

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO 732 OF 2016

KIZZA BESIGYE KIFEFE:.....:PLAINTIFF

VERSUS

1. CIVIL AVIATION AUTHORITY

2. ATTORNEY GENERAL:.....:DEFENDANTS

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff left Uganda in August 2016 and returned on the 3rd October 2016 aboard a flight operated by Kenya Airways at about 8.am through Entebbe Airport. He was arrested by the Uganda Aviation Police (AVPOL) and driven through a route he didn't know to his home in Kasangati.

The plaintiff filed this suit against the 1st defendant seeking redress and compensation for the violation of the right to freedom from torture, cruel, inhuman or degrading treatment or punishment; the right to freedom of movement and association under Objective I(i), II(i) of the National Objectives and Principles of State Policy and Articles 20, 24, 29 and 50 of the Constitution of Uganda.

The 1st defendant denied liability stating that the Uganda Police Force was in charge of security operations at the Entebbe Airport hence the 2nd defendant was brought on board by way of filing a third party notice. The 2nd defendant in their written statement of defence denied the allegations and claims by the plaintiff and prayed that the suit be dismissed with costs.

The plaintiff was represented by *Mr.Ladislus Rwakafuzi* of *Rwakafuuzi & Co. Advocates* whereas the 1st defendant was represented by *Mr. Mathew Ngugo* of the Law Chambers of the Civil Aviation Authority and the 2nd Defendant by *Mr. Godfrey Atwine* from the Attorney General Chambers.

All parties filed written submissions which were considered by this court.

ISSUES FOR DETERMINATION

1. *Whether the arrest of the plaintiff was in violation of Article 23, 24 and 29 of the Constitution.*
2. *Whether the arrest was justified.*
3. *Whether the plaintiff is entitled to the remedies sought.*
4. *Who of the defendants is liable?*

RESOLUTION OF THE ISSUES

Issue 1:

Whether the arrest of the plaintiff was in violation of Article 23, 24 and 29 of the Constitution.

The plaintiff claims that he was violently arrested and his inherent human dignity violated. The plaintiff testified that one of the men dressed in the 1st defendant's reflector jackets dashed forward and grabbed him by the trousers and violently pulled him down. Counsel for the plaintiff submitted that the violation of the plaintiff's liberty emanated from the manner in which the arrest was effected and the reasons or lack thereof. Counsel submitted that Article 24 of the constitution guarantees human dignity and integrity of the person by prohibiting acts that humiliate and embarrass a person. Counsel invited court to find that the arrest of the plaintiff was inhuman and degrading in violation of the guarantees in Article.24 of the Constitution.

Counsel for the plaintiff further submitted that the agents of the defendants arrested the plaintiff without informing him of the reason for the arrest hence violating Article 23(1) of the Constitution. Counsel also submitted that the plaintiff's right under Article 23 (5) (b) of the Constitution was violated since the plaintiff was not allowed to inform his next of kin of his detention.

Counsel submitted that by the fact that the plaintiff was whisked away and driven through "panya" routes he was not able to meet his people which

was a violation to his freedom of assembly, association, political belief and movement all guaranteed under Art. 29(1) and (2) of the Constitution.

The 2nd defendant's counsel on the other hand submitted that plaintiff's arrest was preventative, for a just cause and was carried out in accordance with the mandate of the police to detect and prevent crime under Article 212 and 214 of the Constitution.

With regard to the alleged violent arrest, counsel for the 2nd defendant submitted that the plaintiff other than allege did not show by way of evidence or corroboration by other evidence that his arrest was violent or inhumane. Of all the passengers on the Kenya Airways flight that day none of them come forward to corroborate the plaintiff's claims that he was violently arrested? Furthermore the plaintiff did not adduce any evidence of any injuries or damage suffered and no specific evidence was led to prove damage caused by the 2nd defendant.

Counsel submitted that there was absolutely nothing inhuman or degrading in the actions of police on that day. The Police acted professionally and within the confines of the law. If anything, the police's actions in this matter only assisted the Plaintiff arrive home faster and safely. Therefore the plaintiff suffered no damage or harm at all.

With regard to the plaintiff's contention that his constitutional freedoms of assembly, association and movement all guaranteed under Article 29(1) and (2) of the Constitution were violated. Counsel relied on **Article 43** of the Constitution which provides:

"(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."

