

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ. ✓
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C.K. BYAMUGISHA, JA.

CONSTITUTIONAL PETITION NO. 9 OF 2002

HON. NOBERT MAO.....PETITIONER

VERSUS

ATTORNEY GENERAL OF UGANDA.....RESPONDENT

[Under Articles 50 (1) & (2), 273 of the Constitution; the Fundamental Rights and Freedoms (Enforcement Procedure) Rules S. 1 No. 26 of 1992 and all other enabling laws]

RULING OF THE COURT:

The Petitioner, Hon. Norbert Mao, is a Member of Parliament of the Republic of Uganda for Gulu Municipality in Gulu District of Northern Uganda. He brought this petition on behalf of 21 persons from his constituency for declarations of alleged violations of their constitutional and human rights under *Article 137 of the Constitution* and for redress and compensation under *Article 50 of the same Constitution*.

The grievance of the petitioner was that the persons on behalf of whom the petition is brought had been remanded in Gulu Central Government Prison on charges of treason and murder. On the night of 16th

September 2002 the Gulu Central Prison was attacked by UPDF officers led by Lt. Col. Otema Awany. The soldiers forcibly took away 20 of the prisoners. One of the prisoners No. R. 168/2002 Oloya Peter was shot dead in the process. The prisoners were then driven to the UPDF 4th Division Headquarters where they were held. The body of the late Oloya Peter has never been released to his family for burial.

It is the case of the petitioner that: -

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(i) the killing of Oloya Peter contravened **article 22 (1) of the Constitution;**

(ii) the actions of the Government in refusing to release the body of the late Oloya Peter to his family to afford it decent burial violates **articles 29 (1) and 37 of the Constitution;**

(iii) the forceful removal of the prisoners from Gulu Central Prison to Gulu 4th Division Army Headquarters contravened **article 23 (1) of the Constitution;**

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(iv) the continued detention of the prisoners in the 4th Division Headquarters contravened **article 23 (2) of the Constitution** as the 4th Division Headquarters in Gulu is not a place authorised by law for detaining prisoners;

(v) the failure by the UPDF to tell the prisoners the reason for their arrest and subsequent detention violates **article 23 (3) of the Constitution;**

- (vi) the failure to charge or produce the prisoners in court within 48 hours from time of arrest violates ***article 23 (4) of the Constitution;***
- (vii) the denial of the relatives, next-of-kin, personal doctors and lawyers access to the prisoners violated ***article 23 (5) (b) of the Constitution;***
- (viii) the physical and physiological torture of the prisoners to admit being engaged in rebel activities contravened ***article 24 of the Constitution;***
- 10 (ix) the unlawful search of the prisoners in the process of their evacuation from the Gulu Central Prison to the 4th Division Headquarters contravened ***article 27 (1) (a) of the Constitution;*** and
- (x) the holding of the prisoners incommunicado contravened ***article 27 (2) of the Constitution.***

The petitioner therefore prays for declarations:

- (a) that the continued detention and restriction is unconstitutional and
- 20 (b) the continued refusal by the Government to give the body of the late Oloya Peter to Mega Betty Oloya is unconstitutional.

He also prays for orders that: -

- (a) the Government should forthwith return the affected prisoners to lawful detention in Gulu Central Prison;
- (b) the Government should be ordered to produce the affected prisoners before a court of law;

- (c) the Government should release the body of late Peter Oloya to Mega Betty Oloya for a decent burial;
- (d) the Government compensates the affected prisoners for the violations of their constitutional rights from the 16th September 2002 to date of final settlement;
- (e) the Registrar of this Court or the High Court should determine the appropriate quantum of compensation.

10 He also prayed for interest and costs of the Petition. The petition was supported by the affidavit of the petitioner. The petition was opposed by the Attorney-General, but in view of what transpired when the matter came up for hearing on 20/3/2003, it will not be necessary to detail the answer to the petition.

When this matter came before us Mr. Bereije, Commissioner for Civil Litigation in the Attorney-General's Chambers, informed the Court that on 1/11/2002 Hon. Ronald Regan Okumu and Mr. John Livingstone Okello Okello filed *Miscellaneous Application No. 0063 of 2002* under *Articles 50 and 273 of the Constitution* in Gulu High Court, Gulu District Registry on
20 behalf of the same persons named in this Petition. They were claiming the same redress being claimed in this petition before us for the violations of their constitutional rights by the UPDF officers on 16/9/2002. That application was heard and determined by Kania J and in his ruling dated 14/2/2003 granted to the affected prisoners, the same reliefs the petitioner is seeking in this petition. He, therefore, submitted that as the reliefs being sought in this petition have already been granted in *Misc. Application 0063*

of 2002, the matter was *Res Judicata* and it should not be entertained by this Court. Consequently, he asked us to dismiss the petition.

Mr. Alenyo, counsel for the petitioner, on the other hand, argued that, even though he has not seen a copy of the *Misc. Application 0063 of 2002* and what was decided in that case, he thought that the petitioner's prayer that the matters complained of are unconstitutional as they contravened provisions of the Constitution are matters within the exclusive jurisdiction of this Court under *article 137 (supra)* and therefore this Court should make
10 declarations on them. The preliminary objection, in his view, did not touch on the constitutional declarations aspect of the case. The matters of reliefs and redress can be referred to the High Court or any other competent Court.

