

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC CAUSE NO. 247/06

VICTOR JULIET MUKASA]

YVONNE OYO]::: APPLICANTS

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::: ::::::::::::::RESPONDENTS

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

JUDGMENT:

The appellants brought this application by Notice of Motion under Article 50 of the Constitution and the Rule 3 of (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules for Orders of enforcement of their fundamental rights and freedoms under Articles 27, 23(1) and 24 of the Constitution, allegedly breached by the respondent or its agents and damages for the said breach.

Details are set out in the affidavits sworn by both applicants in support of the application. It is deposed by the 2nd Applicant that she was a Kenyan student

at Makerere University at the material time. She resided part time her friend the 1st Applicant at her home in Kireka, a Kampala Suburb.

On the 20th July, 2005 at about 6:30pm, she was alone at home when two men knocked at the door. She opened the nail clip and the door a bit to see who they were, but they pushed the door forcibly and aggressively and forced themselves inside.

In the process, one of the man later identified as the LC.1. Chairman Kireka (hereinafter referred to as “The Chairman”, for brevity) violently pushed her and cause her to fall on a mat. Once inside the house, the Chairman proceeded to open and rummage through the bookrack and box and searched through documents and CD’s in the box; while both men shouted at her and manifested an aggressive posture towards her. When she asked for identification, one of the men told her that he was the LCI Chairman.

The Chairman then seized a CD, some papers, and one or two booklets and a box of diskettes which he handed over to the other man. He then took a green folder. Then he ordered the 2nd Applicant to dress up and get out of the house. When she asked why he had taken her friend’s documents, the second man shouted at her and ordered her not to question the Chairman. She was made to forcibly dress up and was taken from house. She was then forced along the road, with the LCI Chairman aggressively pushing her along the way.

When they arrived at what she presumed was the Chairman’s Office, she was made to sit in the said office for an unknown period of time and during

that time, when she kindly asked if she could be directed to the “loo”, her request was refused. As a result, she had to suffer gross pain forcing her to “Pee” on the herself.

She was uncomfortable and humiliated having to sit on her own urine for a great length of time and being refused access to the toilet.

After a while, a woman took pity on her and asked the Chairman to allow her to go the toilet. When she was finally allowed to go to toilet, she was roughly shoved to the toilet by an armed male Local defence unit soldier in view of which she was unable to relive her self due to his presence and the trauma she was experiencing at that time.

When she returned from the toilet, the Chairman disgustedly pointed at saying to a group of men and women, “*I found this creature in my area idle and disorderly*”. After a while, the aforementioned LDU soldier was ordered by the Chairman to ‘jerk’ her by the waist so that she would not escape. The woman who had pleaded for her earlier on to be allowed to use the toilet tried to pacify the Chairman, but he refused to listen to her.

She was thereafter physical man-handled and dragged to an unknown destination.

She was then taken to Kireka Police Post, where the Chairman handed over the items he had taken from the 1st applicant’s house and again referred to her as “this creature”. The Officer in Charge asked her whether she is male or female. Despite her saying that she is female, the OC ordered her to

undress and to confirm her sex. She was forcibly undressed in the full glare of the OC Kireka. The OC then roughly proceeded to fondle her breasts. This was not only humiliating but also amounted to sexual harassment and indecent assault.

While at Kireka Police Post, the Chairman, the LDU soldiers and other persons jeered at her and ridiculed her and humiliated her. The LCI Chairman then said that he did not want people like her in his area and menacingly threatened them with eviction. She asked for her lawyer as if she had committed any crime, but her request was maliciously dismissed and laughed at. The OC then asked her what kind of job Ms. Mukasa the 1st Applicant does. She replied that Ms. Mukasa is a human rights activist and that the documents and the property confiscated were hers. The chairman then demanded and took the keys to Ms. Mukasa's home from her. One LDU soldier said she should spend the night at the police post, but the OC released her without writing or signing any document, a fact she questioned but to no avail. Instead the OC ordered her to return the following day with the 1st Applicant.

The 2nd Applicant was nowhere in sight. This was strange because she expected her visitors to be at home at that time and to lock the house from inside.

Upon inquiry from the neighbours, they didn't know the 2nd Applicant's whereabouts. She began searching the local establishment in the area to find out if anyone had seen the 2nd applicant. She then noticed that the chairman was seated some distance away.

