

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

MISCELLANEOUS CAUSE NO. 141 OF 2021

MAJIBU (NAJIBU) SSEBYALA:..... APPLICANT

VERSUS

ATTORNEY GENERAL :..... RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under Article 50 of the Constitution, section 3 (1), 4 (1), (2) and 9 (2) of the Human Rights (Enforcement) Act and Rule 7 (1) of the Judicature (Fundamental and Other Human Rights and Freedoms (Enforcement Procedure) Rules, 2019 for orders that;

1. A declaration that the proceedings, judgement, conviction and sentence against the applicant in the General Court Martial vide Criminal Case No. UPDF/ GCM/ 019/ 2016, which were confirmed by the Court Martial Appeal Court vide Criminal Appeal No. 001 of 2017, infringed and/ or threatened the applicant's rights to liberty, dignity and a fair hearing as enshrined in Articles 23, 24, 28, 42 and 44 of the Constitution and are thus illegal, null and void;
2. An order discharging the applicant and setting him free;
3. Compensation, including general, aggravated and exemplary damages;

4. Orders for the rehabilitation of the applicant paid for by the respondent, including the provision of the medical and psychological care in local and/ or foreign facilities as recommended by the applicant's personal doctor;
5. Costs with a certificate for two counsel.

The grounds in support of this application are stated in the affidavit of the Applicant; Majibu Ssebyala which briefly states that;

1. On 12th December, 2016, the agents of the respondent arraigned the applicant before the General Court Martial on a two count charge vide criminal Case No. UPDF/ GCM/019/ 2016, where he was tried, convicted and sentenced to a term of 15 years on the first count (offences relating to security c/s 130 (1) (a) of the UPDF Act and two 2 years on the second count prejudicial to good order and discipline c/s 178 (1), (2) and (5) UPDF Act which were upheld by the Court Martial Appeal Court vide Criminal Appeal No. 001 of 2017.
2. By failing to render a decision on a series of preliminary objections raised by counsel for the applicant on the 1st day of the trial, the General Court Martial infringed and/ or threatened the applicant's rights to a fair hearing enshrined in Article 28 (1) of the Constitution.
3. By failing to ensure that the applicant received, in a timeous manner, adequate disclosure of all material evidence that the state was going to rely on in Criminal Case No. UPDF/GCM/019/2016, the General Court Martial and its staff infringed and/ or threatened the applicant's fair trial guarantees enshrined in Articles 28 (1) and (3) (c) of the Constitution.
4. By failing to ensure that proper investigations were conducted during the 20 days of the applicant's detention after being discharged in

Criminal Case No. UPDF/GCM/15/2015, or at all, prior to commencement of Criminal Case No. UPDF/GCM/019/2016, the Uganda People's Defence Force, General Court Martial and its staff infringed and/ or threatened the applicant's fair trial guarantees enshrined in Article 28 (1), (9) and 42 of the Constitution, as well as the rights to liberty and dignity enshrined in Articles 23 and 24 of the Constitution respectively.

5. By arbitrary and injudiciously changing the venue of the applicant's trial from Makindye in Kampala City to Barawe in Somalia where he had previously been tortured by UPDF officers, the General Court Martial infringed and/ or threatened the applicant's fair trial guarantees enshrined in Articles 28 (1), (3) (c) and (d) of the Constitution, as well as his rights to liberty and dignity enshrined in Articles 23 and 24 of the Constitution.
6. By arbitrarily imposing court- appointed defence counsel on the applicant while Somali, without giving the applicant adequate time and facilities for contacting Kampala based counsel of his choice who was already on the record, the General Court Martial infringed and or threatened the applicant's fair trial guarantees enshrined in Articles 28 (1), (3) (c) and (d) of the Constitution as well as the applicant's right to dignity enshrined in Article 24 of the Constitution.
7. By failing to provide the assistance of an interpreter throughout the trial, the General Court Martial infringed and/ or threatened the applicant's fair trial guarantees enshrined in Articles 28 (1) and (9) of the Constitution, as well as the applicant's right to dignity enshrined in Article 24 of the Constitution.

8. By conducting a second trial for criminal offences of which the applicant could have been tried and discharged in Criminal Case No. UPDF/GCM/15/2015, the General Court Martial infringed and/ or threatened the applicant's right to fair trial guarantee enshrined in Article 28 of the Constitution.
9. By failing to observe and remedy the above mentioned human rights violations in scrutiny of the General Court Martial record of proceedings and judgement, the Court Martial Appeal Court failed in its duty to respect, uphold and promote the applicant's rights hereby contrary to its duty under Article 20 (2) and 221 of the Constitution.
10. In consequence, the impugned decisions of the General Court and Court Martial Appeal Court are illegal, null and void.
11. The General Court Martial and its staff infringed and/ or threatened the applicant's fair trial guarantees enshrined in Articles 28 (1) and 28 (3) (c) of the Constitution.