Thus one enjoying his or her rights must not prejudice the fundamental or other human rights and freedoms of others or the public interest.

Counsel also cited **Charles Onyango Obbo & Anor vs AG [2004] KALR 1** a case cited by the plaintiff wherein, it was held that any act to limit the

enjoyment of a right or freedom must be proportional to the limitation intended. Inherent in this proportionality test, are the means chosen to limit the right must be such that that nothing less restrictive can achieve the same object. And the means chosen must be lawful.

The proportionality test essentially requires that the limitation imposed on a right must be proportionate to the objective being pursued. Proportionality can be understood and assessed as explained in **R v Oakes [1986] 1 S.C.R. 103**. A party must show that:

"First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

Applying the above test to the instant case, it is evident that the preventive arrest of the Plaintiff was based on the intelligence gathered and need to preserve calm and peace in Entebbe and surrounding arrears.

Counsel further submitted that it should be noted that the Police was not acting whimsically and without evidence as the Plaintiff puts it. The Police was aware of the Plaintiff and his supporter's generalized campaign of violence in pursuit of their defiance campaign.

The 1st defendant made no submissions in regard to this issue.

In rejoinder, counsel for the plaintiff submitted that the 1st defendant was very well placed to tell if there was an unusual assembly of people with an intention to block the road. The CAA is in charge of the airport and its security ipso facto extends to the precincts and immediate stretches of the approaches to the airport. They would have corroborated that fear of the 2nd defendant of the so called "actionable intelligence".

Counsel further submitted that uncorroborated actionable intelligence is a danger to everyone and that anyone can be arrested and his right violated if

court does not declare such a course of action a violation of the plaintiff's right to liberty.

Counsel also submitted that there was no physical injury to the plaintiff hence no need for medical evidence to prove anything. Counsel quoted Uganda vs Kiiza Besigye HCCR Session Case 149/95 where Justice Katutsi held that "...monstrous if to ruin the honour of a man who offered himself as a candidate for the highest office of the country" to support his submission that there is many ways of injuring someone.

Determination

I have analysed the evidence before this court and the submissions of counsel in regard to this issue.

DW2 testified and led evidence that the police officers involved in this matter were acting on the orders of the IGP who sent a directive to the Commander Kampala Metropolitan Police, all regional Police Commanders and District Police Commanders aimed at deterring the irresponsible plans of the plaintiff and his supporters to ensure continued peace and security of the country. The police as submitted by both counsel have mandate to detect and prevent crime under Article 212 and 214 of the constitution.

I note that the police officers were executing their constitutional mandate to arrest however the manner of the arrest is what the plaintiff is contending that infringed on his rights.

As stated by counsel for the plaintiff, the plaintiff is a former presidential candidate; the highest office in the country and the former president of the largest opposition party in the country. Grabbing him by his trousers as he got off the plane and whisking him off to an unknown route violated his dignity and ruined his honor.

Human dignity in its most basic form is an attribute of humanity. Dignity is signalling a term that goes to the heart of what constitutes the quality of humanness.

Dignity, broadly speaking and at a minimum, encompasses the inalienable, inherent and intrinsic worth or values of each individual.

The infringement of human dignity relates to "conduct and ideas that

directly offend or denigrate the dignity and worth of individuals"

Self-respect and freedom from humiliation are the two key aspects that characterize human dignity.

Humiliation as a form of behaviour that gives a person reason to feel that his/her self-respect has been injured. Seen this way, humiliation is not a psychological phenomenon, but an objective ethical issue. Thus, there may be people who have in fact been humiliated, but do not feel humiliated. The contrary holds as well: There may be people who do feel humiliated without having in fact been humiliated in this ethical sense.

The plaintiff in his view, his arrest was inhuman and degrading and to that end it was a humiliation to his person. He was grabbed by the trousers and was violently pulled down.

The police ought to have arrested the plaintiff in a dignified manner especially at the airport which is our gateway for tourists and foreigners coming into and going out of the country. Such crude manner of arrest paints an ugly picture to the country and could also have economic consequences.

