

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

MISCELLANEOUS CAUSE NO. 329 OF 2021

MATOVU FRANCIS aka BUTTO ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. HON. ANITA AMONG

2. ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This was an application brought under the provisions of Article 50(1),26,24,23(1),(2),(3) and (4) of the Constitution of the Republic of Uganda,1995, Sections1,3,4,6,10 and 14 of the Human Rights(Enforcement)Act,2019, Rules 5, 7 & 8 of the Judicature(Fundamental & other Human Rights & Freedoms)(Enforcement Procedure) Rules 2019, Prevention and Prohibition of Torture Act,2012.

The application sought orders that;

- (i) A declaration that the detention of the applicant by the agents of the 2nd respondent for a period exceeding 48 hours without trial was in contravention of the applicant's rights guaranteed under the Constitution of the Republic of Uganda,1995.
- (ii)A declaration that the detention of the applicant by the agents of the 2nd respondent in a non-gazetted place of detention to wit Mbuya military barracks under the orders of the 1st respondent constitutes a

violation of his right guaranteed under the Constitution of the Republic of Uganda, 1995.

- (iii) A declaration that the applicant's right of freedom from torture, inhuman and degrading treatment as guaranteed under Article 24 of the Constitution of the Republic of Uganda, 1995 was grossly violated by the 2nd respondent's agents.
- (iv) The respondents pay general damages, exemplary damages, and compensatory damages to the applicant for the violations of his constitutional rights.
- (v) Costs of this application be provided for.

The application is supported by the affidavit of **Matovu Francis aka Butto** the applicant herein which contains the grounds upon which this application is premised but briefly the grounds are;

- (i) That on the 9th day of November 2021, the applicant was arrested by policemen dressed in police uniform around Speke road in Kampala for no cause at all and later whisked off to Mbuya military barracks where he was illegally detained in a non-gazetted center for a period of three days under the orders of the 1st respondent.
- (ii) That while in Mbuya military barracks, the applicant was subjected to torture, inhuman and degrading treatment.
- (iii) That during the applicant's detention at Mbuya military barracks, the applicant would occasionally be taken to Kireka Special investigations unit for further interrogation by police detectives under the orders of the 1st respondent who had filed a complaint at Kibuli CID Headquarters vide file No.E/346/2021.

- (iv) That the applicant's money worth US dollars 27,000 was forcefully taken from the applicant upon his arrest by the policemen who arrested him on the orders of the 1st respondent and the applicant has failed to recover the said money.
- (v) That on the 12th day of November 2021, the applicant was produced before the Chief Magistrates Court of Buganda road at Buganda road where he was charged with the offence of offensive communication C/s 25 of the Computer Misuse Act 2011 and Libel C/s 179 and 180 of the Penal Code Act Cap 120 vide criminal case No.1457/2021 CID HQTRS E/346/2021but the applicant was denied bail and remanded to Kitalya Prisons.
- (vi) That on the 19th day of November 2021, the applicant was again produced before the Chief Magistrates' Court of Buganda road at Buganda road and later released on bail.
- (vii) That it is just and equitable that the orders being sought be granted.

The 1st respondent filed an affidavit in reply opposing the application stating that it never disclosed any cause of action against her. She stated that;

1. She had lodged a complaint at CID Headquarters against one Bigirwa over offensive communications being circulated at the time on social media orchestrated by him and his cohorts aimed at tarnishing her name.
2. She had no idea that the applicant was one of those behind the said social media communications and his arrest could only have been out of investigations and information independently obtained by the investigating officers who are not under my control.

3. Upon lodging a complaint at the CID headquarters, further investigations and further action in the matter including the arrest and detention of possible suspects was left in the hands of the police and not me as the complainant.
4. The applicant denied the allegations in the affidavit supporting the motion and stated that other than lodging her complaint to the police, she took no further action in the matter and left it to the relevant investigative departments of the police to cause the investigations and cause arrest, detention and arraignment of the suspects before courts of law.
5. She stated that she was therefore not responsible whether in person or vicariously for the alleged embarrassment, inconvenience or loss whatsoever claimed to have been suffered by the applicant and that the allegations were only meant to solicit sympathy from the court.

The 2nd respondent also filed an affidavit sworn by Ndyamuhaki Bill. He stated that;

1. He was a Detective Assistant Superintendent of police attached to the cyber crimes unit of the Criminal Investigations Directorate of the Uganda Police Force and knew that the applicant together with others had been charged in the Chief Magistrates Court of Buganda Road with charges of offensive communications, criminal libel and demanding money with menaces.
2. This resulted from various investigations that had been conducted and were in the advanced stages of being concluded.