At the time Mr. Bereije raised the preliminary objection, the *Misc. Application No. 0063 of 2002* was not before this Court, as it ought to have been. Later copies were made available. In that application, the applicants made an application on behalf of 21 persons who are the same persons as in this petition, and seeking the following redress:

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- (a) an order for the release of the body of the late Oloya Peter to his relatives for burial;
 - (b) an order for release of the prisoner from illegal detention in Gulu Military barracks;
 - (c) an order of transfer of the prisoners to Civil Prison outside Gulu District pending trial;

- (d) orders that the said persons be allowed access to their next-of-kins, lawyers and personal doctors; and
- (e) Compensation for: -
- (i) Loss of life,
 - (ii) Abduction from civil prison,
 - (iii) deprivation of liberty by illegal detention in a military barracks;
 - (iv) denial of access to next-of-kins, lawyer and personal doctor;
 - (v) denial of access to medical treatment;
 - (vi) being subjected to torture, cruel, in-human and degrading treatment;
 - (vii) denial of fair, speedy and public hearing before an independent and impartial Court; and
 - (viii) denial of time and facilities for preparation of their defence.

They also prayed for costs.

The grounds of the application, briefly were, that: -

- (i) the persons on whose behalf the application was brought were on diverse days arrested and charged of diverse offences before the Chief Magistrate's Court at Gulu and remanded in Gulu Central Government Prison pending their trial;
- (ii) on the 16th day of September, 2002 UPDF officers and men/women commanded by Col. Charles Otema Awany forcefully removed the said prisoners from the said prison and

took them to Gulu Military Barracks where they were detained;
and

- (iii) while in the Gulu Military Barracks, the said prisoners were routinely tortured, denied access to food, medical treatment, relatives, lawyers and had never been returned to Court for trial.

These matters were said to be contrary to the provisions of the Constitution.

10 The application was supported by affidavits of the applicants and they contain identical averments. In summary, it was alleged that: -

- (a) the persons were being detained in a dilapidated building at the entrance of the Gulu UPDF barracks and that the building had no windows, was filthy, had no running water, toilet facilities, the roof leaked, thereby exposing the people to cold, wind, rain, dust, human excreta and disease;
- (b) the persons were routinely beaten, and tortured by the UPDF soldiers. They were denied of food and medicine. Their relatives, doctors and lawyers were not allowed to see them;
- (c) that ever since their detention in the Military Barracks, they had never been taken to Court; had never been told about the progress of their case. They had not been allowed access to their witnesses;
- (d) that the lives of the persons were in danger;

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- (e) that the forceful transfer of the persons from Gulu Central Government Prison to Gulu UPDF Barracks and the conditions under which they were being held constituted a violation of their fundamental and human rights and freedoms. They accordingly prayed for redress.

The Attorney-General was cited as the respondent in that application and it was said to be brought under *articles 50 (1) and (2), and 273 of the Constitution; and the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, S. 1. No. 26 of 1992*. We think that the inclusion of article 273 of the Constitution as one of the enabling articles was made in error. We think that what the applicants had in mind is *article 137 (supra)*.

The learned trial judge, in his ruling of 14/2/2003, held: -

- (a) that the killing of late Oloya Peter was unlawful and violated his constitutional right protected by *article 22 (1) of the Constitution*;
- (b) that the Army Commander violated the cultural rights of the relatives of the late Oloya Peter to give him a decent burial as enshrined in the *article 37 of the Constitution* when he refused to give the body of the deceased to them for burial;
- (c) the detention of the 20 persons in Military Barracks between 16/9/2002 and 14/11/2002 was in breach of *articles 23 (1) and (2) of the Constitution* and violated their rights to personal

liberty guaranteed under *article 23 (1) of the Constitution* and:

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- (d) the detention of the prisoners in military barracks under conditions which amounted to torture, cruel, inhuman and degrading treatment violated their rights under *article 24 of the Constitution*;

The Judge then proceeded to make the following orders and reliefs: -

- 10 (a) He awarded Shs.30,000,000/= as compensation to the legal personnel relatives of the late Oloya Peter for the intentional and unlawful deprivation of his life guaranteed under *article 22 (1) of the Constitution*;
- (b) an order that the Commander of UPDF 4th Division at Gulu should release the body of the late Oloya Peter to his relatives or the applicants for a decent burial according to their cultural practices;
- (c) the respondent was ordered to pay each of the 20 prisoners Shs.10, million as compensation for the violation of their rights to personal liberty and freedom from torture cruel, inhuman, or degrading treatment or punishment as guaranteed under *articles*
- 20 *23 (1) and (2) and 24 of the Constitution.*

The respondent was ordered to pay costs of the application.

A plea of *Res Judicata* is provided under the provisions of *section 7 of the Civil Procedure Act*. The section provides: -

"7 No court should try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".

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The expression "*former suit*" appearing in the section has been defined to mean "*a suit which has been decided prior to the suit in question whether or not it was instituted prior thereof*".

The issues in this petition are the same or substantially the same as those in *Misc. Application No. 0063 of 2002*. The learned trial judge, having heard and finally decided the issues and made declarations and orders the applicants sought, this Court is barred from trying those issues again. We do not agree with the argument of Mr. Alenyo that there are other constitutional matters left for this Court to make a declaration on. In our view, there is no matter for constitutional interpretation in this petition. The issues raised were pure and simple for enforcement of fundamental rights. The learned trial judge has ably pronounced on them. The plea of *Res Judicata*, accordingly, succeeds. The petition is dismissed with costs in favour of the respondent.

Dated at Kampala this ... 17th ... day of ... March ... 2003.


L.E.M. Mukasa-Kikonyogo
Deputy Chief Justice.


J.P. Berko
Justice of Appeal.


S.G. Engwau
Justice of Appeal.


C.N.B. Kitumba
Justice of Appeal.


C.K. Byamugisha
Justice of Appeal.

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