The plaintiff also testified that he was not informed of the offence for which he was being arrested. This violated the plaintiff's constitutional right under Art.23(3) which demands that any person arrested, restricted or detained shall be informed of the reasons for the arrest, restriction or detention. The failure by the arresting officers to inform the plaintiff of the reason for the arrest was a gross violation of his rights.

The Police knew well in advance that they were to effect arrest of the plaintiff on arrival. They should have presented written reasons for his arrest at the Airport. This would have avoided the denial made by the plaintiff of the reasons for his arrest.

Issue 1 therefore succeeds in part. The plaintiff's constitutional rights under Article 23(3) and 24 were violated.

I however did not find any violation of the plaintiff's freedom of association, movement and political belief under Article 29. Counsel for the plaintiff submitted that the plaintiff was whisked away and driven through panya routes and was not able to meet his people which was a violation of Art 29.

If the plaintiff intended to meet his political supporters, he ought to have done with due regard of the Public Order Management Act, 2013.

Section 3 of the Public Order Management Act, 2013 empowers the IGP or an authorised officer to regulate the conduct of all public meetings in accordance with the law.

Under **Section 5 of the Act** an organiser of a public meeting is required to give notice to the authorised officer of the intention to hold a public meeting at least three days but not more than 15 days before the proposed meeting.

The notice of the public meeting should be in triplicate and should include:

- a) the full name and physical and postal address of the organiser of the proposed public meeting and his or her immediate contact;
- b) Where applicable indication of the consent of the owner of the venue where the proposed public meeting is intended to take place;
- c) The proposed date and time of the public meeting, which shall be between 7:00 am and 7:00 pm but this time limit shall not apply to a town hall meeting;
- d) The proposed site of the public meeting, the estimated number of persons expected, the purpose of the public meeting; and
- e) Any other relevant information.

Section 4 of the Act is to the effect that, a public meeting means a gathering, assembly, **procession** or demonstration in a public place or premises held for purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.

Failure to observe the set standards under the Act resulted into intervention by the police.

This part of the issue accordingly fails.

Issue 2: Whether the arrest was justified.

Counsel for the plaintiff cited Art. 43(1) which provide that in enjoyment of the rights and freedoms prescribed no person shall prejudice the rights and

freedoms of others or the public interest. Counsel relied on the case of *Muwanga Kivumbi vs AG Constitutional Petition No. 9 of 2005* where it was held that where a person claims his rights or freedoms have been violated, the burden of proof shifts to the respondent to show whether the violation was justified. This is because most rights and freedoms are not absolute and can be limited in public interest. Counsel submitted that in the instant case the defendants particularly the Attorney general claimed that the diversion of the plaintiff from his itinerary where he would have been able to meet his relatives, friends and political supporters was done in public interest to forestall the planned clogging of the Entebbe Kampala road by the supporters of the plaintiff. Counsel submitted that the defendants needed to prove that indeed there was such a magnitude of people waiting to use the plaintiff's arrival to assemble and demonstrate in the middle of the road right from Entebbe to Kampala.

Counsel for the plaintiff submitted that the plaintiff was treated as such, to politically persecute him in violation to Art. 43(2) (a) and the police did not wish the plaintiff to meet his political supporters. Public interest under Art.43 excludes persecution which is also prohibited.

Counsel for the 2nd defendant on the other hand submitted that the arrest was justified and authorized by law in terms of Article 23, 43 and 212 of the constitution in that the police force is mandated to protect life and property, preserve law and order and to prevent and detect crime. The plaintiff and his supporters had mobilized a group of people to receive the plaintiff from the airport and then conduct an unlawful procession from Entebbe to Kampala. The arrest of the plaintiff was preventive as the police knew that the plaintiff was at the center of gravity.

Counsel for the plaintiff submitted in rejoinder that there were no circumstances affording to a reasonable inference that the plaintiff intended to obstruct the highway and the court should find that the arrest and detention of the plaintiff was not justified.

Determination

As I have already ruled in issue 1, the police officers in this case executed and acted within their constitutional mandate to detect and prevent crime.

Preventive arrest and detention entails the incarceration of a person who has not been convicted of a criminal offense, based on his dangerousness, in order to prevent him from causing public harm. Despite the various contexts of these cases, dangerousness constitutes the sole basis for depriving sane persons of their liberty in the absence of convictions.