The Chairman shouted a cross other people demanding rudely talk to her immediately. She asked him kindly to wait a moment to enable her to talk to the 2nd Applicant first, but the Chairman shouted “Now”. At that point, she received a call from the 2nd applicant who sounded very distressed and told her that she had been arrested and the police were looking for her (Ms. Mukasa). The 2nd applicant pleaded with her saying “*don’t go home please. They have arrested me and it is you that they want*”.

The Chairman then rudely told her that he had arrested the 1st Applicant. He ordered her to be at the police post at 10 am the following day. When she asked him the reason, he just shouted, “*I want you there*” when she inquired further about the reason why she was being ordered to go to the police station, the chairman told her verbally that she was unlawfully accommodating someone at her house. He did not produce any paper stating any such thing when she insisted, the Chairman just shouted. “*You must*”. when she told him that she would need to first consult her lawyers, the Chairman began shouting before every one that she did not have manners. She was then advised by a Human rights defender to leave the area.

The following day, she went to the police station accompanied by a lawyer. When she inquired whether there was any file opened with respect to the 2nd applicant and whether any charges were pending against either of them and if so, what the charges were. The police said there were no pending charges and that she could have back her documents.

As she had not been inside her house since the time of the raid, she didn't know what had been taken from her house, but the 2nd applicant immediately realized that there was a CD, a box of diskettes and some documents that were being withheld. The OC admitted that the CD was not there but denied that any other items were missing. He said "the Chairman has taken the CD to town. I will give it back to you tomorrow". He told her to return to the police station next day.

The next day, Friday 22nd July, 2005, she went to the police station again, and was not given the CD. She was however concerned that perhaps other items would be taken so she went to her home for the first time since discovering that men had forced their way into it.

When she entered the house, she was dismayed to find that it had been ransacked. The stool was knocked over on its side and her property had been thrown around the house. Her official documents and papers from the book rack and box were scattered on the floor. There were indeed missing. The whole house was in disorder. Her heart sank to find her property invaded and her work ramped, destroyed and taken for no reason. The CD was later returned to her by the LCI Chairman. The acts of the police, LDU's and the chairman were high handed, illegal, humiliating and did not only cause them grief, injury and apprehension, but above all, these acts were a breach of several constitutional rights which are guaranteed by the Uganda Constitution which the police, LCI Chairman and LDU's are enjoined to protect and defend. They were acting in the usual course of their employment and the Attorney General is therefore vicariously liable.

The actions were also gross violation of several International Human rights Instruments to which Uganda is a signatory.

The breaches complained of are:-

1. The right to privacy of the person, home and property guaranteed by Article 27 of the constitution (the forceful ingress by the LCI Chairman of Kireka Zone into the 1st Applicants house).
2. The right to personal liberty guaranteed under Article 23(1) (arrest of 2nd applicant).
3. The right to protection from any form of torture, cruel or inhuman and degrading treatment guaranteed by article 24.(LCI Chairman and the OC Police)

Naturally, the Respondent denied the allegations by the applicants. It relied on the affidavits by Ison Rose dated 24th May, 2007 and John Lubega of 10 September, 2007.

Ms. Ison deponed that she was the Officer in charge of Kireka Police Post at the material time, and she is therefore well versed with the circumstances and facts regarding the applicants' complaints. Neither herself nor any officer in Kireka Police Post was aware or involved in the alleged illegal search of the home of the 1st applicant, the alleged seizure of property, arrest and alleged harassment of the 2nd applicant at all.

According to her version, on that day, the Chairman came with the 2nd applicant to Kireka Police and the two were exchanging 'hot' words. Whereupon she took over the role of mediator to enable both parties to cool down so that she could get to the root of the fracas. She knows that the house of the 2nd applicant was not searched at any material time as she was informed by the LCI Chairman which information she believed was true. Her information is to the effect that the 2nd applicant and her colleagues were actually found and picked from a bar near their home. The Chairman further told her that he had received several complaints from the residents in the area about the unbecoming behaviour of the applicant and that the residents had threatened to lynch them, so he decided to refer them to police for further action. She told the chairman to provide sufficient evidence from witnesses with regard to the alleged homosexuality before Police could take action.

