

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

MISCELLANEOUS CAUSE NO. 102 OF 2021

1. SSERUNKUMA GEORGE WILLIAM

2. KALYESUBULA EDWARD ::::::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicants brought this application by Notice of Motion under Articles 24, 28 and 44 of the Constitution of Uganda, Articles 5, 6, 7 and 16 of the African Charter on Human and Peoples' Rights, Sections 7(1) and 11(2) of the Human Rights Enforcement Act, 2019, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 52 rules 1 and 2 of the CPR seeking several declarations and orders, namely;

a) A declaration that the acts of the Respondent's servants or agents of arresting and detaining the Applicants for a period of more than 48 hours was a violation of the Applicants' rights under the Constitution of the Republic of Uganda, namely;

i) The right to be informed of the reasons for the arrest and consequent detention under Article 23(3);

ii) The right to prompt access to a lawyer under Article 23(3);

iii) The right to be brought promptly to court under Article 23(4)(b);

iv) The right to notification of next of kin under Article 23(5)(a);

v) The right to personal liberty under Article 23(4) b;

vi) The right to human dignity and protection from inhuman treatment under Article 24;

- vii) Freedom from torture and cruel, inhuman or degrading treatment or punishment under Article 44 (c); and
 - viii) The right against self-incrimination under Article 28(3)(a) and 28(11) of the Constitution.
- b) A declaration that the coercive manner in which the police obtained the original documents of the accused persons was a violation of their right to freedom from torture, cruel, inhuman and degrading treatment and the right against self-incrimination under Article 28(3)(a) and 28 (11) of the Constitution.
 - c) A declaration that the criminal trial in CO-119/2020 is a nullity.
 - d) An order acquitting the accused persons from the charges in CO-119/2020.
 - e) Orders of general, punitive and aggravated damages against the Respondent with interest at 20% per annum from the date of judgment until payment in full.
 - f) An order for payment of the costs of the application by the Respondent.

[2] The grounds of the application are set out in the affidavits sworn in support of the application by the Applicants. In his affidavit, **Sserunkuma George William**, the 1st Applicant stated that in September 2019, he was arrested and detained at Jinja Road Police Station on allegations of trespassing on some one's land. On 6th September 2019, he was released on bond on condition that he would periodically report to the police station pending investigations. On 24th February 2020, when he reported as per the terms of the bond, he was arrested and detained without any explanation detailing reasons for his arrest. The 1st Applicant stated that he demanded to be arraigned in court in order to be formally charged but the police officers declined and informed him that he would be charged in the course of the week. He stated that he was kept in police cells for three days without being taken to court or being told why he was detained. He was threatened into handing over the original title and the original sale agreement for his land in Kisaasi. He averred that he was not informed that he had a right to a lawyer which he learnt after meeting his

lawyers through his brother in law. He further averred that the ordeal he suffered while in police cells without being charged of any offence was traumatizing, dehumanizing and caused him intolerable mental anguish and untold anxiety and the same constituted a violation of his constitutionally guaranteed rights as enumerated in his application.

[3] In his affidavit, **Kalyesubula Edward**, the 2nd Applicant stated that his father (the 1st Applicant) was arrested and detained at Jinja Road police station in September 2019. On 1st March 2020, the 2nd Applicant was also arrested while at his home in Kisaasi by people in plain clothes who claimed they had orders to arrest him. The 2nd Applicant stated that he demanded to know why he was being arrested, but was simply roughed up, his clothes torn and forced to enter a car with them inspite of loud screams. He was dragged into a nearby waiting car and was in shock thinking he was being kidnapped since his tormentors had no recognizable uniform. He stated that he never made any statement to police even when he was told that he was only arrested to make a statement in respect of his father's earlier arrest. He demanded to be arraigned in court to be formally charged but the police officers declined and he was kept in police cells for four days without being taken to court and being told why he was being detained. He was also not informed of the right to a lawyer and was only arraigned before court on 4th March 2020, three days after his arrest. He stated that the ordeal he suffered while in the police cells, without being charged, was traumatizing, dehumanizing and caused him intolerable mental anguish and untold anxiety, and violated his constitutionally guaranteed human rights as enumerated in the application. He concluded that it is in the interest of justice that the application is granted and the criminal proceedings in CO-119/2020 be declared a nullity and he is acquitted accordingly.