Moreover, the trial process is inadequate for dealing with future offenses. Since the state is forbidden from inflicting punishment for a future act, the question arises as to what society can do regarding someone perceived to be dangerous. What is it supposed to do, for example, with respect to the member of a terrorist organization who conducts a normative and peaceful lifestyle, but is ready to carry out a terror attack the moment he is assigned his mission? Should society remain idle until a crime is committed? It is such situations that may justify preventive arrest to deter commission of crime.

The existence of a social interest in maintaining public safety is self-evident as well as the desire of the public to live in peace and safety from the threat of criminals is understandable and legitimate.

Security serves our ability to enjoy life, freedom, and property. Seemingly, the lack of a power to arrest and detain someone for a future offense could lead to impossible situations.

It is proper and even preferable that a person who is going to commit serious crimes will be deprived of his liberty to prevent an innocent person from being seriously harmed. However, humans are not omniscient. In a world of uncertainty, the default rule is and should be the presumption of innocence, which assumes that a person will not commit an offense in the future.

The power to arrest and detain someone to prevent future offenses is based on an assumption regarding the decision-maker's ability to reasonably assess a person's future dangerousness. There is no way to assess the extent to which non-dangerous persons are arrested and detained, because the supposed danger for which they are incarcerated never materializes due to their confinement. Consequently, no data exists to prove that it was possible to allow them to remain free.

Therefore, any decision to arrest and detain a person is, in some sense, a self-fulfilling prophecy, since the error of such detention will never be

discovered. The only verification of the correctness of a decision to impose preventive detention comes when the state's request to detain someone is denied and that individual subsequently commits an offense.

Thus, there is also a danger that decision-makers wishing to avoid visible errors will be overly cautious and, in cases of uncertainty, be more inclined to choose the option of arrest and detention.

An assessment of dangerousness is prone, in any case, to erroneous prediction and abuse in that it relates to factors that have yet to be proven. This potential abuse could lead to arbitrariness and injustice primarily directed at certain groups such as political opponents of the regime.

Furthermore, the concept of dangerousness is elusive and vague. National security is often an "emotive and politically charged" matter. Thus, there is a fear that preventive arrest and detention may serve as a guise for repressing legitimate political dissent.

The United States Supreme Court, has repeatedly held that it is possible to rely on the discretion of decision-makers and their abilities to reasonably predict potential criminality based on existing criteria for assessing dangerousness. Surely, there are good indicators for assessing dangerousness, including, inter alia, a criminal history. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Schall v. Martin*, 467 U.S. 253, 278 (1984)

Denial of freedom on the ground of dangerousness is based on a crime that may be committed in the future. A person is being arrested and detained for a crime that he may perpetrate, even though he has not yet taken any steps toward its commission and even if it has not yet ripened in his mind.

An assessment of future dangerousness rejects the assumption regarding a person's general obedience to the law. The presumption of innocence does not just mean that a person is innocent of the specific offense with which he is charged. It also reflects a general assumption that a person is law-abiding and will not commit any future offenses.

The harm to the presumption of innocence that is caused by detaining a person on the ground of dangerousness does not necessarily render preventive detention unconstitutional.

The state, which assumes the role of maintaining the safety of its citizens, places itself in the shoes of the individual, and it must prevent such a person from causing harm in a timely fashion. There is no dispute regarding the right and the duty of the state to maintain public safety.

Even a minimal restriction of the state's role in accordance with a liberal view of the state as a "night-watchman" would include the duty to protect society from manner of crimes/ offences.

An abandonment of public safety might cause law-abiding citizens to lose faith in law enforcement officials and even in the state establishment as a whole. Therefore, the state is supposed to provide a peaceful, secure and stable political environment which is necessary for economic development and the protection of the public from crime is the most important role of the state. See *National Objectives and Directive Principles of State Policy*.

There is also a fear that repeated violation of the social contract, through disobedience to the law and the threat that criminals or potential criminals pose to public order, would lead to general anarchy and to the ruin of the body politic. It is the function of the Uganda Police to; protect life and property; preserve law and order; prevent and detect crime. See Article 212 of the Constitution. Any failure on their part in execution of those functions would be a total failure of the state.

The police in this matter contended that they had credible intelligence that the plaintiff and his supporters had planned an illegal procession right from the airport and the purpose was to block the highway.

