

UGANDA / JUDGMENT

Wanyoto and Another v Sgt Oumo and Another (Miscellaneous Application No. 26 of 2020) [2021] UGHACD 14 (10 February 2021)

[2021] UGHACD 14

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Gidudu, J

CASE / FILE NUMBER

Miscellaneous Application No. 26 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA ANTI-CORRUPTION
DIVISION HOLDEN AT KOLOLO MISC. APPL 26 AND 31 OF 2020 (Arising from
criminal case 75 of 2019) 1 . PAUL WANYOTO MUGOYA

2. MUGISHA PATRICK Alias KANTU

VRS

1. SGT. OUMO JUSHUA 10

\$5\$

... RESPONDENTS. 2. ATTORNEY GENERAL

BEFORE: GIDUDU, J**RULING.**

- The two applicants filed miscellaneous applications 26 and 31 of 2020 under the 15 provisions of The Human Rights Enforcement Act, 2019 and the Rules made there under (SI 2019 No 31) seeking various declarations and orders. I decided to consolidate the two applications for convenience since the two originated from the same **criminal case 75 of 2019** and are seeking essentially the same reliefs based on the same grounds and facts. 20
- The 1st applicant is A7 in criminal case 75 of 2019 whilst the 2nd applicant is A4. The two together with 7 others are charged with various crimes such as obtaining money by false pretence, cheating and money laundering. They are accused of defrauding one **Ssuuna Dauda** of a total of \$1,270,000,000\$ = by false pretence.

- The two applicants, specifically moved court under Section 11 (2) of the Human Rights (Enforcement) Act, 2019 seeking the court to stop the trial, declare it a nullity and acquit them because of the violation of the non derogable rights of A4, Mugisha Patrick alias Kantu Allan. The court stayed the criminal case to determine the allegations contained in the motions, the accompanying affidavits and annexures. 30

The background according to the summary of the case, is that between April and July 2016, A1 to A6 defrauded one Ssuuna Dauda, a businessman of a total of UGX. 1,270,000,000/= which they obtained in various instalments by purporting to help A2 to get his UGX. 18,500,000,000/= which was in DFCU Bank frozen

by Bank of Uganda. This money (1.27 billion) was to cover bribes to officials in the Bank of Uganda to unfreeze the money which A2 claimed to be his benefit compensation from UNRA.

The second applicant, A4 Mugisha Patrick alias Allan Kantu in his affidavit sworn on 24th July 2020, deposed that he was detained and subjected to torture by the 1st respondent. Torture was administered by insensitively or punishing blows between fingers and tightly tied together with rubber bands to inflict serious pain in act known

'The torture was intended to compel the 2nd applicant to confess to crimes he did not commit and that because of this torture, he was forced to sell his land comprised in Busiro Block 312 Plot E: U land at Kalambilo raise money which the 1st respondent was demanding.

On the other hand, the 1st applicant, Wanyoto Prul Mugoya (A7) deposed in his affidavit of 3rd July 2020 that he was approached by one Hassan Miryrb., ^a police officer who introduced him to the 1st respondent. They handed him ^a duplicate certificate of title for land comprised in Busiro Block 312 Plot 8, 11 claiming that the registered owner one Allan Kantu who was in police custody wanted a quick buyer so he could solve his problems. The land was offered at ^a good price due to the urgency, A4 needs.

In another affidavit sworn by Katende Isaac, it was stated that he was a former flying squad operative detailed by Paul Wanyoto to set up a conversation involving the 1st respondent to confirm torture of A4 by the police.

In a supplementary affidavit sworn on 6th July 2020 by Emuye Francis, an ICT Forensic Consultant, he stated that he was conversant with an audio recording from a Sony Voice Recorder ICD-PX470 1155831 on which he carried out digital

forensic examination. He stated in his report that he imaged the recording and concluded that the Paul Wanyoto was known to the 1st respondent and that the charges against him were maliciously preferred after the deal to share money went bad. He also stated that according to him there was hire of suspects.

The 1st respondent in his affidavit sworn on 29th July, 2020 denied all the averments in the applications and stated that he was not the one who arrested A4 Mugisha Patrick. He denied torturing A4 or witnessing torture by other police officers. He deponed that what is contained in the application is tainted with material falsehoods. He denied participating in a conversation contained in the audio recording. It was his evidence that his voice was fabricated to taint his name and image.

Mr Jude Byamukama appeared for the applicants whilst the 1st respondent appeared in person. The 2nd respondent opted out by conduct.

Learned counsel for the applicants in his submissions essentially repeated what the 10 applicants and their witnesses had deponed in the affidavits. In the same vein the 1st respondent repeated what is contained in his numerous affidavits responding to the allegations against him.

Issues 15

- 1. Whether the 2nd applicant Mugisha Patrick alias Kantu Allan was tortured?
- 2. If so, whether such torture violated his non derogable rights so as to render the trial a nullity under Section 11(2) of the Human Rights (Enforcement) Act, 2019

Was the 2nd applicant, Mugisha Patrick alias Kantu Allan tortured? 20

Fundamental, other rights and freedoms are enforceable under section 3 of the Human Rights (Enforcement) Act, 2019 The victim, any person or organisation have locus standi to apply for redress. The two applicants are therefore properly before court.

