THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. CAUSE NO. 143 OF 2019

NANA ANNETTE NAMATA :: APPLICANT

VERSUS

1. **ATTORNEY GENERAL**
2. **IRAN- UGANDA HOSPITAL :: RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

BACKGROUND

The applicant filed this application seeking for the enforcement of rights under Article 50(1) and (2) of the Constitution and Rule 3 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules 2008 seeking orders/ declarations that:

1) The actions of the officers of the Uganda Police Force against the applicant, to wit, brutally manhandling her, mercilessly beating her up, pepper-spaying her, violently and ignominiously trying to induce her to give birth prematurely, at the headquarters of the Uganda Police Force in Naguru on the 24th of April, 2019, amount to torture, and cruel, inhuman and degrading treatment or punishment.
2) That the impugned actions of the police officers highlighted in paragraph 1 above and elsewhere herein, infringed on the applicant's fundamental rights and freedoms, as well as her special rights as a woman protected by

Articles 20 (2), 21 (2), 22, 24, 27, 29, 33 (1), 33 (3), 38, 39, 43 (1) and 44 (a) of the Constitution.

3) A declaration that the acts and/or omissions of the 2nd respondent's medical staff of forcefully administering medical treatment and conducting medical tests upon the applicant without her consent was unlawful, a violation of medical ethics, a violation of the applicant's right to bodily integrity and an infringement on her rights to dignity and privacy, contrary to Articles 24 and 27 of the Constitution.
4) A declaration that the 2nd respondent deliberately or negligently failed to provide a proper or accurate diagnosis of the applicant's medical condition at the time of admission and declined referral to another medical facility.
5) A declaration that the acts and/or omissions of the 2nd respondent's medical staff complained of above are tantamount to medical negligence and/ or professional misconduct, 3rd and 4th respondents herein enshrined in Art. 23(4) (b), 39, Art 43 (2) (b), Art 26, Art 27 (2), Art. 33 (3), Art 39, Art 43 (2) (b), Art 44(a) and (c) of the Constitution
6) An order directing the 1st respondent to investigate, discipline and immediately disclose to the applicant any and all relevant identification details of each police officer that participated in the impugned attack on the applicant within three (3) months from this Honorable court's ruling.
7) An order directing the 1st respondent to pay and/ or reimburse all past and future medical expenses incurred by or on behalf of the applicant in treatment of any and all medical conditions she is suffering or which she

and/or her baby will suffer as a result of UPF's brutal actions highlighted in para. 1 (above).

8) An order directing the respondents, jointly and/ or severally, to compensate the applicant with special, general, aggravated and punitive damages for the injury caused to her by their impugned conduct and/ or omissions.
9) Costs of the application.

The applicant alleges that on the 24th April 2019, a group of female police officers attacked her while she was seven months pregnant as she held a peaceful sit in protest inside her motor vehicle stationed at the main entrance to the Uganda Police Forces Headquarters in Naguru. The said officers proceeded to violently manhandle, undress, beat up, kick in the stomach, teargas, pepper spray and insert their hands into the applicant's private parts all the while sarcastically ordering her to give birth. They thereafter held her by her arms and legs, dragged her out of her car into the gate, and then callously tossed her from midair onto the ground. When the applicant started vomiting as a result of tossing, one of the police officers got water, poured it into the applicant's mouth and forced her to swallow her vomit. She lost consciousness thereafter and was later admitted to the 2nd respondent hospital.

The applicant alleges that she pleaded with the 2nd respondent's Dr. Kato Edward not to administer any medication but instead transfer her to a private hospital of her choice for health and security reasons. However Dr. Kato rejected this request. That the applicant was later transferred from the 2nd respondent to a private hospital where it was learnt that the 2nd respondent's staff deliberately

and/ or negligently failed to provide a proper or accurate diagnosis of her medical condition during the time she was admitted at the 2nd respondent thereby exposing her and her unborn child to severe and potentially life threatening medical risks contrary to her constitutional rights.

