

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO 419 OF 2017

ASP MUGARURA STEVEN:.....APPLICANT

VERSUS

- 1. CP HERMAN OWOMUGISHA**
- 2. ATTORNEY GENERALRESPONDENTS**

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this Application under Article 20, 23, 24, 44, 50 and 173 of the Constitution of the Republic of Uganda 1995 for declarations and orders that;

1. A declaration that the applicant's right to personal liberty was violated by officers of the Uganda Police who caused numerous unlawful arrests and detention, malicious prosecution of the applicant contrary to article 23 of the Constitution of the Republic of Uganda.
2. A declaration that the applicant's freedom from torture, cruel, inhuman, degrading treatment was violated by officers of the Uganda Police who wantonly beat up the applicant while at Central Police Station Kampala contrary to Articles 24 and 44 of the Constitution of the Republic of Uganda.
3. A declaration that the state breached its constitutional duty to protect the applicant, a public officer while he was discharging his lawful public duty of investigating criminal matters, as OC/CID Kabarole Police Station, and instead obstructed his duties, contrary to article 173 of the Constitution.

4. A declaration that the Attorney General is vicariously liable for the actions of its agents, Uganda Police officers.
5. An order directing the Director Human Resource and Administration of Uganda Police to immediately to re-deploy the applicant.
6. An order for general damages/ compensation against the defendant for the aforesaid violation of fundamental rights of the applicant.
7. An order directing the defendant to pay the applicant punitive damages for the high handed actions of police officers against the applicant, who are mandated with protecting him while in discharge of his public duties.
8. Interest at court rate on (f) and (g) from judgment date till full payment.
9. Costs of this suit.

The grounds of this application are specifically set out in the affidavit of **the applicant dated 29th November 2017** which briefly states;

1. That at all material time the applicant is a police officer at the rank of Assistant Superintendent of Police (ASP).
2. In 2012, while serving as the OC CID of Kabarole Police Station, the applicant encountered a notorious criminal gang that was robbing people's properties across Uganda upon which he started off an operation to have it investigated and brought before the law.
3. In execution of his duties, the applicant faced direct obstruction and confrontation from senior police officials who connived with the said criminals.
4. In further obstruction of his duties, the high ranking officers of the Uganda Police framed several charges against the applicant, carried out unlawful arrests and detentions, maliciously prosecuted the applicant, physical and mentally tortured the applicant and deliberately denied him work and refused to re-deploy him despite being cleared by the authorities, all contrary to Articles 20, 23, 24, 44 and 173 of the Constitution of the Republic of Uganda.

In opposition to this Application the Respondents through the 1st Respondent a Commissioner in Uganda Police filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that the applicant alleged that some armed criminals wanted to kill him and then he reported that to his office where he was the commandant of the flying squad.

That by this time the Applicant was no longer in the criminal investigation department as he had been transferred to Field Force Unit of which he refused to report. That his office was interested in saving the applicant's life from the armed criminals he alleged that they wanted to harm him and it turned out that these criminals(suspects) did not have guns when they were arrested, investigated and searched and it was established that they used to steal beans from Government stores.

That the Applicant acted in a disorderly manner that brought discredit to the reputation of the Uganda Police Force when he in the Assistance of the flying squad operatives on the 19/7/2014 unlawfully arrested and detained Musinguzi Wilson Ruhweza and Kamugisha Ismail at various Police station to wit; CPS Katwe Police Station among others, he further advised the Applicant that the case can be transferred to Fort Portal the place of jurisdiction and that the Applicant should stop investigating that very case and take up other duties since he had been transferred from the office of the OC Criminal Investigation Directorate to the Field Force Unit wherein the Applicant refused to heed to lawful orders from his superiors and he was insubordinate.

That the Applicant solicited for payments from the suspects so as to release them and also illegally tried to make sales of the suspects' properties wherein he was warned. The Applicant thereafter picked two suspects from cells in Central Police Station Kampala inappropriately and coerced them to pay the victims. The Applicant refused to report to the field force unit and he was arrested for misconduct and for the fact that he was wanted by the Police Standard Unit as being AWOL. He was tried and found guilty by the lower disciplinary court of Police and the Appellate Court was then discharged from the Uganda Police Forces.

The Applicant was represented by *Namara Caroline* while the 1st respondent was represented by *Cheptoris Slyvia* (State Attorney).

