

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

**MISCELLANEOUS CAUSE NO. 370 OF 2020**

- 1. DR. LAGU CHARLES**
- 2. WAKULIRA MATHIAS**
- 3. NABUKENYA YASINTA:.....APPLICANTS**

**VERSUS**

**ATTORNEY GENERAL:.....RESPONDENT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

This application is brought under Article 23(4), 24, 27, 28(1), 40(2), 44(a) and (c) and 50 of the Constitution of the Republic of Uganda 1995, Section 3, 4(a), (b), 4(2), 9 and 11(b) of the Human Rights (Enforcement), Act 2019, Section 98 of the Civil Procedure Act Cap 71 & Section 33 f the Judicature Act Cap 13 seeking for orders and declarations that;

1. A declaration that the acts of the Respondent's agents use of abusive and degrading language by referring to the Applicants as thieves, corrupt people during the process of interrogation without giving them an opportunity to give their side of story is a violation of their rights to a fair hearing and freedom from inhuman and degrading treatment.
2. A declaration that the actions of the Respondent's agents of illegally constituting themselves into a tribunal, conducting an illegal trial and determining the same against the 1<sup>st</sup> Applicant at his offices in Entebbe in the presence of the press was a violation of 1<sup>st</sup> Applicant's rights to dignity, privacy, and a fair hearing.

3. A declaration that the initiation of criminal investigations, supervision of the arrests of the Applicants, the process of their interrogation and statement recording and direction of the entire process investigations by army soldiers like Lt. Col. Edith Nakalema and Lt. Daniel Mayombo against the Applicants who are civilian citizens which ultimately resulted in criminal cases vide No. 42 of 2020 and No. 67 of 2020, respectively at the Anti-Corruption Court lacks any legal backing, was unlawful and a gross and blatant violation of the Applicants' rights enshrined under Article 24, 28, and 44 (c) of the Constitution of Uganda, 1995.
4. A declaration that the actions of the Respondent's agents/officers led by Lt. Daniel Mayombo and Chelimo Beata on the orders of Lt. Col. Edith Nakalema the former head of State House Anti-Corruption Unit, of laying siege around the 1<sup>st</sup> Applicant's home at Mbaguta Cell, Ruharo Ward, Kamukuzi Division within Mbarara City and making threats against the Applicant's life throughout the night of 24<sup>th</sup> April, 2020 was unlawful, illegal and a violation of the Applicant's right to privacy, was inhuman and degrading treatment, a violation of his rights to dignity and enjoyment of personal liberty.
5. A declaration that the interrogation of the Applicants by army officers to wit; Lt. Daniel Mayombo among others and police officers like SP Tweheyo Jackson, AIP Bernard Ochaya and Chelimo Beata in total and deliberate exclusion of their lawyers, as well as denying them an opportunity to explain their story is a violation of their rights to a fair hearing and legal representation, respectively.
6. A declaration that the interrogation of all the Applicants by the respondent's said agents at the SHACU with threats to detain them if they did not record self-incriminating statements, which caused great embarrassment and fear to the Applicants, was a further violation of their rights to a fair hearing and freedom from torture, cruel or inhuman and degrading treatment.

7. A declaration that the arrest and detention of the 1<sup>st</sup> Applicant from 25<sup>th</sup> April 2020 from Mbarara and his subsequent detention at Special Investigations Unit, Kireka, Kampala till the 29<sup>th</sup> of April 2020 well beyond the constitutionally allowed 48 hours was a violation of his right to his personal liberty enshrined in Article 23(4) of the Constitution.
8. A declaration that the respondent's agents' actions of detaining the 1<sup>st</sup> and 2<sup>nd</sup> Applicants incommunicado at Kireka, where they were not allowed to be accessed by their lawyers and immediate family members as well as being denied food during the initial days of their detention was a blatant violation of their right to freedom from torture and/or inhuman and degrading treatment.
9. A declaration that the actions of the respondent's agents picking the 1<sup>st</sup> and 2<sup>nd</sup> Applicants at night from police cells at different times during their detention at SID, Kireka, blindfolding them, driving them different places within Kampala while interrogating them for long hours coupled with their physical assault on them with the intention of denying them sleep and issuing threats against their lives is a violation of their right to freedom from torture, inhuman, cruel and degrading treatment.
10. A declaration that the Respondents' deliberate action of arraigning the 1<sup>st</sup> Applicant in the Chief magistrates Court of Makindye at Makindye on the 29<sup>th</sup> of April 2020, a court without any jurisdiction was a continuation of his illegal detention hence violating his right to personal liberty enshrined in Article 23(4) of the Constitution.
11. A declaration that the attempts by the Respondent's agents to wit, AIP Ochaya Bernard, and Lt. Daniel Mayombo to compel the 2<sup>nd</sup> Applicant to falsely implicate the 1<sup>st</sup> Applicant in exchange with his release on bond was a violation of rights to dignity, freedom of thought, conscience, and belief.