[4] The Respondent opposed the application through an affidavit in reply deposed by **Nabeta Mathias**, a detective Inspector of Police in the Uganda

Police Force, who stated that he was the investigating officer in the matter prior to the institution of criminal charges against the Applicants. He stated that the Applicants are currently undergoing a criminal trial in the Chief Magistrates Court of Nakawa where they are charged with forgery of a will and uttering false documents. The criminal matter started when a complainant reported a case of threatening violence and eviction from his land. Both parties were summoned to the LC1 Court and the 1st Applicant produced a will of his late mother and a series of sales agreements which were disputed. The hearing before the LC1 Court was adjourned to permit the Applicant to appear with the original will and the sales agreements. The 1st Applicant instead reported a complaint to State House that the LC1 Chairperson and others were being used to grab his land; whereupon both parties were summoned for a hearing. The 1st Applicant still appeared with only photocopies, later escaped from the hearing and did not show up again despite adjournments.

[5] The deponent stated that the Uganda Police then opened up a general inquiry file over the complaint and invited the 1st Applicant to report to police for the purpose of investigations but he elected not to do so. The 1st Applicant was arrested and his statement was recorded by the deponent. The 1st Applicant submitted the sale agreements and a will willingly to aid the investigations; which documents were subjected to analysis by the handwriting expert. The case file was later forwarded to the Resident State Attorney-DPP for further conduct of the case. The deponent averred that the Applicants were never threatened or treated in any negative manner; he informed the Applicants of the matters and reason for their arrest. He concluded that it is in the interest of justice that the application be rejected.

Representation and Hearing

[6] At the hearing, the Applicants were represented by **Mr. Batanda Gerald** of M/s Signum Advocates while the Respondent was represented by **Mr. Uwizera**

Franklin, State Attorney, from the Chambers of the Attorney General. The hearing proceeded by way of written submissions which were duly filed and have been considered while determining the matter before Court.

Issues for Determination by the Court

[7] Counsel raised four issues that guided their arguments. However, the dispute between the parties boil down to two issues for determination by the Court, namely;

- a) *Whether the named rights and freedoms of the Applicants were infringed by the actions of the Respondent's agents?*
- b) *Whether the Applicants are entitled to the remedies claimed?*

Resolution of the Issues

Issue 1: Whether the named rights and freedoms of the Applicants were infringed by the actions of the Respondent's agents?

[8] The allegations by the Applicants is that a number of their fundamental rights and freedoms were violated, namely; the right to personal liberty, the right to freedom from torture, cruel, inhuman and degrading treatment and the right against self-incrimination as a component of the right to a fair hearing. Fundamental rights and freedoms have been defined, according to Osborn's Concise Law Dictionary, 9th Edition at page 196 as "*rights and freedoms which every person is entitled to enjoy possibly deriving from natural law but more likely to be enforced in international law if founded on, for example, the United Nations Declaration of Human Rights of 1948*".

[9] In *Zachary John Olum v Bongomin John Odora & Others*, HCCA No. 120 of 2015, Mubiru J. stated that a "right" has also been described as "*a liberty protected and enforced by law, which compels a specific person or persons to do or abstain from doing something ... An ordinary right is any advantage or benefit*

conferred on a person by a rule of law. A right in that regard or sense is limited to the specific interest recognized and protected by law. Rights in this sense are considered as reasonable claims of the individual which are accepted by society and approved by statute". Fundamental rights and freedoms are embedded in a Country's Constitution and the International Bill of Rights. In Uganda, Chapter 4 of the Constitution contains the bill of rights.

[10] Article 20 of the Constitution of Uganda provides as follows;

- 1) Fundamental rights and freedoms of the individual are inherent and not granted by the state.
- 2) The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all agencies of government and all persons.

[11] Under Article 50(1) of the Constitution, "Any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation". Consequently, Section 3(1) of the Human Rights (Enforcement) Act 2019, provides that; "In accordance with article 50 of the Constitution, a person or organisation who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened may, without prejudice to any other action with respect to the same matter that is lawfully available, apply for redress to a competent court in accordance with this Act".

[12] With the above legal background, I will now proceed to investigate as to whether any of the named rights of the Applicants was violated as alleged.