She also told the chairman to leave the items he had removed from the 2nd applicant at the bar with her for safe custody. She denied that the 2nd applicant was humiliated, sexually harassed nor indecently assaulted by herself, any other police officer or LDU at Kireka Police Post as alleged. She also denied that any LDU officer was involved in the case since she would have been the one to authorize their involvement in any operation in her area of jurisdiction. She stated that she did not see any reason to detain the 2nd applicant based on the facts presented by the Chairman and she did not open up a file or record any statements in respect of the matter. The next day, when the two applicants appeared before her in the presence of the Chairman, she returned all the property that the chairman had deposited with

her to the rightful owner, and it is not true that any property was detained by the her or any officer thereafter at Kireka Police Post as alleged by the 1st applicant. She further stated that she advised the Chairman to have the matter settled amicably in his area since she did not see any reason for the police to take over and investigate such a matter without evidence from witnesses. The allegations against herself, the police at Kireka police post and LDU's are therefore untrue, unfounded, malicious and without basis.

Mr. Lubega the LC1 Chairman, also vehemently denied on his part that the 2nd applicant was arrested from her house at Kireka as alleged. According to his version of the story, the truth of the matter is that the 2nd Applicant was arrested from a drinking bar where she was about to be lynched together with the 1st applicant by residents. He had received several complaints from the residents of his area of jurisdiction about the unbecoming behaviour of the applicants who were kissing in a public place. When he reached the said bar owned by one Mayanja, he did witness for himself, the applicants kissing in public while the residents and children were looking at them. He proceeded to apprehend them to rescue them from the enraged and/or angry residents who wanted to lynch them. In the process he found them with several CDs, diskettes and documents titled "*Small Minority Uganda*".

The 1st applicant escaped, so he managed to take only the 2nd applicant only to Kireka Police Post where he handed her to the O.C one Isona Rose together with the CDs, diskettes and documents in question. The following day, the applicants appeared at Kireka Police post demanding for them and the O.C handed over the CDs, diskettes and other documents to the applicants in his presence. It is not true that he entered the 1st applicant's

house, humiliated, sexually harassed and indecently assaulted the 2nd applicant as alleged. It is also not true that he made her to sit in his office as she alleged. He took her directly to Kireka Police Post and not to his office as alleged.

By way of a rejoinder dated 11th June 2007, the 2nd applicant described the contents of Mr Lubega's affidavit as untrue and put the respondent to strict proof thereof. She specifically averred that there was no exchange of hot words with the LC1 chairman at all but that she was instead subdued after having been dragged by the waist to the police station under continual harassment by the LC1 Chairman who referred to her as "***This creature***" and the police did not at anytime take over the role of mediator. The admission by the LC1 chairman that the properties were 'police' with the respondent by the LC chairman and retained overnight confirms the applicant's charge of illegal retention of property, as no records were kept by the police.

The 1st applicant also filed a rejoinder on the 21st June 2007 which I find argumentative and therefore violates the law on affidavits. An affidavit is evidence, not arguments or submissions. After expunging the argumentative parts, I can only say that she basically re-stated her case in the rejoinder and attacked the respondent's evidence as untrue and also put the respondent to stuck proof.

The LCI Chairman was cross-examined during the hearing. He basically stuck to his story that he arrested the 2nd applicant in the bar at Kireka where they were about to be lynched by residents for kissing in public, for their own protection.

The following issues were identified from the evidence adduced by both sides.

Whether there was unlawful interference with the applicant's privacy.

Whether there was unlawful arrest and detention of the 2nd applicant and by who?

Whether there was unlawful search of the 2nd applicant's premises.

Whether the 2nd applicant was treated in a cruel, inhuman and disregarding manner.

Whether the 1st applicant's right to property was interfered with.

Remedies if any available to the applicants.

Mr. Rwakafuzi, learned counsel for the applicant's invited court to answer all these issues in the affirmative and award his clients general damages of at least shs 10 million each. His argument was based on the principle that a person's dignity is guaranteed by the constitution and should not be injured by anyone. That any injury to a person's dignity should be therefore condemned by the courts and the injured person should be compensated in damages. This application is basically about human dignity, which should be protected. Decided cases say that when a citizen says that his or her rights have been infringed by the state, then the state has the burden of proof to show that it was actually not true and that it was done in public interest. The

state has not discharged that burden of proof because it has not denied that the LC1 Chairman was acting as an agent of the state.

Additionally, and in relation to the LC1 chairman, Mr. Rwakafuzi submitted that he was not a witness of truth. He stated in cross-examination that the applicants were in the bar giving gifts to the patrons. It is therefore inconceivable that in an atmosphere where people are receiving literature in a bar, from the applicants there would be people waiting to lynch them at the same time.