Only the Applicant filed submissions which have been considered by this court.

In their submissions the Applicant raised the following issues for court's determination;

- a) *Whether the Applicant's right to personal liberty was violated by police officers of Uganda Police.*
- b) *Whether the Applicant's freedom from torture, cruel, inhuman and degrading treatment was violated by the 1st Respondent, an officer of Uganda Police.*
- c) *Whether the State violated its duty of protecting the applicant while he discharged his public duties.*
- d) *Whether the Police unlawfully refused to deploy the applicant in service.*
- e) *Whether the 2nd respondent is vicariously liable.*
- f) *What remedies are available to the parties.*

Whether the Applicant's right to personal liberty was violated by police officers of Uganda Police.

Counsel for the Applicant submitted that personal liberty is guaranteed in Article 23 of the Constitution that is no person may be subjected to arbitrary arrest and detention. In this present case, the applicant's evidence in his supporting affidavit is that, **Paragraph 13 and 14** of his supporting affidavit are to the effect that in August 2014, having been tortured at Kampala Central Police Station by the then head of the Flying Squad Unit of Uganda Police, CP Herman Owomugisha, he was detained at Jinja Road Police Station for three days. In **Paragraph 15**, he states that he was subsequently taken to Professional Standards Unit of Uganda Police where he was charged with desertion from Police and illegal arrest of traders,

before being released on police bond. The bond form is annexure “C” to the supporting affidavit. Paragraph 17 stated that the applicant while attending the burial of the late AIGP Andrew Felix Kaweesa in Lwengo District, he was brutally arrested by men dressed in ordinary clothes and whisked off in a private car, escorted by a police car, detained at Kira Road Police Station in a small, dark, smelly room where he spent 3 days without food or water and his relatives were denied access to him. He was then transferred to another detention at Railway Police Station for 3 more days without any formal accusation.

The applicant further stated in **paragraph 18** of his supporting affidavit, that he was arraigned before the Police disciplinary Court but no charge was preferred against him. He also states in **paragraph 19** that he was consequently re- arrested and detained in a small room at Railway Police station for 6 days before being arraigned before the disciplinary committee.

Counsel for the applicant further submitted that **Article 23(3) of the Constitution of Uganda** requires that a person arrested, restricted or detained should be informed of the reason for his arrest and detention and yet in the present case drawing inference from the applicant’s evidence in the aforementioned paragraphs, it is quite clear that on the numerous occasions which the applicant was arrested and detained by Uganda Police, he was never told of the reason for his arrest and neither was any kind of statement recorded from him at the various police stations.

Article 23(4)(b) of the Constitution of Uganda guarantees that a person detained or restricted on suspicion of having committed an offence must be taken to court not later than 48 hours. However, the applicant through his evidence in the supporting affidavit shows that on the numerous occasions he was detained for 3, 6 and 6 days beyond the 48 hour limit. Although the right to personal liberty is not one of the non derogable human rights, and it is well known that the police can arrest on reasonable suspicion that one has committed an offence, no evidence has been led by the respondents to prove justification for the numerous arrest, hence rendering them unlawful.

Analysis

The applicant asserted that on numerous occasions he was detained for 3, 6 and 6 days beyond the 48 hour limit in different police stations without any statements recorded or relatives allowed access to him. This assertion was not specifically rebutted by the respondent. I take it that it was admitted that indeed the 1st respondent ordered all the arrests since in paragraph 14 of the Affidavit in reply to the amended Notice of Motion, the 1st Respondent admitted that he arrested the applicant for misconduct and he was wanted by Police Standard Unit as being AWOL.

The detention of the applicant for more than the mandatory hours amounts to a violation of their constitution rights guaranteed under the Constitution. Whenever there is 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 a suspected criminal is arrested, they ought to be arraigned before the courts of law which is usually orderly by way of doing things instead of arresting and later delay to produce the suspect before the court. The state should have what is termed as '*holding charges*' upon which any suspect can be arraigned before the court.

The applicant's rights under Article 23 of the Constitution and detention beyond 48 hours was violated.

Whether the Applicant's freedom from torture, cruel, inhuman and degrading treatment was violated by the 1st Respondent, an officer of Uganda Police.