12. A declaration that the respondent's actions of intentionally spraying tear gas in the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent's home on the 8<sup>th</sup> of May 2020 in the presence of the 2<sup>nd</sup> & 3<sup>rd</sup> Applicants' minor children aged 7 years, 5 years & 3 years respectively among other occupants was a callous act, a gross violation of the children's right to freedom from torture, inhuman and degrading treatment and amounted to psychological torture and emotional torture to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.
13. An order for general damages for the mass violations of the Applicants' fundamental Rights and Freedoms guaranteed under The Constitution of the Republic of Uganda and international instruments.
14. An order for punitive and aggravated damages resulting from the callous, arbitrary, and dehumanizing and degrading treatment against the Applicants.
15. An order for interest at 20% per annum on the general damages from the date of judgment till payment in full.
16. An order for interest at 20% per annum on the punitive damages from the date of judgment till payment in full.
17. A declaration that the impending trial/prosecution of the Applicants vide Criminal Case No. 42/2020 arising from Aco-Co-0017-20: Uganda versus Dr. Charles Lagu & 3 Ors and Crim case No 67 of 2020: Uganda versus Dr. Charles Lagu & 9 others respectively at Anti-Corruption Court in so far as the same cases/proceedings arise from the respondent's investigations that were characterized by the callous, deliberate, blatant and gross violations of the Applicants non derogable rights is a nullity in accordance with S.11(2)(c) of the Human Rights Enforcement Act, 2019 and consequently order the Applicants to be acquitted.

18. An order for a public apology by the respondent and the actual officers that perpetuated the Human rights violations against the Applicants.

19. An Order against the respondent for non-repetition of the violations against the Applicants.

20. Costs of this application be provided for.

The grounds upon which the application is based are contained in the affidavits in support of the application deposed by the applicants and a one Tuheirwe Richard the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' advocate but briefly they are;

- a) That around December 2019, the Respondent's agents under the control and direction of Lt Col Edith Nakalema, the head of state House Anti-Corruption Unit, initiated, conducted and supervised purported criminal investigations against the applicants among others purportedly relating to the contracts of supply of Chloris Gayana and Semen by Nurumah Holdings Ltd and Kibubbu Agro Suppliers Ltd respectively to National Genetic and Resource Center and Data Bank (NAGRIC & DB).
- b) That having commenced the said criminal investigations, at different times between the 24<sup>th</sup> of April and 15<sup>th</sup> of May 2020, the Applicants were arbitrarily arrested without informing them of the reasons for their arrest, mistreated and harassed by officers from the said office during interrogations, to wit being openly abused/ insulted, detained for long hours without meals, threatened and or harassed with the intention of obtaining/extracting self-incriminating statements from them against their will, were subsequently detained at Kireka beyond 48 hours in total violation of their rights to freedom from violation of their personal liberty, cruel and inhuman and degrading treatment, privacy among others.

- c) That subsequently the applicants were arraigned at the Anti- corruption court, on the 8<sup>th</sup> May 2020 and later on 11<sup>th</sup> August 2020 and 26<sup>th</sup> August 2020 respectively where they were charged with numerous offences and remanded to prison and were later released on bail on 14<sup>th</sup> August and 26<sup>th</sup> August 2020 respectively.
- d) That the impending trial of the applicants in the said case files, arises from investigations where the officers/agents of the Respondent deliberately, grossly and wantonly violated the applicants fundamental freedoms and rights as well as their non derogable rights well provided for and protected by the 1995, Uganda Constitution as amended.
- e) That among the applicants' rights which include and are not limited to their rights to personal liberty, privacy, right to a fair hearing, right to a fair hearing, right to freedom from torture, cruel, inhuman and degrading treatment, right to have lawyers of their choice present during the process of interrogation among others, were grossly and deliberately violated by the Respondent's officers/ agents for which she is vicariously liable.
- f) That the said violations occurred during the process of conducting investigations and interrogations as well as during the period of their detention, wherein the applicants were subjected to torture/physical assault, callous episodes during their arrest, embarrassing, and uncouth insults, dehumanizing, degrading and cruel treatment by the Respondents said Officers/agents, to wit detaining the 1<sup>st</sup> & 2<sup>nd</sup> applicants, incommunicado without allowing them accessibility by their immediate family members and lawyers well beyond 48 hours, denying them food, picking them from their cells at various times and dates at night, blindfolding them and driving them around Kampala interrogating them for long hours with the sole motive of denying them sleep among other gross violations.

