

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

CIVIL SUIT NO. 386 OF 2014

LT. (RTD) GEORGE KIGGUNDU:.....PLAINTIFF

VERSUS

ATTORNEY GENERAL:.....DEFENDANT

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

Background

The Plaintiff sued the Defendant for special, general and exemplary damages arising out of his false imprisonment, assault, battery, torture and injury occasioned on him by officials of the Uganda People's Defence Forces.

The defendant denied all liability and averred that the plaintiff is not entitled to any of the reliefs sought.

The plaintiff led evidence of two witnesses who were never cross examined by the defendant's counsel. On 13th March 2019, a year after the Plaintiff's witnesses testified, Court granted the plaintiff's prayer to proceed under Order 17 Rule 4 of the Civil Procedure Rules.

Issues for Determination

- 1. Whether the Plaintiff was arrested, detained, battered and injured by the UPDF soldiers*
- 2. Whether the Defendant is vicariously liable for the actions of the Uganda People's Defence Forces*
- 3. Remedies available to the Plaintiff*

Determination

Issue 1: Whether the Plaintiff was arrested, detained, battered and injured by the UPDF soldiers

The plaintiff PW1 testified that in March 2006 while at his home in Makindye, Salaama Road received a phone call from CPL Kiwanuka Richard then attached to Joint Anti-Terrorism Department of Chieftaincy of Military of Intelligence of the Uganda People's Defence Forces, who said that he had wanted him to help a person get a work permit through Kampala Residence District Commissioner Mr. Kinyatta who was his friend.

PW1 testified that he upon reaching at the meeting point at Kibuye was put at gun point and told that the Chief of Military Intelligence wanted him. He was arrested, driven around town and taken to Kitante, which was home of the Chieftaincy of Military of Intelligence at the time. He testified that he was taken to the Head of Investigations Captain Mbahweza Ceaser who was a captain at the time, now a Colonel, who had a heap of sticks and started beating/assaulting him and asked him to remove his shoes and later locked him up in the toilet at Chieftaincy of Military of Intelligence. He was not informed of the reason why he was being beaten. PW1 further testified that was repeatedly beaten to a point when he started bleeding profusely. He was detained in some place in Kololo, which he came to know was a safe house in the dungeons.

The plaintiff further testified that after about two weeks he was asked to make a statement that was when he was told that he was suspected to be recruiting PRA (Peoples Redemption Army) and ADF (Allied Democratic Forces) in areas of Kasese, Kampala and Masindi to which he responded that he did not know anything to do with any rebel activity. He insisted that evidence be brought forward connecting him to the allegations but to date nobody ever brought any evidence against him.

Pw1 stated that spent sixty one (61) days in detention in a safe house under extreme torture, sleeping on floor, no visitors, and no treatment. As a result of that torture and detention, PW1 testified that he became black as a result

of skin disorder, was beaten on his left leg and suffered severe grievous head Injuries.

PW2 Dr. Nkalubo Muhamad of the Family Health Clinic Salaama Road also led evidence stating that the Plaintiff came to his clinic for treatment with wounds after claiming that he was beaten by the agents of the Defendant. He testified that he made extensive diagnosis on the Plaintiff, and on establishing that his condition needed advanced treatment, did recommend him accordingly.

He further testified that the Plaintiff after receiving further medical treatment upon his recommendation has been regularly consulting him, and he has been keenly monitoring his condition.

Both witnesses were never cross examined by the defendant hence leaving the evidence uncontroverted. I also have to note that the defendant did not lead any evidence contradicting the plaintiff's evidence.

Plaintiff's counsel submitted that the Defendant never cross-examined the witnesses, therefore, no challenge to the evidence was ever mounted on the evidence. The evidence remain unchallenged in regard to its truthfulness. There are a plethora of cases on law that unchallenged or uncontroverted evidence will be deemed admitted and court can rely on the same.

Counsel for the plaintiff in his submissions cited the case of James Sewabiri and Another vs. Uganda; SCCR Criminal Appeal No. 005 of 1990 where Court quoted with approval the dicta in Uganda vs Dusman Sabuni, which decided, inter alia that;

"An omission or neglect to challenge the evidence-in-chief on a material or essential point of cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue."

I concur with counsel for the plaintiff that the evidence is uncontroverted. I am satisfied that the plaintiff was indeed arrested, detained, and injured by the UPDF soldiers.

Issue 2: Whether the Defendant is vicariously liable for the actions of the Uganda People's Defence Forces

Plaintiff's counsel submitted that the Defendant in his defence did not deny the action of the UPDF. The Plaintiff testifying as Pw1 clearly showed that the UPDF officials who arrested, detained and tortured him were using UPDF facilities, Kololo, Mbuya and he knew them as officials of the Chieftaincy of Military Intelligence. They were in the course of their duty.

According to the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see *Muwonge v. Attorney General* [1967] EA 17) Court held in *Ongu Tirence vs Attorney General* (unreported) Gulu HCCS No. 104.2001 that *the function of the army and soldiers is to provide security to all citizens of Uganda. To do this they have to ensure that there is no threat to the security of the property and persons of the citizens.*

In this particular case the soldiers were questioning and/or interrogating the plaintiff on allegations that he was recruiting PRA (Peoples Redemption Army) and ADF (Allied Democratic Forces) in areas of Kasese, Kampala and Masindi which rebel groups were threatening the security of the property and citizens of Uganda. This goes on to prove that they soldiers were acting within the scope of their employment although they exceeded their mandate by torturing the plaintiff.

On that basis, this issue is answered in the affirmative.

Issue 3: Remedies available to the Plaintiff

The plaintiff sought special damages, general damages, exemplary damages, interest and costs.