The right to personal liberty

Submissions by Counsel for the Applicants

[13] Counsel for the Applicants cited three instances in which the Applicants' rights to personal liberty were violated, namely; failure to inform them the reason for their arrest, failure to inform them of their right to a lawyer of their choice, and detaining them for a period of over 48 hours; all contrary to the provisions under Article 23(3), (4) and (5) of the Constitution. Counsel submitted that it was the Applicants' evidence that they were arrested without being given any reasons for the arrest and were both not informed of their right to a lawyer of their choice. Counsel referred the Court to paragraph 11 of the 2nd Applicant's affidavit in support wherein it was stated that the police did not inform the deponent about his right to access a lawyer. Counsel prayed that the Court finds that the omission to inform the Applicants of the reasons of their arrest and their right to access a lawyer of their choice was a violation of their rights under Article 23(3) and 23(5) of the Constitution.

[14] Counsel further submitted that under Article 23(4) of the Constitution, a person who is arrested on suspicion of having committed a crime shall be presented before a court not later than 48 hours, if not earlier released. Counsel referred the Court to paragraphs 4-6 of the affidavit in support where the 1st Applicant stated that he was detained from 24th February 2020 and was only arraigned in court on 27th February 2020 which was beyond the 48 hours. Counsel stated that the 2nd Applicant was arrested on 1st March 2020 and was arraigned before court on 4th March 2020; also a period of over 48 hours. Counsel stated that the Applicants have shown in evidence that upon demanding to be arraigned before court, the Applicants were told that they would be arraigned in the course of the week. Counsel disputed the contention that the delay was attributed to the yet to be completed investigations and argued that such could not justify detention beyond the 48 hours. Counsel

prayed to the Court to find that the acts of the Respondent's agents in arrest and detention of the Applicants beyond 48 hours without producing them before a court of law, was a violation of their right to liberty.

Submissions by Counsel for the Respondent

[15] In reply, the Counsel for the Respondent stated that the alleged infringement of the 48- hour timeline was for a day and argued that it was on the basis of the exception spelt out under Article 23(1)(c) of the Constitution; which is for the purpose of bringing a person before a court or upon reasonable suspicion that the person has committed or is about to commit a crime. Counsel argued that the delay was occasioned by the need to ascertain relevant facts to do with the sales agreement and the will; which was done by the handwriting expert. Counsel further argued that the intricate nature of the evidence required to prove the charges created the need for a handwriting expert hence creating a justification for the 24 -hour delay.

[16] Counsel disputed the contention by the Applicants that they ought to have been informed of their right to a lawyer and argued that the reading of Article 23(5)(b) provides for allowing of reasonable access to one's next of kin, lawyer and personal doctor and not the right to inform the detainees of their right to counsel. Counsel also stated that the Applicants were at all times aware of the reasons for their arrest. Counsel referred the Court to paragraphs 16 of the affidavit in reply to the effect that the 1st Applicant was informed of the matters and reasons for his arrest and contrasted it with the contents in paragraph 2 of the 1st Applicant's affidavit in support wherein the deponent stated that he was arrested in September 2019 and detained at Jinja Road Police station on allegations that he was trespassing on someone's land. In the same affidavit, the deponent stated in paragraph 3 that he was released on 6th September on police bond on condition that he would periodically report to Jinja Road police pending investigations. Counsel argued that the 1st Applicant was at all times

aware of the reasons for his arrest and detention as he was on notice as regards the ongoing investigations. Counsel stated that the 2nd Applicant was also on notice as regards the reason for his arrest as his father continued reporting to the police station within the terms of the bond and the allegations were made jointly against them.

Determination by the Court

[17] The lawfulness or not of an arrest and detention is governed by the provisions of the Constitution of the Republic of Uganda under Article 23 which makes provision for the protection of personal liberty. Article 23(1) gives exceptional circumstances under which a person may be deprived of his or her liberty. The relevant exception in the instant case is provided for under Article 23(1)(c) under which a person may be arrested and detained *“for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda”*.

[18] When a person is so arrested, restricted or detained, he or she shall be kept in a place authorized by law (Article 23(2) of the Constitution). The person so arrested, restricted or detained shall be informed immediately of the reasons for the arrest, restriction or detention and his or her right to a lawyer of his choice (Article 23(3) thereof). When the person is arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, he or she shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his arrest (Article 23(4)(b) thereof). In addition, the person is entitled to be accessed by a next of kin, a lawyer and a medical doctor or access to medical treatment (Article 23(5) thereof).