The Respondent filed its affidavits in reply to the application sworn by LT Col John Bizimana, LT Col Raphael Mugisha and LT Col Asha Patra opposing this application on grounds that it was frivolous, vexatious and an abuse of court process. The respondent stated that the application is a disguised appeal against the confirmation of the conviction by the Court Martial Appeal Court. The respondent denied all allegations made by the applicant contending as follows;

1. That the applicant was accused and charged under UPDF/GCM/019/2016 in which he was tried on charges of offences relating to security c/s 130 (1)(f) of the UPDF Act 2005 and Conduct prejudicial to good order and discipline c/s 178 (1) and (2) of the UPDF Act.

2. That the applicant was tried for the above offences at two sessions; one in Uganda and the other in Somalia. The applicant was tried in Somalia where the offences were committed and the key witnesses were somali citizens.
3. That the applicant was represented by a private lawyer who later abandoned him or had lost contact and was duly represented by Lt Col Asha Patra an Advocayte of Courts of Judicature.
4. That the applicant has never raised any objection to the government provided lawyer as his defence counsel.

The applicant proposed the following issues for determination by this court.

1. *Whether the respondent unjustifiably threatened or violated the applicant's rights enshrined in Article 23, 24, 28 (1), 28 (3) (c), 28 (3) (d), 28 (3) (f), 28 (9), 42 and 44 of the Constitution.*
2. *What remedies are available to the parties?*

The applicant was represented by Mr. Ssemakade Isaac and Mr. Dennis Enap and Mr. Gawayya Tegulle while the respondent was represented by Mr. Ebila Nathan Hillary.

The parties were ordered to file written submissions which were accordingly done by the applicant. The respondent did not file written submissions. However, this court considered the pleadings, evidence adduced and submissions in determining the issues raised.

Determination

Whether the respondent unjustifiably threatened or violate the applicant's rights enshrined in Article 23, 24, 28 (1), 28 (3) (c), 28 (3) (d), 28 (3) (f), 28 (9) and 42 and 44 of the Constitution.

The applicant submitted that by failing to render a decision on a series of preliminary objections raised by the defence/ counsel for the applicant on the first day of the trial, the General Court Martial infringed and/ or threatened the applicant's fair trial guarantees enshrined in Article 28 (1) of the Constitution. He relied on the case of *Attorney General vs Media Legal Defence Initiative & 19 Ors EACJ Appeal 3 of 2016*, where it was held that a court seized with a preliminary objection is enjoined by law to determine that objection before going into the merits or substance before it. Failure to do so amounts to an incurable procedural impropriety.

Counsel cited Regulation 78 of Uganda People's Defence Forces (Rules of Procedure) Regulations which imposes a high, compulsory duty on the judge advocate and general court martial in relation to preliminary objections. He submitted that these duties were not fulfilled by the assigned judge advocate and that the general court martial turned a blind eye to this incurable procedural impropriety thereby vitiating its proceedings. Counsel submitted that there is no ruling on a case to answer and nowhere did the judge advocate render the requisite opinion and advice in relation to the preliminary objections raised by the applicant. Accordingly, the court martial appeal court failed in its duty under Article 20 (2) of the Constitution to ensure that there had been no infringement on the applicant's fair trial rights under Article 28 and 44 (c) in the general court martial.

Counsel for the applicant also submitted that the judge advocate did not swear an affidavit to rebut the applicant's material allegations. He stated that there is an evasive denial of the allegations made by the applicant which is unacceptable under Order 6 Rule 8 of the Civil Procedure Rules. It was also submitted that by conducting a second trial for criminal offences for which the applicant could have been tried and discharged in Criminal Case No. UPDF/ GCM/15/2015, the general court martial infringed and/ or threatened the applicant's fair trial guarantees enshrined in Article 28 (1) and (9) of the Constitution as well as the applicant's right to dignity enshrined in Article 24.

It was submitted that the UPDF Act provides for double jeopardy under section 216. The Act and Rules thereunder do not make a clear provision for the joinder of counts as well as sections 86 (1) Magistrates Courts Act which is applicable to the general court martial. Counsel submitted that the principles on double jeopardy as against the applicant were not observed.

Counsel also submitted that the high court at Barawe- Somalia established that the applicant was tortured for the purpose for the tortured for the purpose of extracting a confession in connection with the criminal charge in UPDF/GCM/015/2015 to which the court nullified the trial and directed the general court martial to discharge the applicant. He therefore urged court to find that the offences in count I and II in UPDF/GCM/051/2015 were of the same character sole count in UPDF/GCM/015/2015 were of the same character and indeed could have been adequately joined in one trial.