- g) That currently, the applicants are awaiting trial/ prosecution at the Anti-Corruption court in respect of numerous offences that arise from investigations which were hugely characterized by the above said gross and blatant violations of the applicants' fundamental and non derogable rights by the respondent's officers/agents.
- h) That in the face of all the said violations of the applicants' fundamental and non-derogable rights, it is only fair, just and equitable that this application is granted.

The Respondents opposed the application by filing 9 affidavits in reply deponed by D/IP Ochaya Kinyera Bernard, D/SGT Liwa Samuel, D/ASP Mutabaazi John Bosco, D/IP Swizin Tibesigwa, Bosa Samuel Baker, LT. Daniel Mayombo, Ogema Tanga Thomas Nuwamanya George, Tryasingura Albert, to the effect that the contents of the Affidavits in support of the Application are full of falsehoods and lies. The respondents added that it will be against the interest of justice, fairness, equity and a betrayal of the fight against corruption in Uganda if this application is allowed.

At the hearing, the applicants were represented by *Counsel Kamukama David* and the Respondent was represented by *Counsel Johnson Natuhwera* (State Attorney)

The court gave directives for filing of submissions, which were duly filed by both parties and have been considered in making this ruling.

### **Issues**

1. Whether the Respondents' agents' acts of entering the respective premises of the Applicants and conducting a search in the same without a search warrant was a violation of the Applicants' right to privacy?
2. Whether the Respondent's agents' acts of arresting the Applicants without an arrest warrant and subsequently detaining them for more than 48hrs was a violation of the Applicants' right to personal liberty?

3. Whether the Respondent's agents acts of denying the Applicants access to their Lawyer was a violation of the rights to legal counsel.
4. Whether the Respondents' agents' act of parading the 1<sup>st</sup> Applicant before the media and continuously referring to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants as "thieves" was a violation of the right to presumption of innocence and the right to a fair hearing.
5. Whether the Respondents agents conduct in arresting, detaining and interrogating the Applicants while in detention, was a violation of the right to freedom from torture, cruel, inhumane and degrading treatment?
6. Whether the Respondents agents acts of coercing the Applicants to say that they were corrupt and had stolen money and to and to implicate each other was a violation of the right against self- incrimination and thus a violation of the right to a fair hearing?
7. Whether the Applicants are entitled to the remedies sought?

### **Determination of issues**

Before going to issues would like to first handle a preliminary objection which was raised by the Respondent that the application is defective on account of its lodgment in a civil court and not a criminal court and that its irregular to challenge criminal proceedings in a civil court as it amounts to abuse of office.

This is a case of enforcement of rights under a civil jurisdiction. I find no merit in this preliminary objection.

***Whether the Respondents' agents' acts of entering the respective premises of the Applicants and conducting a search in the same without a search warrant was a violation of the Applicants' right to privacy?***



Counsel for the applicants submitted that the right to privacy is enshrined under Article 27 of the constitution and it prohibits unlawful entries and searches of a person's premises, home or property. The essence of the provision is to ensure that there is no unilateral decision to invade on an individual's personal space without reasonable cause, and he relied on a Kenyan case of ***Okiya Omtatah Oloit v Communications Authority of Kenya & Ors [2018] EKLR*** where it was stated that “ *The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a private sphere with or without interaction with others.....*”

Counsel also submitted that the requirement to have searches and warrants is extremely important not just to protect rights but also to promote professionalism within the law enforcement, he relied on the case of ***Victor Mukasa Juliet & Yvonne Oyo vs Attorney General*** where the Applicants had been subjected to the unlawful entry of their house in Kireka , the learned Judge Stella Arach- Amoko (as she then was) relied on Article 27 of the constitution to find that the forcible entry and search of the Applicants premises without a warrant were breaches of their constitutionally guaranteed rights.

Counsel for the applicants further submitted that officers from the SHACU illegally laid a siege at the offices of the National Animal Genetic Resource Centre and Data Bank (NAGRIC& DB) at Entebbe and confiscated some files without any reasonable explanation and that further still on 24<sup>th</sup> of April, 2020 at about 7: 30 pm a mob acting on the instructions and directives of Lt Col. Edith Nakalema attacked and laid a siege around the 1<sup>st</sup> applicant's home in Mbarara, placed his family under illegal detention where no one was allowed move out of the house and the same happened to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants house where the Respondents agents entered their home in their absence, and ransacked the whole house turning the whole household properties upside down.

Counsel for the Respondent submitted in reply that the Applicant's right to privacy was not infringed upon by any actions done by the Respondent and that the right to privacy as provide under Article 27 of the constitution is not absolute, thus the right to privacy is considered on a case- by- case basis, it can be limited

where it is fair and justifiable in an open and democratic society. Therefore the law allows searches and seizures where there is reasonable and probable cause or a reasonable basis for suspicion in order to facilitate criminal investigations, and relied on the case of ***Baguma Mugarama v Uganda Revenue Authority CS No. 93 of 2014.***

Further still that there are exceptional circumstances where a search may be conducted without a warrant for example Section 27 (1) of the Police Act provides for the same.