[19] In the present case, the evidence by the Applicants is that they were detained at Jinja road police station for three days before being arraigned in court. The Respondent agreed that the period of 48 hours was exceeded by an extra 24 hours but sought to justify this by stating that it was occasioned by incomplete investigations which required the evidence of a hand writing expert. However, the attempt by the Respondent to justify this occurrence is both legally and factually faulty. As submitted by Counsel for the Applicants, the time set by the Constitution is the maximum. The ideal is that a person arrested and detained in terms of Article 23(1)(c) of the Constitution, if not earlier released (on police bond), shall be produced before the court as soon as possible but in any case in not more than 48 hours. As such, it is not open to justify continued detention after the 48 hours; the option available is either to produce the person before the court or release them on bond.

[20] I am of the strong view that the argument that a person could not be produced in court owing to the fact that investigations were incomplete, is grossly faulty and ought not be raised at all. This is because of three strong imperatives, namely; it is not correct to routinely arrest suspects before conduct of investigations; secondly, where the circumstances warrant immediate arrest of a suspect, there is no rule of thumb or practice that requires that before producing a person in court, investigations must be complete – a person may be charged and produced in court on basis of prima facie evidence of commission of an offence; thirdly, where both positions above cannot be attained, the police has an option of releasing the person on bond, on such terms as are necessary to preserve the integrity of the investigations. In light of these imperatives, I do not see any window or ventilator that is left by the law that can be exploited by the police as to justify a breach of the 48-hour rule.

[21] Counsel for the Respondent referred me to a decision in *Bukeni Ali & Others v Attorney General & Others*, HCMC No. 10 of 2021 which itself relied on a Kenyan decision in *Republic v Amos Karuga [2008] eKLR* which appeared to leave a room to the police, upon failing to produce a suspect before the court within time, to “satisfy the court that the accused had been brought before court as soon as was reasonably practicable”. I am not in any way persuaded by the suggestion in the above decision. In my view, and in agreement with learned counsel for the Applicants, that assessment is available to the police before the lapse of the 48 hours and not after. After the 48 hours, any continued detention is strictly illegal and any assessment of how long it was exceeded and the injury occasioned to the suspect, is simply for purpose of consideration and assessment of damages, never for purpose of ascertaining whether the right has been violated or not.

[22] The other leg is that the attempted justification by the Respondent on the present facts is also factually faulty. It is an agreed fact that the Applicants were produced in court on 27th February and 4th March 2020 respectively. The charge sheet on record, attached to the affidavit in support of the application, which is conceded to by the Respondent, is dated 27th January 2020 and was apparently sanctioned by the Office of the DPP on 18th February 2020. The 1st Applicant was arrested on 24th February and produced in court on 27th February. The 2nd Applicant was arrested on 1st March and produced in court on 4th March 2020. Clearly, by the time of arrest and detention of both suspects, there was an already sanctioned charge sheet. As such, even if a window for justification existed, the same could not be factually established by the Respondent. There would be no excuse as to why the Applicants were not arraigned before the court within the prescribed 48 hours when there was in place an already sanctioned charge sheet. My finding, therefore, is that the detention of the Applicants beyond the prescribed 48 hours amounted to a

violation of their right to personal liberty contrary to Article 23(4)(b) of the Constitution.

[23] The next allegation was that the Applicants were not informed of the reasons for their arrest and of their right to access a lawyer of their choice. The insistence on the part of the Respondent was that the Applicants were informed of the reasons of the arrest. It was stated that the 1st Applicant was aware of the ongoing investigations into allegations of trespass over which he was earlier arrested and released on police bond pending the investigations. It was further stated that the 2nd Applicant also knew of the ongoing investigations, the allegations having been made jointly against him and his father. I would agree that the 1st Applicant had been informed and was aware of the allegations levelled against him by the time of his arrest. There is evidence that the 1st Applicant had before been arrested in September 2019 and was released on police bond. The 1st Applicant knew that he was being investigated over allegations concerning some land in issue. He was re-arrested when he had returned to police to answer his bond. It would be superfluous to demand that it had to be repeated to the 1st Applicant as to why he was being re-arrested. I have found no merit in this allegation by the 1st Applicant.

[24] Regarding the 2nd Applicant, it is shown in his evidence that he was arrested while at his home in Kisaasi by people in plain cloths who claimed they had orders to arrest him. He stated that he demanded to know why he was being arrested, but was simply roughed up, his clothes torn and forced to enter a car with them in spite of loud screams by him. He was dragged into a nearby waiting car and was in shock thinking he was being kidnapped since his tormentors had no recognizable uniform. This evidence was not rebutted by the Respondent. It was only claimed by the Respondent that since the 2nd Applicant knew that his father (the 1st Applicant) was being investigated over allegations of trespass to land, the 2nd Applicant also knew that he was jointly

under the same investigation. I am unable to buy this argument by the Respondent. The right to be informed of the reason for one's arrest is a distinct right with a clear rationale; which is that since a person's liberty is being curtailed, they are entitled to know why and should not be left to guesswork; if not for their mental preparation, to at least be able to trigger the other rights like informing their next of kin, a lawyer or access to medical treatment.