3. The police are by virtue of Article 212 of the Constitution mandated to preserve the law protect and detect crime.
4. That he personally took the applicant's statement who never indicated the allegations he was making in the application indicating that they were therefore an afterthought and devoid of merit, frivolous, and a waste of court's time which should be dismissed with costs.

The following issues were framed for determination by the court:

1. *Whether the application is competent before court.*
2. *Whether the fundamental rights and freedoms of the applicant were infringed upon by the respondents.*
3. *What remedies are available to the parties?*

The parties filed written submissions that were considered by this court.

The applicant was represented by Counsel Wabwire Denis while the 1st respondent was represented by Counsel Kyazze Joseph and 2nd respondent was represented by Twinomugisha Mugisha (State Attorney)

Whether the application is competent before court.

The 1st respondent contended that there was no valid and competent application as the same stands dismissed on account of expiry of summons and non-service.

Counsel for the 1st respondent submitted that when they got notice of the application on 12th January 2022 and alerted the 1st respondent, no service had been effected. That there was no proof of service on record by the said date as envisaged under Order 5 Rule 16 CPR.

Ibrahim Abdul Majid the court process server whose affidavit of service is on the record, swore that he was instructed by the applicant's counsel on the 14th day of December 2021. He stated that he proceeded to the 1st respondent's office at the Parliament Uganda but was denied access to her on grounds that he had no appointment. That he was told to hand over said court documents to a gentleman named Patrick who returned later and stated that he was instructed not to receive the documents by the 1st respondent until she conferred with her lawyers and then would acknowledge receipt. That he left the premises and returned on 17th December 2021 to follow up but was denied access at the gate.

Counsel for the 1st respondent submitted that the affidavit was filed belatedly and was clothed with lies.

I find the affidavit of service on record sufficient to prove that there was service effected upon the 1st respondent at her office. The process server was illustrative in the steps taken to effect service and cannot be expected to provide more detail especially with regard to the names of the security personnel who escorted him to the office or the one Patrick who received the documents.

The respondents also objected to the application's competency for want of a cause of action.

The 1st respondent contended that it was not pleaded anywhere that the 1st respondent arrested and detained the applicant, caused him any injuries, took his money or interrogated tortured or assaulted the applicant. That the 1st respondent who lodged a complaint to CID cannot be responsible for the manner in which police identifies the suspects, arrest and detains them, or what happens in the detention centres of security agents.

Counsel for the applicant submitted that the applicant had ably pleaded material facts which implicated the 1st respondent in the arrest, torture, and illegal detention of the applicant hence being sued in her personal capacity.

Analysis

A perusal of the applicant's affidavit shows that while detained at Mbuya barracks, he was tortured by army men as he was being asked why he was defaming the 1st respondent and also taken to Kireka Special Investigations unit for further interrogation under the orders of the 1st respondent. This is farfetched evidence to satisfy the 1st respondent's involvement in the applicant's woes.

The applicant as the then Deputy Speaker of Parliament simply lodged a complaint with the police and had no personal or official capacity to determine how the investigations, arrests or detaining of the offenders would be done. It would be an injustice to hold the 1st respondent personally liable for the actions of the Police CID.

Any litigant is at liberty to set the law in motion by lodging a complaint at Police or any responsible authorities. In order to succeed against such a party who had set the law in motion, the applicant must show that party to have been actively instrumental to his detention and or violation of his rights. Any citizen who reports a commission of an offence like in the present case cannot be added as a party to violations which may have occurred. The 1st respondent had a genuine belief in the guilt of the applicant and his racket who were posting defamatory messages on social media and indeed the proceedings have been initiated and justifiably so against the applicant.

A party will only be liable where he deliberately, falsely, maliciously and vindictively sets the machinery in motion for breach of the person's rights

without any justification or basis. The court should be able to interrogate the circumstances surrounding any case of alleged violation of rights.

Where the complainant (like the 1st respondent) lodges a complaint to police or other authorities and leaves them to do their own investigation and conclude and such conclusion results in the arrest of the applicant, an action of violation of rights will not lie against such complainant. The applicant and his counsel merely added the 1st respondent in order to make his case 'look big' or flowery and extend his publicity stunts on social media against the 1st respondent. There was no justification in adding the 1st respondent and this was an extension of the applicant's hidden agenda of continuing to defame and attack the person of the 1st respondent in her position then of Deputy Speaker.