Counsel further submitted that that the purpose underlying the alleged search of the Applicants office premises and respective homes was to assist the investigative officers to unearth evidence of suspected crimes and that for that reason the Applicants home was not subject to an illegal search. Thus, they contend that the search was conducted peacefully in accordance with the law and only the material items relevant to the criminal investigations were retrieved.

### ***Analysis.***

The right to privacy is provided for under Article 27 of the constitution, as relied on by both the applicants and respondents. **Article 27** provides that;

***1. (1) No person shall be subjected to –***

***(a) Unlawful search of a person, home or other property of that person; or***

***(b) Unlawful entry by others of the premises of that person.***

***(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.***

Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to protection of the human dignity and forms the basis of any democratic society.

Uganda has ratified the International Covenant on Civil and Political Rights (ICCPR) Article 17 of ICCPR provides that; *“no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.”*

Right to privacy is a generic term encompassing various rights recognized to be inherent in concept of ordered liberty, and such rights prevent government interference in intimate personal relationships or activities, freedoms of individual to make fundamental choices involving himself, his family and his relationship with others.

The right to privacy thus has been held to protect a private space in which man may become and remain himself. Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy. By protecting this this private and intimate sphere, we are allowed” establish and nurture human relationships without interference from the outside community.

It is the duty of the court to determine whether the person claiming that his or her privacy was infringed could reasonably expect his or her privacy to be protected in the particular circumstances. The court should bear in mind that privacy too can be restricted in well-defined circumstances; (1) .There is a legitimate state interest in restricting the right. (2) The restriction is necessary and proportionate to achieve the interest and (3) the restriction is by law.

The applicants contend that their homes and office were searched illegally since in their view there was no search warrant and some files of documents were taken. Section 27 of the police Act allows a police officer not being lower in the rank than a sergeant, has reasonable grounds for believing that anything necessary for purposes of an investigation into any offence which he or she authorized to investigate may be found in any place and that thing cannot in his or opinion be otherwise obtained without undue delay..... The officer may search or cause a search to be made....

The purpose underlying the power of search is to assist the law enforcement officials to investigate violations of the law by unearthing evidence for the suspected commission of breaches of the law which may otherwise not be available to an investigating agency. The search is of an investigatory nature as it is conducted as a result of the belief that there is a contravention of the law. The officers who conducted the search had a warrant card in the name of Tibesigwa Swizen in accordance with the Police Act.

The exercise of the power of search and seizure is of a drastic nature and constitutes a serious invasion of the affected person's privacy, property rights, reputation, business and his freedom. Therefore, the power of search and seizure must be exercised only in accordance with the law which must be strictly observed by the person conducting the search otherwise it will be declared illegal.

This is intended to minimize the chance of misuse or abuse of power of search and seizure, the question of procedural safeguards, subject to which such power may be exercised, becomes a matter of great significance.

The Police Act does not confer unqualified power of search and seizure. To do so would subject the power to constitutional objections. Some safeguards are therefore interwoven into the fabric of power of search and seizure. Such power is qualified by '*has reasonable grounds for believing*'.

There must be reasonable grounds to believe or reason to suspect that there is a breach of the law. The expression 'reason to believe' is not synonymous with subjective satisfaction of the police officer concerned. The belief must be held in good faith; it cannot be merely pretence. There should be material adequate or evidence adequate for forming the reasonable belief to carry out a search or to issue search warrant or warrant card.

The courts have resisted attempts made from time to time by interested parties to have the scope of search power narrowed down restrictively interpreting the statutory provisions authorizing search, or by liberally interpreting the safeguards subject to which the power is given. By and large the courts have interpreted these provisions liberally and safeguards against misuse of search power narrowly.

It is open to the court to examine the question whether the reasons for the belief have a rational nexus or connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the investigation in question. If as a result of the search nothing incriminating is found, that by itself cannot conclude that, at the inception, the search was *malafide* or was for irrelevant or extraneous reasons.

If the power of search is exercised bonafide, and in furtherance of the statutory duties of officers of government, then any error of judgment on the part of such staff will not vitiate the exercise of power especially where there has been minimal violation of human rights. See ***Baguma-Mugarama v URA HCCS No. 93 of 2014; Fuelex (U) Ltd v Commissioner General URA HCCS No. 4 of 2010; Kifampa Siraj & Yusuf Musa Musuda AG HCMC No.154 of 2017***

Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. A power of search and seizure is in any system of jurisprudence' an overriding power of the State for the protection of social security and that power is necessarily regulated by law.