[25] In the present case, it is not bad enough that the 2nd Applicant was not expressly informed at the time of arrest of the reason thereof, but the evidence also indicates that the persons that effected the arrest were in plain cloths. Any reasonable person would be alarmed by such arrest. In such circumstances, it was particularly imperative that the arresting officers introduce themselves properly to the suspect, inform him of the reason for his arrest and ask him to follow them. It is only after his resistance that they would have resorted to forcefully arresting him and dragging him into the vehicle. In this case, the 2nd Applicant states that he was grabbed and dragged into a waiting vehicle, in a manner akin to kidnap. I have not seen any evidence from the Respondent rebutting this piece of evidence.

[26] I must sound a strong view over this manner of arrest. The practice of effecting arrests by persons not in police uniform and using civilian vehicles is highly condemnable and ought to be stopped. It has the grave and long term effect of obliterating the difference between lawful arrests on the one hand and kidnap on the other. The suspect and other persons watching would be forgiven to believe that a particular suspect is indeed being kidnapped, only to turn out that they are in police custody. The long term negative effect is that when a real kidnap occurs, the public will keep looking for their person at police stations and army installations; only to be later called for a ransom or to learn of the death of the person as an after effect of the kidnap. The police and security agencies must not allow themselves to get this low; to the point of

making the public guess as to whether their person is in the hands of the security or of the law breakers! If the police and security agencies choose to find a comfort zone in this kind of practice, then the law and the courts must not allow them to bask in that kind of indecency.

[27] On the present facts, I find that the 2nd Applicant has satisfied the Court that he was not informed of the reason as to why he was being arrested; which conduct amounted to breach of his fundamental right to personal liberty under Article 23(3) of the Constitution.

[28] The other allegation is that the Applicants' right to personal liberty was also violated owing to the failure by the police to inform the Applicants of their right to access a lawyer of their choice. Contrary to the perception by Counsel for the Respondent, this right is twofold; it constitutes a right to be informed that a suspect is entitled to a lawyer of their choice [article 23(3)] and when a lawyer appears, the suspect has a right to be accessed by the lawyer [article 23(5)(b) thereof]. In this case, it was alleged by the Applicants that they were never informed of their right to access a lawyer of their choice until they were informed by a relative, who happened to be an in-law to the Applicants. Although there was a discrepancy in the Applicants' evidence whereby both Applicants referred to the relative as their brother-in-law; yet the Applicants are father and son, it was explained that this was an error. I do not find the error or inconsistency so grave as to make the evidence false. It is one that can be severed from the substance of the evidence; which I accordingly do.

[29] Looking at the evidence in its entirety, I do not find any averment by the Respondent stating that the Applicants were informed of their right to access a lawyer while in detention. Indeed, all evidence indicates that the police and the Respondent's representative in court were of the thinking that the Applicants' right stopped at being allowed to access their lawyer if the lawyer appeared.

The police did not appreciate that their duty also extends to informing suspects of their right to a lawyer of their choice. This must be correctly understood by the police authority. As it is, therefore, the Applicants' right to be informed of their right to access a lawyer of their choice was violated, in breach of article 23(3) of the Constitution. This part of the allegation has been proved on a balance of probabilities.

Freedom from torture, cruel, inhuman or degrading treatment

Submissions by Counsel for the Applicants

[30] Counsel for the Applicants cited the provisions of Article 24 of the Constitution which prohibits treatment that would amount to torture, cruel, inhuman or degrading treatment and Article 44 of the Constitution which makes the right non-derogable. Counsel submitted that the 1st Applicant was threatened and coerced into producing original documents and told that he would be charged with multiple offences if he did not produce them. Counsel stated that the 2nd Applicant spent time in police cells without knowing why he was there and without talking to his lawyers or family which left him in intolerable mental anguish and untold anxiety.