Court therefore submitted that the applicant was treated shabbily and deplorably, in a demeaning and degrading manner before the general court martial and court martial appeal court contrary to the respondent's duty in Article 24 and 44 (a) of the Constitution.

The applicant's counsel submitted that by failing to ensure that the applicant received in a timeous manner, adequate disclosure of all material evidence that the state was going to rely on in Criminal Case No. UPDF/GCM/019/2016, the general court martial and its staff infringed and/or threatened the applicant's fair trial guarantees enshrined in Article 28 (1) and (3) (c) of the Constitution. He relied on *Soon Yeon Kong Kim & Anor vs Attorney General Ref. No. 06 of 2007* to state that facilitating an accused person in a criminal trial includes disclosure of copies of prosecution witness statements made to the investigating authority as well as the exhibits to be tendered as evidence. He thereby relied on Regulation 6 (1) (b) (ii), 12 and 18 of the UPDF Rules of procedure and therefore prayed that court finds that by failing to ensure that the applicant received, in a timeous manner, adequate disclosure of all material evidence, the general court martial and

its staff infringed the applicant's fair trial guarantees enshrined in Articles 28 (1) and (3) (c) of the Constitution.

The applicant counsel submitted that by failing to ensure that proper investigations were conducted during the 20 days of the applicant's detention after being discharged or prior to the commencement of trial, the general court martial infringed and/ or threatened his fair trial guarantees enshrined in Articles 28 (1), (9) and 42 of the Constitution as well as the right to liberty and dignity under Articles 23 and 24. Counsel stated that the UPDF Rules of procedure impose a clear compulsory duty of investigation on a commanding officer before a trial by a court martial is commenced.

The plaintiff's counsel stated that had a proper and lawful investigation been carried out pursuant to Regulations 6 (1) (b) (ii), 12 and 18 of the UPDF Rules, the commanding officer ought to have reduced into writing the charge and evidence at issue, caused the same to be read and explained to the applicant and submitted the foregoing record to a higher authority.

However, the decision to arrest, detain and cause the applicant's trial were taken injudiciously and in breach of the constitutional rights of liberty, dignity a fair hearing contrary to the respondent's duties.

The applicant's counsel further submitted that by arbitrary and injudiciously changing the venue of the applicant's trial from Makindye to Somalia, imposing a court appointed defence counsel on the applicant while in Somalia and failing to provide the assistance of an interpreter throughout the trial, the general court martial infringed on his right guarantees enshrined in Article 28 and Article 24 of the Constitution. He therefore prayed that this court finds so.

Analysis.

I have had an opportunity to read the pleadings, evidence adduced by the parties and submissions for which I have considered in determining whether

this is a proper case for enforcement of human rights. The applicant brought this suit for enforcement of his human rights under Article 50 of the Constitution, section 3 (1), 4 (1), (2) and 9 (2) of the Human Rights (Enforcement) Act and Rule 7 (1) of the Judicature (Fundamental and Other Human Rights and Freedoms (Enforcement Procedure) Rules, 2019. It is therefore important for us to understand the scope for bringing an action under this law.

For context, **Article 50 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.

Enforcement of human rights and freedoms

Section 3 (1) of the Human Rights (Enforcement) Act, 2019 provides that;

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

Section 4 (1) of the Human Rights (Enforcement) Act, 2019 provides that;

The High Court shall hear and determine any application relating to the enforcement or violation of;

Non derogable rights and freedoms guaranteed in article 44 of the Constitution;

Other rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms envisaged in article 45 of the Constitution;

Rights and freedoms restricted under a law made for purposes of a state of emergency; and

Rights and freedoms which are preserved by this Act to be determined by a magistrate court, where the remedy sought by the applicant is beyond the pecuniary jurisdiction of that court.

The applicant alleges that the respondent unjustifiably threatened or violate his rights enshrined in Article 23, 24, 28 (1), 28 (3) (c), 28 (3) (d), 28 (3) (f), 28 (9) and 42 and 44 of the Constitution.

The the applicant was tried, convicted and sentenced by the General Court Martial vide Criminal Case No. UPDF/ GCM/ 019/ 2016, which conviction and sentence were confirmed by the Court Martial Appeal Court vide Criminal Appeal No. 001 of 2017. The applicant was facing disciplinary charges under the UPDF Act which are purely criminal charges in nature.

The alleged violations purely arise from the nature and conduct of the applicant's trial before the General Court Martial in both Uganda and subsequently in Somalia where the alleged offences were committed. The alleged violations of the applicants rights are as a result of the conviction by the two courts both at first instance and subsequently on appeal.

The applicant and his counsel have tried to do a 'postmortem' of the entire process leading to charging him before the General Court Martial with a view of finding some mistakes or errors to label them violations of his rights. The court should always be alive to such smart litigants who will try to make up claims of violations iof human rights.