As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of Crime or disorder or protection of health or morals or protection of rights and freedoms of others.

Right of privacy is subject to such action as may be lawfully taken for protection of rights of others; that the level of privacy protection depends on the context; The right to privacy in any event will necessarily have to go through a process of case-by-case development. If the scope of right to privacy is widened beyond limit, it may interfere with governance of state or other person's constitutional rights. Rights are protected and enjoyed by reasonable people who are law abiding and do not refuse to obey the sanction of the law and respect the rule of law when sanctioned by authority.

The search conducted by the respondent's officers was justified and was made in accordance with the law. Therefore, there was no violation of the applicants' right to privacy as contended.

***Whether the Respondent's agents' acts of arresting the Applicants without an arrest warrant and subsequently detaining them for more than 48hrs was a violation of the Applicants' right to personal liberty?***

The Applicants counsel submitted that the right to liberty is enshrined under Article 23 of the constitution which provides that “No person shall be deprived of personal; liberty except, among other things for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda”. In addition even where the arrest has happened in the circumstances laid out in Article 23(1) (c) the individual arrested must if not earlier released, be brought to court within 48 hours of the arrest.

Counsel further submitted that in the instant application the 1<sup>st</sup> applicant stated in his affidavit that on when the Respondents agents attacked and laid a siege around his home on 24<sup>th</sup> April, 2020, that in the morning he opened the house and he was taken by officers to Mbarara central police station from where he was transferred to the special investigations unit in Kireka up to 29<sup>th</sup> April, 2020 where they decided to produce him before court. The other applicants where by the 22<sup>nd</sup> Applicant was also arrested beyond 48 hours as when he went to SHACU offices on 12<sup>th</sup> May, 2020, he was after a long day of interrogation driven to SID Kireka and he was detained until 5<sup>th</sup> May, 2020 when he was given a police bond.

The respondents counsel submitted that there was a probable cause for the arrest of the Applicants and relied on the case of **Magezi Raphael v Attorney General HCCS No. 977/2000** which adopted the decision in **Lutaaya v Attorney General HCCS No. 461/1989** where it was stated;

*“ An arrest becomes wrongful when the same is carried out before one is arrested and subject to some to some exceptions, in the absence of an arrest warrant...in our laws arrests in the absence of warrants are permitted only where the police or private individual has reasonable cause to suspect that the person being arrested had committed or is about to commit a crime”*. And that in relation to this case there was sufficient probable cause as stated in different paragraphs of the Respondents affidavits in reply.

In addition that the Applicants were suspected of having committed offences of abuse of office, fraudulent false accounting, and fraudulent procurement pursuant to the Anti- Corruption Act of 2009 and that there’s evidence in the

Respondents affidavits in reply that there were criminal investigations which were conducted professionally prior to the arrest and that any cautious person would conclude that the Applicants had committed the offence. Thus, the arrest was based on probable and reasonable cause.

On the issue of arrest beyond the mandatory 48 hours counsel for the Respondent submitted that there was no violation of the Applicants constitutional right to liberty as enshrined under Article 23 (1) (c) of the constitution. That the 1<sup>st</sup> Applicant was arrested on 25<sup>th</sup> April, 2020 and taken to the courts on 29<sup>th</sup> April, 2020 where he appeared before the chief magistrate and that it should be noted that during this period the country was under nationwide covid-19 lockdown and that the date 25<sup>th</sup> April fell on Saturday and that it was impossible to produce the Applicant before court on that day. Therefore, the Applicants rights were not violated.

### ***Analysis***

Arrest is carried out where there is reasonable ground for suspicion of guilt. The test to be applied is that the onus of proof is on the person making the arrest to justify his conduct, must be that of a reasonable person acting without passion or prejudice. An arrest properly made by the police cannot amount to breach of fundamental rights.

An arrest pending investigation is unconstitutional. The position of the law presupposes that while the police has a duty to infract a person's right based on allegation of crime, it must first investigate such allegation and establish a prima facie evidence that will tantamount to either the commission of the same or reasonable suspicion of the commission of crime which is the universally accepted practice among policemen.

This universal stance of the law is emphasized in order to obviate cases where mendacious, vindictive and vengeful persons raise spurious and malicious allegations. Although the evidence acquired in the course of police investigation may be used in criminal proceedings and become decisive of their outcome but that does not make the investigation itself criminal proceedings. A stage should

be reached in an investigation where it might look, from the evidence, that there is sufficient cause to believe that an accused has emerged or discovered. It is usually at that stage that he is arrested, charged and cautioned.

In the instant case the Applicants submitted that they were arrested without an arrest warrant and that they were detained beyond the mandatory 48 hours and the respondents submitted that they had a probable cause and thus the Applicants rights were not violated.

