationale is not to enrich the plaintiff, but to punish the defendant and deter him or her from repeating similar conduct (See **Dorothy Tuma v. Elizabeth Muller & Anor* C. S No. 229 of 2011)*. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal (See **Obongo v. Municipal Council of Kisumu* [1971] EA 91)*. All circumstances of the case must be taken into account, including the behavior of the plaintiff and whether the defendant had been provoked. (*See *O'Connor v. Hewston* [1979] Crim. LR 46 CA; *Archer Brown* [1985] QB 401.*

[26] Counsel for the Applicant prayed that the Applicant should be awarded general damages of UGX 500,000,000/= and aggravated damages of UGX 300,000,000/=. On general damages, I note that the Applicant was unlawfully detained for 10 days outside the constitutional 48 hours. During his detention, he was not granted access to his lawyer or personal physician or next of kin. I consider that an award of UGX 30,000,000/= (Uganda Shillings Thirty Million) as general damages. I do not consider that the circumstances of this case warrant an award of exemplary damages.

[27] In the end, the following orders are hereby made.

- 1. A declaration that the agents of the Respondents violated the Applicant's rights to liberty and the right not to be subjected to torture.
- 2. The Respondents to pay the Applicant general damages of UGX 30,000,000/= (Uganda Shillings Thirty Million).
- 3. The general damages shall attract interest at the court rate from the date of this ruling till payment in full.
- 4. The Respondent to bear the costs of this application.

I so order.

Dated and delivered by email this 22nd day of September 2023

Phillip Odoki JUDGE.

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