The applicants' case is that there was no bar incident at all. The bar incident is a figment of the chairman's fertile imagination. He set it up so that he could justify his acts of torture against the innocent girls. There was no bar incident and no lynching because if it were true that there were so many people against the girls in the said bar., why should they continue to do what the chairman alleges, namely kissing in public? Secondly if it were true that there was this bar incident and the 2nd applicant was held by her hand by the chairman and taken to police as stated by the chairman, to the police, then the O.C could not have deponed that they were exchanging hot words.

That would not be possible if the 2nd applicant was being helped for own safety. The true story is the one told by applicants, that the 2nd applicant was arrested by the LC1 Chairman while she slept in her room in Kireka, who forcibly took her in his office where she was denied toilet facilities and later escorted by a male person to the toilet, and eventually on taken to Kireka police post where she was undressed in the gaze of men and was mistreated

by the LC1 chairman and police in breach of her constitutional guarantees as alleged.

The applicant's properties namely CDs and documents were taken. There were no accompanying witnesses. The six people he talked about were not there. There was no mob.

Ms. Nabakooza, the learned Senior State Attorney who represented the Attorney General, opposed the application relying on the affidavits in reply. Starting with the LC1 chairman. Ms. Nabakooza submitted that the chairman had been before court. His evidence had remained firm and consistent even after cross examination. It should be accepted as the truth of what transpired on that particular day.

The evidence of the O.C police had also rebutted the applicant's case. The police who are her clients in this matter were not involved at all in the alleged search of the 1st applicant's premises. The O.C says that upon arrival at the station, she was a mediator. Her story is as was told by the LC Chairman. It is true that the applicant was about to be lynched. These statements are corroborated by the affidavit of the chairman himself who also testified in court. The O.C said she needed more evidence before she could consider taking up the matter for further investigation and released 2nd applicant and also returned all their documents and CDs. According to Ms. Nabakooza, the police in their wisdom felt that the matter could be amicably settled in the area. The 2nd applicant was not humiliated or sexually harassed as alleged or indecently assaulted by the police or LDU. The allegation

against the police are therefore untrue, unfounded, malicious and without basis.

The LC1 chairman stated that there were several complaints in the area. The residents threatened to lynch the applicants. He told court that there have been lynching the applicants. He told court that there have been lynching in the area before and he didn't want a repeat of the same, that is why he took the action he did to save the applicants from the crowd. There was therefore no breach of any rights as alleged because there was first of all no unlawful entry in any house by the chairman as alleged or by any other person.

Secondly, there was no torture by the servants of Government or any other person.

Thirdly, there was no incidence at all of any other person.

Thirdly, there was no incidence at all of any cruel inhuman or degrading treatment by the police or any other person as alleged.

Fourthly, there was no search for homosexual tools or persons, undressing of the 2nd applicant and ridicule at Kireka police station or any other place. The evidence adduced by the applicant is therefore insufficient and the LC Chairman has rebutted it. They opted not to cross examine the O.C Kireka; so it should be presumed that her evidence is unchallenged. The suit should therefore be dismissed with costs.

In the unlikely event that it is found that the LC1 Chairman breached any right of the applicants, which is denied, Ms Nabakooza submitted that, under the Local Government Act, (LGA) CAP 243 he is not a servant of Government and the respondent is not vicariously liable. They should have sued him separately under section 6 of the LGA. The Attorney General cannot carry another person's burden.

I have carefully perused the affidavits and listened to the submission by both counsel. I respectfully agree with Mr. Rwakafuzi, that there was no bar incident at all. The bar incident is a figment of the LC1 chairman's imagination calculated to mislead the court and to justify the shabby manner in which the said Chairman treated the applicants particularly the 1st applicant. He said that at that time, the applicants were in Mayanja's bar, kissing each other. People were crowded and were shouting saying, *"Chairman this time assists us, otherwise this time we are going to do something to them."* He arrested them because he wanted to save them from the mobs that wanted to lynch them. No other independent witness, who was part of the mob, was called to testify. Mr. Mayanja in whose bar the incident allegedly occurred did not testify either. He did not even state the name of the bar in question. In the circumstances I find it extremely dangerous to rely on the uncorroborated evidence of the LC1 Chairman, who was in my view only bent on saving his skin on realising his predicament.

Secondly, the police officer said the Chairman and the 2nd applicant arrived at the police post while exchanging hot words. Why would the 2nd applicant exchange 'hot' words with a person who was saving her from being lynched by a mob? The true story is therefore as given by the applicants. The 2nd

applicant was arrested by LC1 chairman while she was in the 1st applicant's house resting. He took her to the police post forcibly via his office where he denied her the use of the toilet. From there he took her to the police under escort of LDU's from where she was forcibly undressed and "examined" and her breast fondled by the Police O.C. to establish her sex.