The applicants' were lawfully arrested and it is not a requirement of the law that a person must only be arrested with a warrant of arrest. There are different modes of arrest under the law with or without a warrant. Even an ordinary person can effect arrest and hand over the suspect to police. The Applicants were suspected of having committed offences of abuse of office, fraudulent false accounting, and fraudulent procurement they could therefore be arrest upon that reasonable suspicion of having committed those offences. The applicants personal liberty by arrest was deprived in accordance with Article 23(1)(c) of the Constitution.

The applicants contend that they were held beyond 48 hours and this according to them was a violation of their rights and freedoms. The 1<sup>st</sup> applicant was arrested on 25<sup>th</sup> April, 2020 and that it was a Saturday hence he could not be produced before court and that it was also during Covid-19 lockdown. This was an usual situation which equally affected the operations of court and this court takes judicial notice of such since the courts closed for some days until the Chief Justice gave guidelines on how the courts would operate under such unusual circumstances of covid lockdown and advocates had to be given special permit to go to court and represent their clients as 'essential workers'.

The arrest of the applicants without a warrant of arrest was lawful and later charging applicant after 48 hours was justifiable in the prevailing circumstances of covid-19 lockdown.

***Whether the respondent's agents acts of denying the applicants access to their lawyer was a violation of the rights to legal counsel.***



Counsel for the applicants submitted that the right to legal counsel is part of the enabling rights of the wider appreciation of the right to liberty as its even enshrined under Article 23 (3) of the Constitution that the state has a duty to inform the accused of their right to legal counsel. The right to legal counsel is further guaranteed under international instruments to which Uganda is a party and one of them is the International covenant on civil and political rights under Article 14(3) (d) and that the obligation imposed on the state sets such a high bar that it is a mockery of our human rights regime not to do the bare minimum of informing the accused that they have a right to legal counsel.

The Respondents counsel in their submissions vehemently denied the allegations of the Applicants and that they never denied the Applicants their right to access a legal counsel and that in fact they always kept on reminding them of their rights and questioned in accordance to the law. And that relying on the case of **Gregory Kafuuzi v Attorney General [2000] KALR 743**, they are very much aware that every person has a right to inform the next of kin of the arrest and to seek the counsel of their choice in accordance with Article 23 of the constitution. Therefore it's the Applicants burden to prove that indeed they were denied access to their lawyers.

### ***Analysis***

A person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice.

Some people understand on the basic level that they have a constitutional right to a lawyer if they are accused of a crime. Few realize, however, that their constitutional right to a lawyer is limited in a number of significant ways.

Access to a lawyer constitutes an important safeguard against, and reduces the risks of torture and ill-treatment, conferring protections beyond those pertaining to the preparation of a detainee's legal defense. The implementation of this safeguard can help to:

- Ensure that detaining authorities respect the human dignity and physical and mental integrity of the person in custody, in full compliance with human rights standards.
- Discourage authorities from abusing their powers and resorting to abuse against the detainee in order to obtain information.
- Ensure that the person in custody is aware of his or her rights and is able to exercise them effectively, and has an understanding of technical procedures pertaining to detention and the criminal justice process.
- Prevent arbitrary and unlawful detention, and coerced confessions.
- Facilitate access to complaints mechanisms for reporting any instance of torture and ill-treatment.
- Protect the welfare of and safeguard the other rights of detainees in practice.

The 1<sup>st</sup> applicant stated that he was summoned to State House Anti-Corruption Unit and he indeed appeared with his lawyer, Kamukama David and he was interviewed in the office of SP Tweheyo Jackson. Later he was interrogated by Ochaya Bernard in exclusion of his lawyer. The said Ochaya contended that the applicant was in hiding and was brought to them by a one Hajj Abdu Kiyimba, the then LC III Chairperson Kyengera.

The applicant does not show whether and how his lawyer he had gone with at the police office was later abandoned or restricted to be present. Therefore, the accused equally had options available in case he felt that he needed his lawyer's presence at the time of interrogation. He would have remained silent while in the interrogation room in order not to incriminate himself. The applicant never alleged that his statements recorded proces-verbal had been the result of any duress or ill treatment.

From the evidence above there's no clear evidence that the Applicants were not given a right to lawyers they have failed to prove the same.

***Whether the Respondents' agents' act of parading the 1<sup>st</sup> Applicant before the media and continuously referring to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants as "thieves" was a violation of the right to presumption of innocence and the right to a fair hearing.***

Counsel submitted that a person has a right to fair hearing is provided for under Article 28 of the constitution and that there lies the non-derogable right of presumption of innocence relying on **the case of Jim Muhwezi v Attorney General Misc Application No. 18 of 2007.**

Further still that in the instant application the Applicants were subjected to acts that violated their right to a presumption of innocence as they were labeled “thieves, good for nothing and pathetic parasites” as seen in paragraphs 7, and 10 of the 1<sup>st</sup> Applicant’s affidavit and that the Respondents never gave him a chance to tell his side of the story in that even the employees of the NAGRC &DB who had some alternative facts to those being propped by the unit were shut down and totally denied any opportunity to speak.