Counsel for the Applicant submitted that **Article 24 of the Constitution** guarantees freedom from torture, cruel and inhuman or degrading treatment/punishment. This guarantee is absolute & non derogable under **Article 24** Parliament enacted the **Anti Torture Act 2012. Section 3 of the Prevention and Prohibition Act 2012** states that notwithstanding anything in this act, there shall be no derogation from the enjoyment of the right to freedom from torture. The

said Act was enacted to give effect to Articles 24 and 44(a) of the Constitution of the Republic of Uganda 1995, under **Section 2(1)** defines torture to mean any act or omission, by which severe pain and 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 public official or other person acting in an official or for private purposes. The Applicant pleaded evidence of the torture occasioned to him by the 1st Respondent, a police officer.

In **paragraph 13** of his supporting affidavit he states that in August 2014, he received a phone call requiring him to report at the flying squad Headquarters and record a statement regarding a criminal gang and on reaching there, he was immediately handcuffed and wantonly beaten by the commandant of the flying squad then, one CP Herman Owomugisha, his head was banged on chairs and wall causing him to sustain grave injuries.

Applicant's counsel further submitted that in paragraph 14 of the applicant supporting affidavit, the applicant states that due to the beating, he sustained grave injuries a fact that is corroborated by a medical report issued by Dr. Mutumba Male of Mulago Hospital and Life Link Medical Centre which showed that the applicant had been occasioned grievous harm, blunt chest trauma and a fractured tooth and suffered from scalp, neck and chest pain.

Analysis

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

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

- (a) Freedom from torture and cruel, in human or degrading treatment or punishment.”

Freedom from torture is a non derogable right under the constitution

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;

- obtaining information or a confession from the person or any other person;
- 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
- 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, the treatment must also be intentionally inflicted for the prohibited purpose. A single act of assault should not be termed as torture as this would water down the seriousness of offence or gravity that it is intended to address.

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'.

Torture is considered one of the most serious crimes against humanity because of its profound violation of the moral and physical integrity of the individual.

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 suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in for example, measures depriving a person of their liberty. See ***Wainwright v United Kingdom Case No. 12350/04, ECHR***

Torture; it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, pain or suffering to amount to torture it must result in significant psychological harm of significant duration.

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 worst examples are likely to satisfy the test. See *Issa Wazembe vs Attorney General HCCS No. 154 of 2016*

The court's basis of imputing torture in different cases should be understood and based on methods of inflicting suffering which have already been overtaken by the ingenuity of modern techniques of oppression. Torture no longer presupposes violence, a notion to which the public understands it to be in most cases.

Torture can be practiced and is indeed practiced-by using subtle techniques developed in multidisciplinary laboratories/centres which claim to be scientific. By means of new suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will.

There are no exceptional circumstances whatsoever to justify torture. The court cannot be a silent spectator where stinking facts warrant interference in order to serve the interest of justice. See *Baguma Paul v Uganda Revenue Authority HCCS No. 93 of 2014*.

The applicant has a duty to prove the facts asserted exist as **per section 101 of the Evidence Act**. Under that duty, the applicant ought to satisfy this court the allegations that he was tortured by CP Herman Owomugisha.

The applicants put forward detailed account of his alleged torture and only corroborated it with medical forms. Owing to the intensity of his allegations, there should have been residue evidence even without immediate medical reports indicating that he was tortured. Photographs showing scars as well as corroborating statements from friends or relatives among others would have sufficiently proved his case. In absence of further corroborating evidence, the

applicant has failed to prove on a balance of probabilities that he was tortured thereby violating his right and freedom against torture as provided for under the Constitution.

The gravity of allegations of torture should have required some more medical proof like the X-ray, photographs showing the fractured tooth remains as explained by Police Form 3, affidavits from the various doctors that carried out the examinations on the applicant, to satisfy court on balance of probabilities not mere statements of torture and medical forms which can be challenged or highly suspect. There might have been singular acts of assault against the applicant but this cannot be 'baptized' torture as the applicant would wish this court to believe.

Considering the evidence adduced by the applicant, it shows in 'Annexure C (Release on Bond)' that he was released on the 15th day of August 2014, however the Discharge Form in 'Annexure B' shows that he was admitted to Life Link Medical Centre on the 13th day August 2014 and discharged on the 14th day of August 2014 a day before he was released on Police Bond and later on the 26th day of September 2014, the applicant was sent to the forensic pathologist Male Mutumba who examined him on the 3rd day of September 2014.