The applicant was represented by *Mr. Gawaya Teggule* whereas the 1st respondent was represented by *Mr. Moses Mugisha(SA)* and the 2nd respondent by Ms. *Namwanje Justine*

At scheduling, the parties proposed the following issues for determination by this court;

1. ***Whether the instant application is properly before this court.***
2. ***Whether the applicant was actually assaulted and tortured by the Uganda Police Force.***
3. ***Whether the handling of the applicant by the 2nd respondent amounted to the violation of her rights.***
4. ***Whether the applicant is entitled to any of the prayers sought.***
5. ***What remedies are available to the parties?***

Order 15, Rule 5 of the Civil Procedure Rules SI.71-1 gives this court the power to amend and strike out issues at any time before passing a decree as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the interest of adequate discussion of the legal issues at hand, the court rephrases the issues for determination to reflect as;

1. ***Whether the fundamental rights and freedoms of the applicant were infringed upon by the 1st respondent.***

2. ***Whether the 2nd respondent violated the applicant's rights under Articles 22, 24, 33 and 44 of the Constitution of Uganda.***
3. ***What remedies are available to the parties?***

The parties were ordered to file written submissions; and the parties accordingly filed the same.

All parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the fundamental rights and freedoms of the applicant were infringed upon by the 1st respondent.

Counsel for the applicant submitted that the applicant in her affidavit in support under para 2 and 3 states that she arrived at the 1st respondent's gate on an appointment that she had made the previous day. She was blocked by heavily armed officers of the 1st respondent who rudely told her to wait as confirmed by the additional affidavit in reply of the 1st respondent sworn by Obol Hellen under para. 5 and 6. That paragraph 4, 5 and 6 of the applicant's affidavit in support states how the applicant was violently descended upon by the 1st respondent's agents; assaulted and tortured. The applicant stated that she was teargased and pepper sprayed, pulled apart as it they wanted to dismember her body or tear her apart, slapped, punched and beaten up inside the car, stripped naked by removing shorts and under garments. The applicant in para 8 of the affidavit in support to the applicant stated that she felt severe pain all over her body as a result of the assault and torture and exhibited photos of her taken at

that time showing the dark skin around her neck and bruises on her legs and thighs occasioned by the assault and torture.

Counsel for the applicant submitted that the 1st respondent's additional affidavit in reply by Obol Hellen at para 8 to 12 confirms the incidence of the violence. He submitted that why a pregnant woman would be violent if she had locked her own vehicle and was alone unless she had been assaulted by the police officers deployed.

Counsel submitted that the respondent's agents attacked the applicant and assaulted and tortures her with full knowledge of exactly what they were doing.

The applicant submitted that in her rejoinder under para. 15 of the 1st respondents' affidavit in reply, she challenged the 1st respondent to produce the CCTV footage to confirm that "reasonable force "was used.

Counsel further submitted that the 1st respondent made no attempt to challenge the medical reports exhibited by the applicant under para 17 of the supplementary affidavit in support showing the bodily and mental injury that was suffered by the applicant and that this could only meant that their authenticity is entrenched.

The applicant had to attend several medical facilities both in Uganda and Kenya. Counsel argued that people against whom reasonable force was used do not normally end up delivering premature babies, losing their uterus and being unable to walk. It was clear manifest violation of rights of the applicant was occasioned.

The 1st respondent submitted that the 1st respondent did not make any admission on any of the contents of the applicant's allegations. Counsel submitted that Article 24 of the Constitution provides that no person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. He also defined torture under section 2 of the Prevention and Prohibition of Torture Act, 2012 and assault under the Black's Law Dictionary 8th Edition.

Counsel relied on *Felix Cuthbert Esoko & 3 Ors V A.G and Ors Misc. Cause No. 42 of 2019* where court held that for a violation to amount to torture, not only must there be a certain severity in pain and suffering, but the treatment must also intentionally inflicted for the prohibited purpose. Counsel also quoted *Ireland v United Kingdom ECHR Application No.5310/17* where court explained the distinction between torture and inhuman or degrading treatment lies in the difference in the intensity of suffering inflicted. In deciding whether certain treatment amounts to torture, the court takes into account factors of each individual case, such as the duration of treatment, its physical and mental effects and age, sex, health and vulnerability of the victim.