The people had indeed gathered at the airport in order to escort the plaintiff or engage in a procession that would have paralyzed economic activity along the Highway. The risk and danger of arresting the plaintiff from a big gathering would have raised tensions in the crowd and increase the amount of violence and clashes with the police. As the 2nd defendant's witness testified could even result in murder or death.

As discussed earlier, the police applying the dangerousness principle as an

indicator based on history of the 2011 incident when the same Highway was blocked by the supporters of the plaintiff upon his return was justified in effecting preventive arrest of the plaintiff.

I hasten to add however, that the state's duty to maintain public safety is not an absolute value, and it must be fulfilled with a minimal violation of individual rights. An attempt must be made to find ways in which the least harm is caused.

The administration of any rights regime necessitates adjudicating the accommodation between rights and other public interests. For example, limitations on rights protections may be necessary to achieve important societal objectives such as the health, safety, and welfare of the citizenry; the maintenance of public order; or national security.

The arrest of the plaintiff was justified although the manner of the arrest was grossly improper.

This issue fails.

Whether the plaintiff is entitled to the remedies sought.

The plaintiff sought declarations that the defendants breached the constitution and violated his human rights, orders for compensation, punitive damages, interest and costs.

On the basis of how this court has resolved issue 1 and 2, the plaintiff is entitled to compensation for violation of his rights under Article 23 and 24 of the Constitution.

A deprivation of liberty in the public interest normally requires the payment of compensation. Compensation would deter society from curtailing freedom without strong justification. The sum of compensation is symbolic rather than a reflection of the actual harm caused.

Nevertheless, the state should be responsible for any deprivation of liberty outside the framework of punishment that is designed to promote public safety.

The underlying assumption of such arrest and detention should be that the detainee is being asked to sacrifice himself for the public good.

The plaintiff prayed for an award of 300,000,000/= as punitive damages. This court has not found any justification for the said award.

The plaintiff is therefore awarded 10,000,000/= (Ten million Uganda shillings) as compensation for the above violations.

Who of the defendants is liable?

The 1st defendant disclaimed liability contending that airport security is the responsibility of police employed by government upon which the defendant was added as a co-defendant.

DW1 Omondi Christopher; the Manager Operations at Civil Aviation Authority led evidence showing that security at the airport is the responsibility of the Uganda Aviation Police whose officers are also required to wear reflector jackets. The state of Uganda agreed to the international requirements under the Chicago Convention that all persons who access the airside of the airport are required by the international Civil Aviation (ICAO) standard operating procedures (SOP's) as customized for use at Entebbe International Airport to put on reflector jackets.

Plaintiff's counsel submitted that both defendant's liable. Counsel submitted that the incident happened in broad day light and the 1st defendant claiming that they did not know about it means they were reckless and did not care what happens to any of their passengers. Counsel submitted that 1st defendant was obliged to know why the police wished to access the airside of the airport.

Counsel for the 1st defendant on the other hand submitted that the plaintiff had led no evidence to show any damage and high handed behavior by the 1st defendant. Counsel further submitted that it is not automatic that since the 1st defendant issues security permits for airport users to access restricted areas and safety reflector jackets to the airport users while on the airside, it is not responsible for their conduct, arbitrary or not.

Counsel for the 2nd defendant also submitted that the plaintiff led no

evidence to show any damage or highhanded behavior of the 1st and 2nd defendant which disentitles the plaintiff to any damages and also vindicates the 1st defendant from any liability.

Counsel further submitted that as far as the claim for indemnity is concerned because there is no case made out against the 1st defendant by the plaintiff, the 1st defendant has no claim for indemnity or contribution against the 3rd party.

Determination

The 1st defendant in her defence denied liability or any involvement in the arrest of the plaintiff. Their role was to avail reflector jackets and give security clearance for the police officers to execute their constitutional mandate.

The 1st defendant's witness testified that Uganda Police Force is responsible for the protection against acts of interference. They availed the reflector jackets in accordance with Chicago Convention.

It is the Attorney General who is liable for the acts of the Uganda Police which violated the rights of the plaintiff.

The Attorney General ought to have been added as a defendant and not as a Third party.

Costs

The plaintiff is awarded costs of the suit as against the 2nd defendant.

I so order.

SSEKAANA MUSA
JUDGE
15th/03/2019