Enforcement of human rights and freedoms 25

- (1) In accordance with article 50 of the Constitution, a person or organisation who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened may, without prejudice to any other action with respect to the same matter that is lawfully available, apply for redress to a competent court 30

in accordance with this Act.

The complaint here is that the 2nd applicant was tortured physically by inserting sticks between his fingers and pressing them to exact serious pain. Further, it is alleged by the 2nd applicant that he was held for about 30 days in police cells before he was taken to court.

Implicit in these allegations is that A4's right to *freedom from torture and cruel*, *inhuman or degrading treatment or punishment* was violated by the infliction of pain and incarceration in custody beyond 48 hours. These rights are inviolable and protected under Article 44 of the Constitution as shown below.

44. Prohibition of derogation from particular human rights and 10 freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

(a) freedom from torture and cruel, inhuman or degrading treatment

or punishment; 15

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

(d) the right to an order of habeas corpus

If proved, the court would have to apply the provisions of **section 11(2)** of the Human Rights (Enforcement) Act, 2019. The effect of which is to declare the 20 trial a nullity and acquit the accused persons. The provisions applicable are cited below.

11. Derogation from non-derogable rights and freedoms

(1) It is an offence for a person to derogate from a non-derogable

right and freedom guaranteed under the Constitution. 25

(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.

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It was submitted for the applicants that as a result of torture and long detention, Mugisha Patrick the 2nd applicant was forced to sell his land, to A7. It was submitted that torture is a **non derogable right** and as such the applicant should be unconditionally set free under Section 11(2) of the Human Rights (Enforcement) Act.

Further, it was submitted that in view of the provisions of section 11(2) of the **Human Rights Enforcement Act**, the charges against Mugisha Patrick cannot stand and that since Wanyoto's charges arise from the circumstances of **torture** of Mugisha Patrick, charges against him must collapse.

The 1st respondent denied allegations of torture and contended that he did not arrest the 2nd applicant. He denied sourcing the 1st applicant to buy land from the 2nd applicant. He also denied being in the recorded conversation with one Katende Isaac and Hassan, wherein he plotted to charge the 1st applicant out of malice.

He attributed the arrest of the 2nd applicant to ASP Nuwahereza Hillary on 4th August 2018 and contends that this application is intended to evade trial.

Fundamental rights and freedoms of the individual provided for under Article 20 of the Constitution are inherent and not granted by the state. They are required to be respected, upheld and promoted by all organs and agencies of government and all persons.

Article 24 of the Constitution guarantees freedom from torture, cruel, inhuman or 25 degrading treatment or punishment. This guarantee is absolute and prohibitory under Article 44 (a) of the Constitution.

The Prevention and Prohibition of Torture Act 2012, defines torture in Section 2 as any act or omission by which severe pain or suffering whether physical or mental is intentionally inflicted on any person for the purpose of obtaining information or confession or 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 etc.

Section 3 of the Prevention and Prohibition of Torture Act, 2012 provides for prohibition of torture and the enjoyment of the right to freedom from torture shall be non derogable.

The 2nd applicant contends that physical pain was inflicted upon him so as to obtain money from him in exchange of his freedom. As a result, he was forced to sell his property to the 1st applicant at a giveaway price. After his release on bail, he contends that he approached the 1st applicant for a fair price and after reaching an agreement and reselling the property, the 1st respondent who was actuated by malice wanted a share of the extra money. After failing to get more money the 1st respondent chose to treat the 1st applicant as a criminal yet he (1st respondent) had acted as a broker for the sale of the property.

The burden of proof lies upon the applicants to prove allegations of torture. For a 15 court to apply the provisions of section 11(2) of the Human Rights (Enforcement) Act, 2019, there should be credible, believable, verifiable and proven evidence that a person's non derogable rights and freedoms have been infringed upon. It is a serious matter to declare a trial a nullity and acquit the accused. In a way the court should be satisfied that on the evidence adduced, 20 fundamental Rights and freedoms that are non derogable have been violated or infringed.

The 2nd applicant, Mugisha Patrick, alleges that he was subjected to torture by inserting sticks between his fingers and tying them together to inflict pain in an act known as "baibbuli"

Severe pain or suffering is defined in section 2 of the Prevention and Prohibition of Torture Act, 2012 as prolonged harm caused by or resulting in intentional or threatened infliction of physical pain or suffering.

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It was incumbent upon the 2nd applicant, A4, to adduce medical or physical evidence to demonstrate the effect the alleged torture had on his hands or his mental condition. No medical assessment or report was filed for my benefit. An applicant cannot just allege torture and ask court to find in his or her favour. There should be physical, mental or psychological injury capable of medical assessment to satisfy the court that there was torture.