He stated that courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading.

Counsel quoted section 5 of the Evidence Act, Cap 60 that stated that in civil cases the fact that the character of any person concerned in such as to render probable or improbable any conduct imputed to him or her is irrelevant except in so far as that character appears from the facts.

He further stated that section 5 (1) of the Public Order Management Act, provides that an organizer shall give notice in writing signed by the organizer or his or her agent to the authorised officer of the intention to hold a public meeting at least three days but not more than fifteen days before the proposed dare of public meeting.

Counsel stated that the applicant in her affidavits does not adduce any evidence to show that she and her other people gave notice in writing to the authorised officer at least three days before her intended demonstration. Helen Obol SSP in para. 7 of her affidavit in reply to the application stated that the applicant without notice in writing went to the Uganda Police Headquarters to notify the Inspector General of Police about her intention to protest. It was also stated that in para. 9, 10, and 11 of the affidavit that the applicant who was pregnant was very hostile to the police officers as corroborated by Dr. Kato Edward in para. 5 of his affidavit stating that the applicant appeared not in sound state when she was delivered.

The respondent submitted that from a scan, it was discovered that the applicant had previous four caesarian sections which caused pain and that the medical report showed that she was in good health and did not state that the applicant was bruised or had difficulty in breathing.

Counsel therefore prayed that this court applies a very strict test when considering the applicant's right to freedom from torture or inhuman or degrading treatment and find that the applicant was neither tortured nor assaulted by the respondent as alleged.

Determination

Article 44(a) of The Constitution of The Republic of Uganda provides;

"*Notwithstanding anything in this constitution, there shall be no derogation from enjoyment the following rights and freedoms-*

(a)Freedom from torture and cruel, inhuman or degrading treatment or punishment."

Freedom from torture is a non-derogable right under our Constitution. Uganda is also a signatory to African Charter on Human and Peoples' Rights, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as treaties on the prevention and punishment of torture and other forms of cruel, inhuman or degrading treatment or punishment. The prohibition against torture is a bedrock principle of international law.

Section 2 of the Prevention And Prohibition of Torture Act, 2012 defines torture to *mean 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;*

i) *obtaining information or a confession from the person or any other person;*
ii) *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*
iii) *Intimidating or coercing the person or any other person to do, or to refrain from doing, any act.*

For an act to amount to torture, not only must there be a certain severity in pain and suffering, but the treatment must also be intentionally inflicted for the prohibited purpose.

Freedom from torture is one of the most universally recognized human rights. Torture is considered so barbaric and incompatible with civilized society that it cannot be tolerated. Torturers are seen as the 'enemy of mankind'. The ban on torture is found in a number of international treaties, including **Article 2 of the United Nations Convention against Torture** and **Article 3 of the Human Rights Convention and Article 5 of the Universal Declaration of Human Rights** and **Article 5 of the African Charter on Human and People's Rights.**

In ***Ireland vs United Kingdom ECHR Application No.5310/71,*** *court explained the distinction between Torture and inhuman or degrading treatment lies in the difference in the intensity of suffering inflicted. In deciding whether certain treatment amounts to torture, the court takes into account factors of each individual case, such as the duration of treatment, its physical and mental effects, and age, sex, health, and vulnerability of the victim.*

The courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading treatment. Only the worst examples are likely to satisfy the test. There are no exceptional circumstances whatsoever to justify torture.

I have analyzed the evidence before this court and the submissions of counsel in regard to this issue.

The respondent's counsel conceded that the applicant was restricted from accessing the Uganda Police Headquarters upon which she parked her vehicle a Toyota, Noah and locked herself therein. He stated that it was corroborated by the 1st respondent's witnesses Helen Obol and Musani Micheal Sabila in paragraphs 7 and 8 of their affidavits. He further submitted that the applicant appeared not to be in sound state when she was delivered by the police officers to Dr. Edward Kato.