Submissions by Counsel for the Respondent

[31] It was submitted by Counsel for the Respondent that there was no proof of torture, cruel, inhuman or degrading treatment. Counsel stated that there is no proof of any ordeal different from the normal acclimatization of a detainee to a police cell, let alone proof of mental anguish and untold anxiety. Counsel argued that the blanket expressions of alleged trauma and dehumanizing feelings creating intolerable mental anguish and untold anxiety cannot compel the conclusion proposed by the Applicants. Counsel referred the Court to paragraph 14 of the Respondent's affidavit in reply wherein the deponent stated that the Applicants were never threatened or treated in any negative manner while in custody at Jinja Road Police Station and invited the Court to

find no basis for the allegations of torture, cruel, inhuman or degrading treatment.

Determination by the Court

[32] Article 24 of the Constitution of Uganda guarantees freedom from torture, cruel, inhuman or degrading treatment or punishment. This right is non-derogable and is therefore absolute according to Article 44(a) of the Constitution. Under Section 2 of the Prevention and Prohibition of Torture Act 2012, torture is defined as *“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 consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as – (a) obtaining information or a confession from the person or any other person; b) 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 c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act”*.

[33] According to Section 2(2) of the Prevention and Prohibition of Torture Act, “severe pain or suffering” means the prolonged harm caused by or resulting from the intentional infliction or threatened infliction of physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; or the threat of imminent death; among others. Under Section 2(3) of the Act, the acts constituting torture shall include the acts set out in the second schedule to the Act. These include physical acts such as systematic beating, head banging, punching, kicking, striking with truncheons, rifle butts; electric shocks; being tied or forced to assume a fixed and stressful body position; harmful exposure to the elements such as sunlight and extreme cold; among others. They also include

mental or psychological kind of torture such as blindfolding; threatening the victim or his or her family with bodily harm, execution or other wrongful acts; confining a victim incommunicado, in a secret detention place or other form of detention; confining the victim in a solitary cell; among others.

[34] On the case before me, it was alleged that the Applicants were subjected to torture, cruel, inhuman or degrading treatment by threatening them with more prolonged detention and placing on them multiple and more dangerous charges; which caused the Applicants trauma and dehumanizing feelings, creating intolerable mental anguish and untold anxiety to them. The Applicants claimed that they were subjected to psychological pain through acts of intimidation or coercion against them to make them produce a will and an agreement that were necessary for purpose of the on-going investigations. In reply, it was stated that the Applicants were never threatened or treated in any negative manner while in detention.

[35] In my view, if infliction of any force upon the applicants was proved under such circumstances, the same would technically amount to an act of torture. On evidence before the Court, however, it is simply the Applicants' word against that of the Respondent. While the Applicants assert that they were intimidated and/or coerced to produce documents, the Respondent averred that the 1st Applicant produced the documents willingly. I have not found any independent evidence that could assist the Court to choose as to which of the version to believe. This leaves the matter in equilibrium and thus remains unproved. As such, the allegation that the Applicants were subjected to torture, cruel, inhuman or degrading treatment has not been made out and it fails.

The right to a fair hearing/the right against self-incrimination

Submissions by Counsel for the Applicants

[36] It was submitted by Counsel for the Applicants that the fact that the 1st Applicant was compelled to give away his original land sale agreement was a violation of the right to self-incrimination contrary to the provision under Article 28(11) which postulates that no person being tried for a criminal offence nor their spouses shall be compelled to give evidence against that person. Counsel argued that the police had nothing to charge the applicants with until they looked at the original agreement and decided to charge him on 27th February 2020 with the offence of forgery contrary to Section 348(1) of the Penal Code Act. Counsel further argued that the violation of the right against self-incrimination casts the entire process in doubt as to its fairness.

Submissions by Counsel for the Respondent

[37] In reply, it was submitted by Counsel for the Respondent that the 1st Applicant was not coerced into producing his original land sale agreement. Counsel referred the Court to paragraph 11 of the affidavit in reply to the effect that the deponent recorded the 1st Applicant's statement and the 1st Applicant willingly submitted the sale agreement and a will to aid the investigations. Counsel further stated that according to the Applicants' evidence, the Applicants were affected by the threatening environment at police and not by threats from the police officer and the two aspects are different.

Determination by the Court

[38] Article 28(1) of the Constitution provides that in the determination of civil rights and obligations or any other criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Under article 28(3) of the Constitution, every person who is charged with a criminal offence shall be presumed to be

innocent until proved guilty or until that person has pleaded guilty. Article 28(11) of the Constitution provides that where a person is tried for a criminal offense, neither that person nor the spouse of that person shall be compelled to give evidence against that person.