Counsel for the Applicants contended that even where the SHACHU had to hold a public inquiry which was headed by Lt. Col. Edith Nakalema read out charges against him and even presented witnesses to the public which had thronged the place, all the while in the full glare of the invited media.

In addition the 1<sup>st</sup> Applicant states that he was paraded before the invited media upon his arrest in Mbarara on 25<sup>th</sup> April, 2020 and on the advice of the lawyers this was a violation of the right to enjoy the presumption of innocence. They relied on the decision of ECOWAS community court’s decision in **Djot Bayi Talbia & Ors v The Republic of Nigeria** where members of a crew were arrested at sea and accused of stealing Nigerian crude oil, they were paraded before domestic and international media as thieves and vandals of Nigeria oil. The court had the occasion to resolve the issue as to whether such parading of the suspects was a violation of Article 7 of the African Charter on Human and people’s rights which is to the effect that every person shall enjoy the right to a fair trial. The court observed that the parading of the suspects before international and local media when no court had found them guilty of any crime was a violation of the principle of presumption of innocence. The language used at the media parade was not consistent with the framework of preliminary investigations. Therefore the acts of the Respondents agents of parading the 1<sup>st</sup> Applicant before the media at

Mbarara and introducing him as a thief was a violation of his right to enjoy the presumption of innocence and thus a violation of his right to a fair hearing.

The Applicants counsel submitted that they were coerced into making statements against each other and to make confessions. The 2<sup>nd</sup> Applicant stated on that the officers of the Respondent made attempts to coerce them by all means possible to acknowledge wrongdoing or implicate the others if they did not want to suffer the wrath of the officers of the State House Anti-Corruption Unit. Thus the applicants contend that the right against self- incrimination is part of the right to enjoy the presumption of innocence until proven guilty, it is the right that protects the accused from the actions of the state that are intended to trick him/her into incriminating themselves as articulated in Article 28(11).

Therefore the individual and total sum of the above violations was ultimately a violation of the right to the non-derogable right to a fair hearing.

Counsel for the Respondent submitted that the Applicants rights were not violated during meeting attended by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have presented by mere conjecture based on rumors and unverified accounts of events.

The respondents contends that the Applicants case is riddled with falsehoods as the Applicants have not furnished any credible evidence to show that the right to a fair hearing as per Article 28 (3), that first of all the 1<sup>st</sup> Applicants allegations that he was subject to a public trial wherein the Lt. Col Edith Nakalema convened as the judge, prosecutor and witness before the media, however there is no evidence of any such media proceedings before court and neither is there clear evidence to show that the Applicants were indeed paraded before the media.

In addition counsel for the Respondent contend that there has not been any finding of guilt on the applicants and the same can only be arrived at by the Anti-corruption court after a full trial of the accused persons, and the applicants have failed to produce sufficient evidence to prove that they were pronounced guilty by the Respondents and that its for that purpose that the Applicants were charged in a court of law and are undergoing a trial.

The respondents counsel further deterred with the Applicants submissions that they were being coerced into making confessions and that that is a total falsehood, they referred to Ogema Tanga's statement during cross-examination where he clarified that he did not find it necessary to respond to the Allegations of forcing the Applicants to make statements because it was a material falsehood and that there is no sufficient evidence to prove the same.

### ***Analysis***

Public officials including judges, prosecutors, the police and the government officials, all of whom must avoid making public statements of the guilt of an individual prior to conviction or after an acquittal. It is permissible, however, for the authorities to inform the public of the name of a suspect and that the person has been arrested or has made a confession, as long as the person is not publicly declared guilty.

A suspect or accused person should not be made to look like a guilty person by being caged or shackled in the courtroom or forced to appear in court wearing a prison uniform or with his or her head shaved. If possible, the accused should be allowed to dress in civilian clothes for the duration of the trial. The presumption of innocence will not be violated where the accused person needs to be handcuffed or restrained to prevent his or her escape or to maintain general security of the courtroom.

Basing on both parties evidence, it should be noted that the burden of proof in civil cases vests on the complainant and the same is not different in this case, thus whereas the Applicants contend that they were paraded before the media and calling them thieves e.t.c and also coercing them to give evidence against each other they have failed to produce conclusive evidence to the same.

The applicants have not mentioned any news media before whom they were paraded and there is no single photograph presented in this court. At least for the issue of being paraded before the media they would have been in position to produce evidence of any news or newspapers where the same was published unfortunately there's no such evidence on record. Therefore court cannot give a

decision basing on a mere word of mouth hence reaching to a conclusion that the Applicants rights were not violated in any way.