Furthermore, with the discharge form from Life link Medical Centre, the diagnosis showed that the applicant had blunt chest trauma and fractured tooth, however the clinical findings were that he had headache, scalp pain, neck pain, chest pain and painful tooth whereby he was given paracetamol and diclogel for management and advised to visit the dentist for future removal, which evidence was never adduced to court. The applicant's lawyer must do more than making statements which may be weighed against the prevailing circumstances of the entire case.

The applicant has not proved the alleged torture, inhuman and degrading treatment on the balance of probabilities.

Whether the State violated its duty of protecting the applicant while he discharged his public duties. / Whether the Police unlawfully refused to deploy the applicant in service. / Whether the 2nd respondent is vicariously liable.

Counsel for the applicant submitted that **Article 173 of the Constitution** provides that a public officer shall not be victimized or discriminated against for having performed his or her duties faithfully in accordance with the Constitution. In execution of his duties, the applicant faced direct obstruction and confrontation from senior police officials who connived with the said criminals and obstructed him of his duties. The high ranking officers of the Uganda Police framed several charges against him like a theft case in 2013, in December 2013, the Director Operations of the Uganda Police AIGP Grace Turyagumanawe physically warned him against investigating the affairs of the notorious criminal gangs and on such he was transferred and deployed under Field Force Unit at Naguru Police to try and stop him. That in January 2014, he was transferred to Katakwi Police Station with instructions not to be given work.

Applicant's counsel further submitted that **Article 40 (2) of the Constitution** states that every person in Uganda has the right to practice his or her profession and to carry on lawful occupation, trade or business. **Article 173 (b) of the Constitution** provides that a public officer shall not be dismissed or removed from office or reduced in rank or otherwise punished without just cause. In **paragraph 10** of his supporting affidavit states that in April 2014, he made a complaint to the DPP who called for and perused the file only to find no merit, the Director of Legal Services of Uganda Police also made similar findings and directed his re-deployment as all the allegations labelled against him were cleared, however the directive was defied by the officers of police and brought about more threats from the AIGP Grace Turyagumanawe who promised to send the applicant to the coolers from following up the criminal gangs.

Counsel for the applicant cited **Muwonge vs Attorney General [1967] EA 17** to support the principle of vicarious liability that makes masters responsible for the actions of their agents, in the course of employment. He further cited **Article 119**

(4)(c) of the Constitution of the Republic of Uganda and Section 10 of the Government Proceedings Act, civil proceedings for and against government are instituted by and against Attorney General. The applicant led evidence to show that he was arrested and unlawfully detained by police officers attached to Flying Squad Unit of Uganda Police and tortured by CP Herman Owomugisha, framed with a case of theft, persecuted and tormented by fellow officers and further refused to be re-deployed in the police.

Analysis

The applicant has a duty to prove the facts asserted exist as per section 101 of the Evidence Act. The Applicant adduced evidence to prove that the DPP found no merit in the theft case that was framed against the Applicant. And also evidence that the Director Criminal Investigations and Intelligence Directorate directed that the applicant be deployed elsewhere and his performance tracked according. In paragraph 4 of the Affidavit in reply to the amended Notice of Motion the 1st respondent admits that the applicant was transferred to another department (Field Force Unit) later on transferred to Katakwi where he refused to report.

The Respondents adduced evidence that the applicant in 2017 was arrested and charged with irregular misconduct and withdrawal from duty or absence without leave. This is unchallenged evidence since the applicant provided no proof that he was still a member of the Uganda Police Force contrary to the Disciplinary charge sheet register no. 07/2017.

The applicant has failed to adduce evidence that he reported to Katakwi where the Respondent alleges to have deployed him and the state protected the applicant while discharging his duties since when he forwarded a letter to the DPP to review the case files against him, there was a report in that regard and furthermore the Criminal Investigations and Intelligence Directorate also provided an order to have the applicant deployed which the same was done wherein the applicant refused to report on duty.

What remedies are available to the parties?

The applicant has succeeded on one issue of violation of his right to personal liberty. The Respondents did not challenge any of the arrests stated by the Applicant in the various police stations for the stated days in each cell. I would award the applicant 10,000,000/= as damages for the violation of his personal liberty with interest of 15% from the date of this ruling.

The applicant is awarded costs of the case.

I so order.

SSEKAANA MUSA

JUDGE

23rd July 2021