Indeed, if torture is proved to the satisfaction of court, the court would be compelled to offer compensation and order the prosecution of the offender. See sections 9(3) and 11(3) of the Human Rights (Enforcement) Act, 2019.

I was asked to consider evidence of the audio recording contained in annexures \$5\$ "C" and "D" to the affidavit of the 1st applicant to confirm torture and malice in this case. Emuye Francis, an ICT Freelance Consultant by profession stated that he carried out a digital forensic examination of the recording. He made a report which is annexure "D" wherein he reported that he imaged the recording and concluded that the Paul Wanyoto was known to the 1st respondent and that the charges against Wanyoto Paul were maliciously preferred after the deal to share money went bad and that there was torture of suspects.

The 1st respondent denied the voice in the audio recording attributed to him. He argued that the participant in the audio was imitating his voice. He insisted that he was not a participant in the conversation and insisted that the application is full of lies and should be dismissed.

The audio was played in court. It runs for 26 minutes. It is a casual conversation between people familiar with each other. The subject of discussion is a strategy to fix the 1st applicant by slapping charges against him to pay back for a deal gone bad. A voice attributed to the 1st respondent boasts about using his office and relationship with the prosecutors to slap charges against the 1st applicant (Wanyoto) as an act of malice. The speaker boasts of his trickery to embarrass the 1st applicant in his profession as

a lawyer. It shows how well the speaker knows the 1st applicant's strengths and weaknesses.

- The audio evidence focuses on the property bought by the 1st applicant. It also 25 reveals malice towards the 1st applicant (Wanyoto). However, it does not reveal evidence of torture of the 2nd applicant (A4). A voice attributed to the 1st respondent avoids talking about torture of the 2nd applicant every time he is prompted to do so.
- I have had sufficient opportunity to listen and hear the 1st respondent speak in court 30 in his submissions opposing the application. I have also listened to the audio recording which runs for 26 minutes. The audio speaks about matters relating to the charges preferred in **criminal case 75 of 2019**. It dwells on matters canvassed

in this application regarding the property that the 1st applicant bought from the 2nd

My conclusion is that the voice in the audio is that of Sgt Oumo, the 1st respondent. There is no doubt about that. All circumstances irresistibly point to the 1st respondent as a protagonist in the audio. What he promised to do in the audio happened. This is no coincidence. I believe the audio recording was genuine. The 1st respondent's denials that he was not the one recorded cannot be true. He was put on the spot in the audio. It was his true soprano voice - a type of classical female singing voice. It was consistent with his free speech. There was no attempt to imitate his voice for the entire 26 minutes. 26 minutes were long enough for the

court to assess that there was no imitation of Sgt Oumo's soprano voice. He was

The evidence presented through the audio recording falls short of corroborating the torture allegations put forward by the applicants. On the contrary it shows that the charges preferred against the 1st applicant are an alien thought actuated by malice. It revealed the underworld of some investigators in manufacturing evidence against people they disagree with.

In conclusion, the evidence produced in court, consisting of affidavits, annexures and an audio recording does not prove allegations of torture inflicted on A4, O Mugisha Patrick. The applicants cannot invoke the provisions of section 14(2) of the Human Rights (Enforcement) Act, 2019 to nullify the trial. I have not been persuaded to nullify the trial on the basis of evidence adduced. Most arrests invariably involve discomfort to the suspects but such accused should demonstrate to court that their non derogable rights have been trampled upon and it would be unfair to stand by. I resolve the first issue in the negative.

This issue resolves the second issue. there was no sufficient proof of torture tendered to cause the acquittal of the Accused persons.

But before I take leave of this matter, I would like to express my concern about the manner in which investigators deal with cases involving money and exhibits before deciding to charge suspects in court. There is strong evidence to prove that charges against the applicant were slapped upon him in bad faith. I am satisfied that the respondent, Sgt Ouno has abused his mandate as an investigator to cause charges to be preferred against a bulk of properly where he was a broker. He brokered deals to dispose of exhibits and turned around to seek the arrest of one of

If the applicant had brought this application under the provisions of the Judicature Act and cited the DPP as respondent, he could have obtained an appropriate remedy which I cannot grant now because I have not heard the DPP in reply.

- There is no point in departing from the original charges of obtaining money by false pretence. This application has exposed the criminality that goes on behind the scenes before some people are charged in court. The DPP has discretion to decide on who to charge in court but malice or bad faith should never be part of that
- The office of the DPP should be above petty machinations by its investigators ^d should supervise them instead of being influenced by them as Sgt. Ouno boasted in the audio recording. A. This would ensure that trials are held speedily unlike in the current case where the main trial has stalled just because Sgt Ouma has influenced the addition of his "enemies" to the case. It is a big shame.
- The application fails. No order as to costs. The DPP should focus on the trial of persons that are alleged to have defrauded Ssruna Dauda of his money. The fights investigators such as Sgt Oumo are having with people he meets as he sells off exhibits is compromising the integrity or the dignity.

JTIDGE,

10 February, 2021

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