It is hard to believe that the applicant self-inflicted the bruises upon herself to the state of losing consciousness or appear to not be in a sound state at the time she was delivered to the 2nd respondent because of her hostility towards the police officers. The 1st respondent has not denied that the applicant was at its headquarters nor had it made any explanations as to how the applicant left her car and ended up at the 2nd respondent for medical treatment or check up at the time she was delivered by the officers.

Further, the 1st respondent did not controvert the fact the applicant lost consciousness upon being assaulted by the police officers before they took her to the 2nd respondent. The 1st respondent only states that the applicant went to the headquarters without a notice in writing to notify the Inspector General of Police's office about her intention to protest. This does not qualify to treating the applicant in such a way as she was treated by the officers. The annextures attached to the 1st respondent's affidavits in reply do not represent the facts as stated by both parties since the applicant is said to have been pregnant at the time of the incident and not carrying a child as represented therein.

I have considered all the evidence before court and I'm therefore inclined to believe the evidence of the applicant as to being violently handled by the 1st respondent's officers to a point that she had to lose consciousness leading to her admission to the 2nd respondent for medical attention. The mere statements made by the 1st respondent were not satisfactory to this court.

Much as the evidence suggests that the applicant was violently handled by the 1 respondent's officers, this court is alive to the fact that courts should apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman or degrading treatment. Only the worst examples are likely to satisfy the test.

It must be emphasized that the right to personal liberty is available to law abiding persons to do what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person and it must be matched with social security i.e peace and good order of the community in which we live. Therefore any breach of the law that violates other peoples rights and violates peace of community shall give court a narrow interpretation of violation of personal liberty.

In the circumstances before this court, the applicant was therefore inhumanly treated violating her constitutional rights under Article 20(2) and 24. I however did not find any violation of the applicants' freedom from torture and cruel and rights of women under Articles 26, 27 (2), 33 (3), 39, 43 (2) (b) and 44 of the Constitution.

Issue 2

Whether the 2nd respondent violated the applicant's rights under Articles 22, 24, 33 and 44 of the Constitution of Uganda.

As for the violation of rights by the 2nd respondent, the applicant submitted that she demanded the 2nd respondent that no medical treatment should be administered to her and that she should be referred immediately to a hospital of her choice. She submits that she was subjected to intrusive medical treatment against her will by the 2nd respondent despite expressly forbidding them to do so. Counsel quotes the learned author ***Professor Ben Twinomugisha in Fundamentals of Health Law in Uganda at pg. 199*** on the requirement of obtaining the patient's consent. It was submitted that the applicant had full decisional capacity and was aware of the dangers of surrendering herself to the doctors who are either policemen or under the control of the Uganda Police Force, whose officers had tortured her. Counsel stated that a responsible medical practitioner has a duty to respect the patient's wishes as anything done from then on is illegal. He stated that the 2nd respondent was in breach of his duty to the patient and went out of his way by disobeying the patient's instructions and consent which amounted to violation of the applicant's right to privacy and bodily integrity.

The applicant therefore submitted that there was breach of the Code of Ethics and negligence occasioned to the applicant.

The 2nd respondent that defined negligence to mean the omission to do something which a reasonable man would not do ***(see Blyth v Birmingham Water Works Co. 11 Ex. 784)***. Counsel submitted that the principles regarding

medical negligence are well settled that a doctor can be held guilty of medical negligence only when he falls short of this standard of reasonable medical care. He stated that a doctor cannot be found merely because in a matter of opinion, he made an error of judgement.