[39] The complaint by the Applicants is that the compulsion upon the 1st Applicant to hand over his original land sale agreement and a will for use in the investigation and eventual charges was a violation of the right against self-incrimination, which infringes on the right to a fair hearing. As was submitted by Counsel for the Applicants, I agree that the right against self-incrimination is part of the broader right to a fair hearing and is enjoyed even in the context of pre-trial conduct since the right to a fair hearing includes pre-trial conduct in investigations. See: *Soon Yeon Kong Kim & Another v Attorney General, Constitutional Reference No. 6 of 2007* and *Mapp v Ohio* 67 U.S. 643; 81 S. Ct. 1684; 6 L. Ed. 2d 1081 pp.2, 8. That being the case, compulsion upon a suspect to produce documents upon which to base charges against him/her would amount to self-incrimination and would constitute an affront to the right to a fair hearing.

[40] On the facts before me, however, I have already stated that there is no evidence to the satisfaction of the Court showing that the 1st Applicant was intimidated or coerced into producing the said documents. In absence of such proof, the allegation of breach of the Applicants' right against self-incrimination is not made out. This allegation also fails.

[41] In all, therefore, on Issue 1, the Applicants have proved a violation of their right to personal liberty in terms of failure by the police to inform the 2nd Applicant of the reason of his arrest contrary to article 23(3) of the Constitution; failure by the police to inform both Applicants of their right to access a lawyer of their choice contrary to article 23(3) of the Constitution; and

detention of the Applicants for a period exceeding 48 hours contrary to article 23(4)(b) of the Constitution. On the other hand, the allegations of breach of the rights to freedom from torture, cruel, inhuman or degrading treatment and the right against self-incrimination, as part of the right to a fair hearing, have not been made out and have failed.

Issue 2: Whether the Applicants are entitled to the remedies claimed?

[42] The Applicants sought various declarations in the Notice of Motion based on alleged breaches of their fundamental rights and freedoms. As indicated above, only breach of the right to personal liberty has been proved. Declarations thereof shall issue to that effect.

[43] The Applicant also sought for a declaration that the criminal trial in Co-119/2020 in the Chief Magistrates Court of Nakawa is a nullity on account of being based on infringement of the Applicants' fundamental rights and freedoms. The Applicants relied on the provision under Section 11(2) of the Human Rights Enforcement Act 2019, which provides as follows;

“Whenever, in any criminal proceeding –

(a) it appears to the judge or magistrate presiding over a trial,

(b) it is brought to the attention of the competent court; or

(c) the competent court makes a finding, that any of the accused person's non-derogable rights and freedoms have been infringed upon;

the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person”. [Emphasis added]

[44] The argument for the Applicants is that if this Court were to find an infringement of any of the Applicant's non-derogable rights, it should declare the trial in the magistrate's court a nullity and acquit the Applicants (who are the accused persons in the said criminal trial). This argument is based on a wrong construction of the above provision. Clearly, the duty of the competent

court such as this one, in a matter brought for human rights enforcement, is to make a finding as to whether or not an infringement of a non-derogable right was occasioned. Where the court finds so, it may issue a declaration to that effect. The successful applicant, in that regard, would use the said declaration to move the trial court in the criminal case to declare the trial a nullity and acquit the accused person. The other option is for the accused person to raise the issue of infringement of their non-derogable right before the very trial court in the criminal case; which court may make the necessary findings and orders.

[45] Clearly, therefore, the role of finding and declaring the trial a nullity and acquitting the accused person is within the domain of the criminal trial court and not the competent court to which a claim for violation of the given human right was lodged and determined. It is, therefore, not correct for the Applicants herein to seek the declaration and order rendering the criminal trial a nullity and acquitting the accused persons that are appearing before a different court. As such, even if I had found a violation of any of the Applicants' non-derogable rights, I would have stopped at issuing a declaration that such an infringement occurred. However, as seen from the above findings, no infringement on any of the Applicants' non-derogable rights has been established. No declaration or order can issue in that regard.

[46] The Applicants further claimed for orders for general, punitive and aggravated damages for the mental suffering, psychological torture and anguish suffered while in detention; for interest and costs of the suit. I will proceed to consider each of the said reliefs as set out in the Notice of Motion.

[47] The law on general damages is that the damages are the direct natural or probable consequence of the act complained of and are awarded at the discretion of the court. The damages are compensatory in nature with the purpose of restoring the aggrieved person to the position they would have been

in had the breach or wrong not occurred. See: *Hadley v Baxendale (1894) 9 Exch 341* and *Kibimba Rice Ltd v Umar Salim, SC Civil Appeal No. 17 of 1992*. In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: *Uganda Commercial Bank v Kigozi [2002] 1 EA 305*. Under the law, general damages are implied in every breach of contract and every infringement of a given right.