The applicant has failed to show a cause of action against the 1st respondent or any violations by the 1st respondent. The preliminary objection is allowed and application against the 1st respondent is therefore dismissed with costs.

The 2nd respondent's counsel submitted that the applicant had failed to establish a cause of action against the 2nd respondent and or its agents. That apart from stating that his rights were violated he had not adduced or shown any evidence to prove that the said rights have been infringed upon by the 2nd respondent and or its agents.

Counsel submitted that the application was based on general averments with no supporting materials like particulars /names of the respondent's agents who had violated his rights. That it was incurably defective and ought to be struck out.

The applicant contends that his non-derogable right of freedom from torture was violated by army men who were dressed in military attire who

detained and beat him, and soaked him in very cold water among others while he was detained at Mbuya barracks.

Analysis

These allegations disclose a cause of action against the respondent in as far as the applicant identified by their uniforms that it was the 2nd respondent's agents who allegedly tortured him. It would be unfair and unjust to expect the applicant to make more specific averments on the particulars of the respondent's agents like providing the names of the officers who allegedly tortured him. The facts disclose a cause of action which must be interrogated against the evidence produced on record in the affidavit evidence

The application is therefore competent and discloses a cause of action against the 2nd respondent.

Whether the fundamental rights and freedoms of the applicant were infringed upon by the respondents.

The applicant contends that the following fundamental rights were violated by the respondents. The said allegations of violations are totally denied by the 2nd respondent and this leave this court with the duty to evaluate the evidence on record.

It should be noted and emphasized that a mere allegation of crime or wrong-doing against a suspect, irrespective of its seriousness, cannot operate to curtail the fundamental rights of the suspect nor can it operate to justify the incarceration and torture of a suspect. A person who infringes or breaches the constitutional rights of another person has the onus to justify such breaches.

The nature of the allegations made by the applicant required testimony before court but the procedure adopted by the applicant did not avail this

court with an opportunity to test the veracity of the statements made between the parties. It remained a case of allegation of one party against each party, my word for your word.

The applicant's constitutional guarantee to the right to personal liberty under Article 23 of the Constitution

The applicant alleged that on the 9th day of November 2021, he was arrested by policemen dressed in police uniform around Speke road and was taken to Mbuya Military Barracks which is a non gazetted detention center. That he demanded from the policemen who had arrested him to know why he had been arrested but the policemen refused to inform him why he had been arrested. That he was detained for a period of more than 48 hours before being produced before the chief magistrate's court of Buganda Road on the 12th day of November 2021 and he was not allowed to inform his next of kin about his arrest.

Article 23(4)(b) of the Constitution of Uganda guarantees that a person detained or restricted on suspicion of having committed an offense must be taken to court no later than 48 hours.

The 2nd respondent denied the allegation that the applicant was arrested on the 9th of November 2021 but rather was arrested on the 12th of November 2021 which date correlated with the date when he made a statement to the police. There is no evidence to corroborate the applicant's allegation that he was arrested on the 9th of November 2021 or that he was ever held at the Mbuya Military Barracks.

It is the applicant's evidence that he was produced before the Chief Magistrates Court at Buganda Road on the 12th of November 2021 which would mean that the 2nd respondent's agents acted within the mandated 48 hours to produce the applicant before a competent court. It also seems unlikely that the applicant was missing for three days before being

produced in court and not one of his loved ones made a report of his disappearance to the police or even swore an affidavit in support of his motion to this court.

The applicant made a statement at Police and surprisingly none of what is now alleged was stated at police. The applicant stated that he was arrested by policemen who were on a pick-up but the allegation has now changed to soldiers in army Uniform later at the Mbuya barracks. This fact was never reported to court when the applicant appeared before the Chief Magistrate of Buganda Road. This makes it suspect and an afterthought and only intended to test the court or evoke courts sympathy.

In those circumstances, I find that the applicant has failed to prove on the balance of probabilities that his right to personal liberty under Article 23 of the Constitution was violated.

The applicant's constitutional right to own property.

The applicant alleged that upon his arrest on 9th November 2021, the policemen conducted a search in his pockets and took away his money totaling a sum of US\$ 27,000. That the aforementioned sum was money which he had obtained from the sale of his personal car a Toyota Landcruiser Reg No. UAZ 188F which he had sold to Kibirige Farouq. The applicant told this court that he went to CPS in Kampala to file a complaint about the theft of his money by the policemen who arrested him but the police at CPS refused to register his complaint which prompted the applicant to lodge a complaint to the commandant professional standards unit Uganda Police Force but he was equally not assisted at all. He contended that he had to date failed to recover his money which amounted to a violation of the applicant's right to property under Article 26 of the constitution of Uganda.