According to the 2nd respondent's affidavit in reply under para. 12, the 2nd respondent stated that it was never at any time negligent as proper emergency treatment was given to the applicant'

Counsel submitted that for negligence to arise, there must have been a breach of duty which must have been direct or proximate cause of the loss, injury or damage.**(see: Sarah Watsemwa Goseltine & Anor (through Sarah Watsemwa Goselltine) v A.G HCCS No. 675 of 2006)** he stated that to show deviation from duty, one must prove that; it was usual and normal practice, that the health worker has not adopted that practice and that the health worker instead adopted a practice that no professional or ordinary skilled person would take.

Counsel submitted that the medical records attached to the applicant's affidavit as annextures D show similar treatment and diagnosis as the 2nd respondent's report. It was submitted that 2nd respondent was never at any time negligent as stated in para. 12 of the affidavit in reply as proper emergency treatment was given this the usual and normal practice done and never deviated from.it was further submitted that the applicant was admitted with complaint of pain in the thighs and the necessary prescribed drugs were administered to relieve pain. Counsel therefore submitted that the diagnosis of the 2nd respondent is the same

as that of Kampala Independent Hospital and St. Franscis Hospital Nsambya and that there was no deviation from normal and usual practice.

Counsel therefore submitted that the applicant failed to prove professional negligence against the 2nd respondent and prayed that this issue be answered in the negative.

In respect to the assertion that the 2nd respondent violated the applicants rights under Article 22, 24, 27, 33 (3) and 44 (a) of the Constitution of Uganda, the respondent submitted that it has never done any act or omission to intentionally derive the applicant's life as it is under a duty to preserve and protect people's lives.

Counsel further submitted that it the 2nd respondent is not and has never been run by the 1st respondent s it is an independent entity fully registered under the laws of Uganda.

Counsel also submitted in regards to medical consent that the medical practitioner can waive the requirement of consent in cases of emergency. According to the 2nd respondent's affidavit in support under paragraph 5, it was stated by Dr. Kato that the applicant was brought to hospital while she complained of pain and appeared not to be in a sound state of mind and needed an emergency medication. That the applicant admitted that necessary tests be done since she seemed to be in pain and to check on the status of her baby.

Counsel submitted that section 10 and 11 of the Patient's Charter which was developed by the Ministry of Health in 2009 provides that consent can be waived

in cases of medical emergency and got after if the patient's mental or physical state does not permit obtaining his or her informed consent.

Counsel therefore submitted that the way the applicant appeared before the 2nd respondent was a clear manifestation of an emergency situation in the circumstance where consent is waived and was given a referral. The 2nd respondent therefore prayed that court dismisses this application against it with costs.

Determination:

Regarding the applicant's claim as to the 2nd respondent's negligence, I must state that the same must be particularly pleaded and strictly proved.

As was held in the case of ***Donoghue v Stevenson*** **[1932] AC 502,** to make up a case for negligence; three ingredients must exist as follows:-

1. The defendant owed a duty of care to the plaintiff.
2. There was breach of that duty by the defendant; and,
3. The plaintiff suffered injury as a result of the breach.

The negligence talked about in this case relates to medical specialists. It was held in ***Lt. Colonel Christopher Kiyingi Bossa & 2 Others vs Attorney General & 3 others HCCS No.189 of 2008,*** that:

"Whilst there may not be hard and fast rules laid down to guide medical specialists in each and every case where one is confronted with complications, a

high degree of alertness, sense of proportion, prudence and balanced consideration of all facts and circumstances surrounding the case is the best guide on how to act and pursue the best course of action in a particular case, and to deal with certainty and peculiar or specific problem at hand. Under such circumstances, sometimes far from being favorable, time is of essence if lives are to be saved."

Whereas the applicant alleges that the 2nd respondents was negligent, the 2nd respondent denies the accusation and contends that it did its duty to treat the applicant and was never negligent at all. From the evidence on record, it is undisputed that the applicant was admitted to the 2nd respondent where she complained of pains and was not in a sound state as stated by both the respondents' witnesses.

Having analyzed the evidence and submissions by respective counsel, I agree with the submissions of learned counsel for the 2nd respondent that the applicant was properly managed and hence no negligent acts on the part of the 2nd respondent have been proved. The applicant's life and condition is attributed to the timely action taken by the 2nd respondent to give her medical attention since she was also expecting at the time.