The Constitutional court has warned against challenging criminal proceedings in a civil court. The nature of this application of enforcement of rights equally amounts to challenging criminal trial in a civil court and thus making it appear like an appellate court that is reviewing what could have transpired in the course of criminal trial.

Similarly in the case of *Dr. Tiberius Muhebwa vs Uganda Constitutional Petition No. 09 of 2012* and also in *Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others vs Attorney General and Inspector General of*

Government, the court cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair. In the latter case, court noted further as follows;

“ The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional court with a request to stop the prosecution pending hearing his challenge against the prosecution. In due course, this court would find itself engaged in petitions to stop criminal prosecutions and nothing else. This could result into a breakdown of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court”

It can be deduced from the above cases and by analogy, challenging criminal trials in a civil court will likely cause confusion in the criminal justice system. It may be interpreted that a civil court stands on higher pedestal than a criminal court in respect of protecting human rights. The courts have the same jurisdiction in respect of enforcement of rights whether criminal court or civil court.

This court affirmed the same views in the case of **Hon. Kipoi Tonny Nsubuga v Attorney General HCMA No. 230 of 2018** and noted as follows;

“I entirely agree with the views espoused in the above authorities. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or military court martial.

There is an appeal system in criminal trial system through which the applicant can raise his grounds of a mistrial or defectiveness of charge sheet or challenge of proceedings in Military Court Martial after DPP had entered a nolle prosequi.

The applicant will be able to challenge the proceedings by way of appeal, to Court Martial Appeal Court, then to the appellate courts of Judicature, namely the Court of Appeal and the Supreme Court”.

The applicant should have challenged the trial in the appellate court of the Court Martial Appeal Court and later further challenge the violations of his rights through the appeal in the Court of Appeal. It is against public policy to allow convicted criminals to challenge their concluded trials in fresh suits or applications for violation of their rights like in the present case. This would mean every convicted criminal would institute new proceedings to challenge their convictions on premises of alleged violation of rights which would cause confusion in the criminal justice system with unintended consequences.

The court should not lend the applicant an excuse to avoid serving a confirmed sentence arising out of a conviction under the disguise of violation of his rights in the course of trial. The applicant's sole intention of filing this application is to be discharged and be set free upon court finding that his rights were infringed and threatened.

Constitutional provisions like Article 50 are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts or challenging court decisions. See *Article 126(2)(e) of the Constitution*.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good on issues of human rights violations.

In the case of *Charles Harry Twagira v AG & 2 others SCCA No. 4 of 2007* Justice Mulenga (RIP) noted as follows;

"Article 50 of the Constitution proclaims the infringement of the rights and freedoms guaranteed under the Constitution to be justitiable. However, the right to

apply to a competent court for redress on the ground of such infringement must be construed in the context of the whole Constitution generally and in the context of Chapter 4 in particular. In the instant case, the appellant's right to bring such an application must be construed together with the right and indeed obligation that the State has to prosecute the appellant in a competent court, for any offence he was reasonably suspected to have committed. Neither right could be exercised to defeat the other...."

This court agrees with the respondent that this application is an abuse of process of court since it is not brought in good faith but rather with some ulterior motive of defeating the criminal trial and conviction of the applicant. Courts should guard against frequent abuse of the court process and this duty equally extends to parties and their respective counsel to take the necessary steps to safeguard the integrity of the judiciary and obviate actions likely to abuse its process. *See Caneland Ltd and Others v Dephis Bank Ltd Civil Application No. 344 of 1999*

The applicant's counsel crafted this case from the proceedings of the General Court Martial with ill motives to defeat justice after the applicant lost his appeal at the Court Martial Appeal Court. To safeguard the dignity and authority of the court, the applicant's claims cannot be sustained in a separate application for enforcement of rights.

From the evidence on record, it is uncontroverted that the applicant was charged before the general court martial in Criminal Case No. UPDF/ GCM/ 019/ 2016 and Criminal Case No. Court Martial Appeal Court vide Criminal Appeal No. 001 of 2017, sentenced and also convicted. The applicant did not appeal the decision from the Court Martial Appeal Court. As such, it would be unfortunate to find that his right to personal liberty was violated when he is in fact serving his sentence as provided for under Article 23 (1) of the Constitution.

It would therefore be wrong for this court to entertain this application as it is actually a disguised appeal against the judgment of the Court Martial

Appeal Court. It is an abuse of court process to use another remedy under the Constitution and prescribed laws to avoid a set procedure. Easy access to justice should not be misused as a license to file misconceived and frivolous applications. This application did not involve any violation of rights and it had no basis to be “baptized” as an enforcement of rights application.

I therefore find that this application is in effect an appeal that had been disguised as an application for enforcement of human rights and is accordingly dismissed with costs to the respondent.

I so Order.

SSEKAANA MUSA

JUDGE

8th September 2023