[48] More particularly, in the assessment of damages arising out of a constitutional violation, the court has to bear in mind that although infringement of a person's liberty per se imputes damage, a plaintiff needs to prove some damage suffered beyond the mere fact of unlawful arrest or detention; otherwise, the mere breach may only entitle a plaintiff to nominal damages. This, however, may not be the same in the case of acts of torture, cruel, inhuman or degrading treatment whose severity may exist even without leaving physical footprints.

[49] In the present case, the Applicants have established before the Court that they were held in detention for three days which was beyond the mandatory 48 hours; by an excess of 24 hours. The 2nd Applicant was also arrested without being informed of the reason of his arrest. Both Applicants were not informed of their right to access a lawyer of their choice. All these amounted to infringement of the Applicants' right to personal liberty. According to the Applicants' evidence, the treatment while in detention occasioned them trauma and dehumanizing feelings, creating intolerable mental anguish and untold anxiety to them. Considering the facts and circumstances of this case, I am convinced that the Applicants are entitled to an award of a modest sum in general damages. I believe a sum of UGX 10,000,000/= (Uganda Shillings Ten Million only) to each of the Applicants would constitute appropriate

compensation to the Applicants in the circumstances; and I award the same as general damages.

[50] The Applicants also claimed for exemplary/punitive damages to deter the Respondent's agents from similar high handedness and impunity with which they acted in the present case. According to decided cases, there are only three categories of cases in which exemplary damages are awarded namely; where there has been oppressive, arbitrary, or unconstitutional action by the servants of government; where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or where some law for the time being in force authorizes the award of exemplary damages. Three other considerations must be borne in mind before making an award of punitive/exemplary damages, namely; i) the plaintiff cannot recover exemplary damages unless he or she is a victim of punishable behaviour; ii) the power to award exemplary damages should be used with restraint; and iii) the means of the parties are material in assessment of exemplary damages. See: *Rookes v Barnard* [1946] ALLER 367 at 410, 411 and *Fredrick J.K. Zaabwe v Orient Bank & Others*. [2007] UGSC 21.

[51] On the case before me, I have not found any overt acts on impunity, arbitrariness or high handedness, such as would invoke the court's power to make an award of exemplary damages. The wrongful and illegal acts of the agents of the Respondent herein have been condemned and subjected to an award of general damages in favour of the Applicants. It is my view that such award suffices to meet the ends of justice in this matter. In the circumstances, I have not found any strong basis for award of any punitive damages and none shall be awarded. I have also found no aggravating factors as would invite the court to make any award of aggravated damages in the matter. I make the same finding in that regard.

[52] The Applicants also claimed for interest on the awarded damages. The discretion of the court regarding award of interest is provided for under Section 26(2) of the Civil Procedure Act. On the present facts, I award interest on the general damages at the rate of 10% p.a. from the date of this ruling till payment in full.

[53] Regarding costs of the suit, under Section 27 of the Civil Procedure Act, costs follow the event unless the court upon good cause determines otherwise. Given the findings above, the Applicants are entitled to costs of the application and the same are awarded to them.

[54] In all, therefore, the application largely succeeds and is allowed with the following declarations and orders;

(a) Declarations do issue that;

(i) The 2nd Applicant's right to personal liberty by being informed of the reasons of his arrest under article 23(3) of the Constitution of Uganda was infringed upon by the servants or agents of the Respondent.

(ii) The 1st and 2nd Applicants' rights to personal liberty by being informed of their right to access a lawyer of their choice under article 23(3) of the Constitution of Uganda was infringed upon by the servants or agents of the Respondent.

(iii) The 1st and 2nd Applicants' right to personal liberty by not being kept in detention beyond the period of 48 hours under article 23(4)(b) of the Constitution of Uganda was infringed upon by the servants or agents of the Respondent.

(b) Orders do issue for payment by the Respondent of;

(i) The sum of UGX 10,000,000/= (Uganda Shillings Ten Million only) to each Applicant as general damages.

(ii) Interest on the sums in (b)(i) above at the rate of 10% p.a. from the date of this ruling until payment in full.

(iii) The taxed costs of this application to the Applicants.

It is so ordered.

Dated, signed and delivered by email this 8th day of July, 2024.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala

JUDGE