All these actions clearly amounted to a breach of their constitutional guarantees stated earlier and a violation of International Human Rights Instruments to which Uganda is a party. The 1st applicant's house was forcibly opened and unlawfully searched without a search warrant. The LC Chairman had no such power. Section 50 of the LGA which spells out the functions of LC's does not give an LC chairman powers of arrest and search without a warrant. Mr. Lubega said he was the Chairman Local Council 1 Zone C of Kireka Parish, Kira Town Council. His actions were accordingly unlawful. The section reads:

"50 Functions of the chairperson of an administrative unit council.

The chairperson shall-

- (a) At the country and parish level convene and preside at all meetings of the county or parish council; and in the absence of the chairperson, the vice chairperson shall perform those functions;***
- (b) At the village level-***
 - (i) be the political head;***
 - (ii) preside at meetings of the council;***

- (iii) monitor the general administration of the area under his or her jurisdiction;*
- (iv) perform other functions that may be necessary for the better functioning of the council, or which may be incidental to the functions of the chairperson or imposed on the chairperson by the law”*

However, Section 6 of the LGA provides that:

“(1) Every local government shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name and may, subject to the provisions of the constitution, do enjoy to suffer anything that may be done, enjoyed or suffered by any body corporate”

The LC Chairman is clearly part of the lower local government administrative unit namely Kira Town Council, which is capable of suing and being sued in its corporate name under the LGA.

Consequently, the Attorney General is not liable for the actions of the LC1 Chairman as rightly stated by Ms Nabakooza.

The Attorney General is however liable for the actions of the police. The O.C. ordered the forceful undressing of the 2nd Applicant in public and fondled her breast. This is humiliating, degrading and contravened Article 24 of the Constitution which militates against torture, cruel, inhuman and degrading treatment. It also amounted to abuse of office by the said O.C. This case as Mr. Rwakafuzi rightly pointed out in his submission is

however, about abuse of the applicants' human rights and not abuse of office. It is also not about homosexuality. This judgment is therefore strictly on human rights. Article 24 of the Constitution reads as follows:-

“24. Respect for human dignity and protection from inhuman treatment.

No person shall be subjected to any form of torture or cruel, inhuman or disregarding treatment or punishment”

As pointed out earlier, the actions of the stated agents also violated the provisions of a number of International Human Rights instruments to which Uganda is a party. These include:-

- (i) The Universal Declaration of Human Rights particularly, Article 1 which reads:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”

I presume “brotherhood” includes “sisterhood”

- (ii) The Covenant on the Elimination of All forms of Discrimination Against Women (CEDAW), Article 3 which reads:

“Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural and civil or any other field. These rights include, inter alia:

- (a) *The right to life;*
- (b) *The right to equality;*
- (c) *The right to liberty and security of person;*
- (d) *The right to equal protection under the law;*
- (e) *The right to be free from all forms of discrimination;*
- (f) *The right to the highest standard attainable of physical and mental health;*
- (g) *The right to just and favourable condition of work;*
- (h) *The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”*

Learned counsel proposed shs 10 million as a fair compensation for the humiliation, injury and trauma suffered by the 2nd Applicant at the words of state agents. I find that reasonable and I award it to the 2nd applicant. In Ronald Reagan Okumu & Others –vs- Attorney General MA 63/02, Kania J. awarded the applicants shs 10 million each for violation of their rights or personal liberty and from torture, cruel inhuman and degrading treatment or punishment guaranteed under Articles 23(1) and 24 of the Constitution. Here the award is in respect of violation of Article 24 only in view of my earlier findings that the Attorney General is not vicariously liable for the LC1 chairman’s atrocities.

In respect of the 1st applicant, the evidence of record shows that the police did not handle her documents properly. They gave the LC1 chairman unlimited access to the said documents even after he had handed them over to Police and detained the said documents over night without any entry in their books in accordance with their laid down procedures. She is accordingly awarded 3 million shillings for violation of her rights to property contrary to article 27(2) of the Constitution which reads:

“(2) No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication, or other property”

The applicants shall also have the costs of the application.

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M.S. Arach-Amoko

JUDGE

22/11/2008

Judgment delivered in the presence of :

- (1) Mr. Rwakafuzi
- (2) Ms Margaret Nabakooza for the Attorney General
- (3) Okuni Charles Court clerk

Absent: Both Applicants

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M.S Arach-Amoko

Judge

22/12/2008