Article 26 (1) of the Constitution provides that every person has a right to own property either individually or in association with others. The applicant attached a copy of the sale agreement and a sworn affidavit of Kibirige Farouq as evidence. This evidence only proves that the applicant sold his vehicle to Kibirige but does not prove that he had the money from the sale at the time of the arrest. There is also no evidence implicating the arresting officers in the theft of the said monies. Furthermore, the 2nd respondent denied the allegation that the applicant was arrested on the 9th of November 2021 and contended that he was arrested on the 12th of November 2021 which was corroborated by the fact that he made his police statement on the 12th and not the 9th of November 2021.

The agreements for the sale of motor vehicle is not registered or simply put stamp duty was not paid as required under the Stamps Act which makes it inadmissible in evidence and highly suspect drawn for the sole purpose of this suit.

This court is in the circumstances not satisfied by the applicant's evidence that his monies were stolen or taken by the agents of the 2nd respondent at the time of his arrest.

The applicant's right of freedom from torture, inhuman and degrading treatment.

In his affidavit, the applicant led evidence that while at Mbuya Military Barracks where he was illegally detained, the 2nd respondent's agents whose actions the 2nd respondent is vicariously liable tortured him by subjecting him to lengthy periods of investigations with a view of depriving the applicant of his sleep. That he was beaten with a wire rod and sticks on his stomach, chest, legs, and back, he was soaked in extremely cold water for a long time, and tied with a rope on his hands which was attached to the ceiling which caused severe wounds on the applicant's hands. That he was

slapped on his ears which has grossly affected him. That his nose was pricked with a stick which caused him a permanent scar on the nose and he was kept in solitary confinement for 3days.

The applicant attached photographic evidence to show the injuries he sustained as a result of the torture as well as a medical form to show the extent of the injuries. Counsel for the applicant submitted that the applicant's evidence was not contested at all and therefore prayed that this court finds that the applicant's right to freedom from torture, cruel, inhuman, and degrading treatment was violated by the agents of the 2nd respondent under the orders of the 1st respondent.

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

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

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

Freedom from torture is a non-derogable right under 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, but the treatment must also be intentionally inflicted for the prohibited purpose.

The applicant alleged that he was severely physically harmed by the agents of the 2nd respondent under the orders of the 1st respondent. In the medical examination form on record, the medical clinical officer noted that the applicant was found to move with pain and had fresh wounds on the right lower arm, lower back, and bruises on the stomach as well as pain around the chest on percussion. However, the photographs produced by the applicant showed dry/ healed wounds and scars which did not correlate with the medical report.

The applicant further did not produce in court the medical officer who conducted the exam or attach their sworn affidavit on the application in order to corroborate the medical form. This leaves the document wanting and cannot be relied on by the court. The scars and healed wounds shown in the photos cannot also be satisfactorily be attributed to the 2nd respondent's agents due to a lack of corroborative evidence. It can be said that these scars were caused by anything other than the alleged torture by the 2nd respondent's agents.

In the absence of sufficient evidence, the applicant has failed to prove that he was tortured by the agents of the 2nd respondent. The applicant appeared in court at Buganda Road on 12th but did not report or inform the court about the alleged torture while in detention. This makes his case for alleged violation of his rights an afterthought without cogent evidence.

The applicant in his letter dated 29th November 2021 makes a narration about what happened but does not state the same allegations made in the

application and there are no specifics of torture. He alleges he was arrested by parliamentary police and he was at police cells and yet he is now alleging that he was kept at police cells and not the army as he contends in this application and yet he claims to have been tortured at Mbuya Military barracks.

A court of law is governed by principles of law, not hardship of any individual case. The judges feeling of sympathy cannot be acceptable substitute for law. The judge could not step in the arena of the contest otherwise he would be blamed for being biased. There is justice for the applicant as well as for the respondent and it would be an intolerable negation of justice if a judge were free to inject his own subjective feeling of sympathy for a party in defeat of his opponent's legally proven right or defence. The court must act on credible evidence and not mere statements intended to hoodwink it and yet they are very uncorroborated.

On that premise, I find that the applicant has not proved that there was a violation of his fundamental rights and freedoms by the respondents.

Therefore, the application is dismissed and the orders sought are denied.

The costs are awarded to the 1st respondent.

I so order.

SSEKAANA MUSA

JUDGE

27th July 2022