Medicine being a specialized field, to attribute negligence on medical personnel has to be done carefully and with caution. The case of ***Sarah Watsemwa Goseltine vs Attorney General HCCS No. 675 of 2006*** relied upon by learned counsel for the plaintiff is very instructive. In that case it was held inter alia that:

"The principles regarding medical negligence are well settled. A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care. A doctor cannot be found negligent merely because in a matter of opinion he made an error of judgment. It is also well settled that when there are genuinely two responsible schools of thought about management of a clinical situation, the court could do no greater dis-service to the community or advancement of medical science than to place the hallmark of legality upon one form of treatment…….

For negligence to arise there must have been a breach of duty. Breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous sequence, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker. To show deviation from duty, one must prove that;

1. *It was a usual and normal practice.*
2. *That a health worker has not adopted that practice.*
3. *That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken.*

In the instant case, it has not been proved that the medical workers who attended to the applicant fell short of the standard of reasonable medical care. The applicant was given emergency medical treatment and scans to

ascertain her safety and that of the baby before she was transferred to a hospital of her choice which seems to be reasonable of any medical practitioner. No breach of duty or deviation has been proved by the applicant to warrant penalizing the 2nd respondent.

I therefore find that the 2nd respondent was not negligent and thus no violation of the applicant's right under Article 22, 24, 33 and 44 of the Constitution of Uganda**.**

What remedies are available to the applicant.

The applicant prayed for general, special, punitive and exemplary damages, nominal damages and costs.

Counsel submitted that general damages according to Lord Macnaghten in the case of *Stroms v Hutchinson [1905] AC 515* are such as the law will presume to be the direct natural or probable consequence of the act complained of. Counsel stated that the applicant being a business woman, she was not able to put bread on the table for all the time she was in hospital. That she was dirty, muddied, her clothes were torn and had her skin burning due to pepper spray and teargas and also lost her uterus.

In respect of special damages, counsel stated that the applicant in paragraphs 18 and 19 of the supplementary affidavit in pleaded special damages and exhibited annextures of hospital bills and receipts to prove them. She therefore sought a total claim of UGX. 31, 215, 350\-as special damages from the 1st respondent.

As to exemplary damages, the applicant submitted that the 1st respondent's agents actions torwards her were arbitrary and unconstitutional.

The applicant further prayed for costs under section 27 of the Civil procedure Act.

Article 50 (1) of the constitution provides that;

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent Court for redress which may include compensation.

With regard to my findings on issues 1 in respect of Article 23(4), the applicant is entitled to redress for violation of her constitutional rights.

The whole process of assessing damages where they are "at large" is essentially a matter of impression and not addition (per **Lord Hailsham, LC in *Cassell v Broome [1972] 1 All ER 801 at 825).***

The awards reflect society's discomfiture of the wrongdoer's deprival of the man's liberty and society's sympathy to the plight of the innocent victim. The awards therefore are based on impression. In ***Jennifer Muthoni & 10 ors vs Ag of Kenya [2012] eKLR,*** a case for enforcement of rights and freedoms court cited **Pilkington, Damages as a Remedy or Infringement of the Canadian Charter and Freedoms [1984] 62 Canada Bar Review 517;**

"It is said that the purpose of awarding damages in constitutional matters should not be limited to simple compensation. Such an award ought in proper cases to be made with a

view to deterring a repetition of breach or punishing these responsible for it or even securing effective policing of the constitutionality enshrined rights by rewarding those who expose breach of them with substantial damages."

With due consideration to the submissions of counsel and the above principles, I award the applicant a sum of UGX 35.000.000/= as general and special damages.

This application therefore succeeds in part as to the violation of Article 20(2) and 24 of the Constitution.

The applicant is awarded costs of the suit against the 1st respondent.

I so order.

SSEKAANA MUSA
JUDGE
15th December 2020