***Whether the Applicants were subjected to any torture, inhuman acts and degrading treatment during their interrogation and detention?***

The applicants counsel submitted that the freedom against torture, cruel, inhuman and degrading treatment is protected under Article 24 and 44 (a) of the 1995 Constitution. The 1<sup>st</sup> applicant states that when he appeared at the office of Lt Col. Edith Nakalema, the head of SHACU, he was interrogated by Ochaya Bernard up to about 7:00pm without allowing him a break or affording him a meal and as a result he suffered from acute ulcers for which he was subsequently hospitalized of and the same has been evidenced by medical report dated 10<sup>th</sup> January, 2020 from case medical center and that one from Ebenezer medical clinic.

And the same ordeal happened to the 2<sup>nd</sup> and 3<sup>rd</sup> applicants as stated in their affidavits in support of the Application thus, reaching to a conclusion that there was indeed degrading treatment because it left the Applicants and their families in fear, anxiety and traumatized by the brute assault on their right to be free from torture, cruel, inhuman and degrading treatment. They also feel that they were subjected to torture and cruel and degrading treatment.

Counsel for the respondent contend that the Applicants were never tortured or subjected to cruel, inhuman and degrading treatment contrary to Article 24 of the constitution of Uganda 1995. and that the applicants case is riddled with falsehoods which the court should ignore since there is insufficient evidence produced by the applicants to prove the same. The court should evaluate the evidence presented by the applicants and treat the same with all the suspicion since there is a missing link.

In addition that during cross examination the 1<sup>st</sup> Applicant admitted that he did not have any evidence that tear gas was used and that he did not have any physical evidence of torture, and that the same applies to the 3<sup>rd</sup> applicant who admitted of having no medical evidence or report to corroborate her torture.

## ***Analysis***

Article 24 of the Constitution of the Republic of Uganda provides for freedom from torture or cruel, inhuman and degrading treatment. Article 44 of the Constitution of the Republic of Uganda prohibits derogation from that right.

*Under Article 44 the protection from the seven conditions is absolute.”*

The right to freedom from torture, inhuman and degrading treatment is also provided for in the ***Universal Declaration of Human Rights*** under Article 5 thereof which provides;

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

The right to freedom from torture is also envisaged in the ***International Covenant on Civil and Political Rights***, Article 7 thereof provides;

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”*

The ***African Charter on Human and People’s Rights*** provides for freedom from torture, inhuman and degrading treatment under Article 5 which states;

*“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”*

Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical and psychological suffering, but which humiliate the individual or force him or her to act against his/her will or conscience. See ***International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998)***

Inhuman treatment or punishment is treatment which causes intense physical or mental suffering. It includes:

- serious physical assault
- psychological interrogation
- cruel or barbaric detention conditions or restraints
- serious physical or psychological abuse in a health or care setting, and

- threatening to torture someone, if the threat is real and immediate.

In the instant case basing on the evidence from both parties counsel for the applicants submitted that they were tortured and treated in degrading manner whereas the Respondents contends that the applicants were never tortured, the applicants produced evidence of medical reports from different hospitals and the Respondents did not produce any evidence to disprove the same however they contended that the medical reports were not properly adduced before court as the author did not directly appear before court to do so, and also that the 1<sup>st</sup> applicant could not tell during cross examination who actually tortured him.

In the cases of violation of rights through torture, the parties make all manner of allegations of torture and the same usually remain extremely controversial since it is the 'case your word against my word'. The court will need to have cogent and credible evidence before it arrives at the decision that a person was tortured or subjected to inhumane and degrading treatment.

Although the applicants have claimed a violation of their right to freedom from torture, they have not substantiated on this claim and did not lead evidence to prove inhumane treatment by the State House Anti Protection Unit. In absence of such evidence, the court cannot find a violation as alleged.

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***

Simple assault should never be interpreted as torture or inhuman and degrading treatment. It is merely a tortious act of trespass to person and should not be categorized as serious violation of the right to freedom from torture or inhuman or degrading treatment envisaged under the Constitution. 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.



It is true that any interrogation by police and sometimes summoning of any person to police for questioning sends chills down the person's spine and especially State House Anti-Corruption Unit. It should not be interpreted as torture in absence of such credible evidence otherwise every suspect of corruption will be encouraged to file cases of torture in order to secure their freedom as the applicants have sought from this court to declare their prosecution illegal because of the alleged torture.

The applicants have failed to prove the alleged acts of torture, cruel, inhuman and degrading treatment.

This application fails and is dismissed with no order as to costs

I so order.

***Ssekaana Musa***

***Judge***

***31st January 2023***