Counsel prayed for the award of special damages as prayed, pleaded and provided – Ug. Shs. 110,000,000 (One hundred ten million only).

In paragraph 7 of the Plaint, his claim for special damages was particularized as follows;

i. Mobile phone lost during the arrest	1,000,000=
ii. Medical expenses for treating the Plaintiff's injured head and the left leg	70,000,000=
iii. Ticket and visa to United Kingdom for treatment	5,000,000=
iv. Medical bills in the United Kingdom	30,000,000=
v. Transport to and from hospital and clinics in Kampala	4,500,000=
Total	<u>110,500,000=</u>

In his testimony in chief, the Plaintiff states thus;

Para 30. *“My Lord, lost my new Motorola phone which I had bought at Ug. Shs. 1,000,000 (One million only).”*

Para 31. *“My Lord, treatment abroad cost us a lot of money after selling my cows and my small house at about Ug. Shs. 50,000,000 (Fifty million only). My wife sold also her cows and gave me Ug. Shs. 10,000,000 (Ten million only) and my father gave me Ug. Shs. 10,000,000 (Ten million only) after selling his cows.”*

Para 32. *“I bought myself a ticket to the United Kingdom and for treatment which cost me about Ug. Shs. 5,000,000 (Five million only).”*

Para 33. *“My Lord, my cousin spent almost Ug. Shs. 30,000,000 (Thirty million only) on my treatment while I was in London for one year.”*

Para 34. *“My Lord, while still in Kampala I spent a lot on transport by special hire and subsistence for almost nine (09) months which cost me around Ug. Shs. 4,500,000 (Four million five hundred thousand only).”*

Counsel submitted that the above evidence was never controverted or even challenged even when the Defendant was served with the Plaintiff's witness statement long before the closure of the Plaintiff's case.

I have carefully evaluated the evidence submitted by the plaintiff and I am not satisfied to award the amount prayed for by the plaintiff. The receipts presented as proof of payment by the plaintiff did not detail the purpose of the payment and were left ambiguous hence the plaintiff did not satisfy this court on a balance of probabilities that the amount prayed for was indeed paid for the various treatments as a result of the torture.

Some of the payments for the medical bills were made on the same day he appeared for treatment and it could not be true that as soon as he went for treatment he was assessed to spend a lumpsum payment of 19,000,000/= or later 11,000,000/=. The said receipts are highly suspect to court.

Furthermore with regard to the treatment overseas the plaintiff did not prove the amounts prayed for.

The plaintiff did not lead sufficient evidence to warrant the award of special damages prayed for.

Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw

*them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See **Benedicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011***

With regard to general damages, counsel for the plaintiff prayed for an award Ug. Shs. 700,000,000 (Seven hundred million only) in general damages.

Counsel in his submissions cited the case of *Agaba Alex Vs. Attorney General; Civil Suit No. 659 of 2016* a soldier working with the UPDF who was unlawfully arrested, detained and tortured for allegedly losing a gun. As a result of the torture, he damaged right tympanic membrane with chronic discharge of pass with a risk of becoming deaf, poor heart function in relation to strength of pumping blood, the Judge stated and I quote –
"The applicant is a trained soldier who earns a living from his military training and there was evidence that he did not have the conditions before he was arrested, detained and tortured. The injuries he sustained which are not denied have led to his present condition and I have no doubt that they are the natural and probable consequences of the defendant's servants' act and a sum of Ug. Shs. 300,000,000 would resolve the plaintiff's condition or would enable him to seek better health facilities."

Counsel submitted that the above dicta made in 2016 is very relevant in the instant case, only that the Plaintiff's ailment is more grave and relates to the brain which is fundamental than loss of an ear.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Respondent.

General damages are presumed or implied to naturally flow or accrue from the wrongful act. They are a result of inconvenience and mental anguish

caused due to the Defendant's action as against the plaintiff. See: *Ronald Kasibante versus Shell (U) Ltd (2008) HCB 163*.

Resolution on Damages

It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the Respondent's actions.

The plaintiff has proved to this court that he suffered physical injuries due to the torture he was subjected to at the hands of the UPDF soldiers.

There is no specific formula or detail of how the damages are worked out in cases of torture or inhuman and degrading treatment; generally it is not a pecuniary loss but a loss of dignity or suffering or injury. The principal heads of damage would appear to be injury and liability, loss of time considered primarily from a non-pecuniary view-point and injury to feelings i.e the indignity, mental suffering, distress and humiliation with any attendant loss of social status. *See Mc Gregor on damages, 14th Edition*.

In other words the whole process of assessing damages where they are "at large" is essentially a matter of impression and not addition. Per Lord Hailsham, LC in *Cassell v Broome [1972] 1 All ER 801 at 825*.

I find the award of **UGX 50.000.000** as sufficient compensation for the injuries suffered (torture) and illegal detention.

Exemplary Damages

With regard to exemplary damages, counsel submitted that the state actors have not learnt a lesson in avoiding loss to government especially where there are constitutional provisions prohibiting subjecting any person to any form of torture, cruel and inhuman or degrading treatment (Article 24 of the Constitution).

There is also another effort to curb torture in the promulgation of the Prevention and Prohibition of Torture Act, No. 3 of 2012 all those have not been an example. The Attorney General has never taken steps to curb that vice inspite of paying the victims.

Counsel cited *Akankwasa vs. Attorney General; HCCS No. 202 of 2013* Justice Musota (as he then was) referring to the case of MC Cardie J Butterworth [1920] 126 stated thus –

“Simply put, the expression exemplary damages means damages for examples sake. These kind of damages are clearly punitive or exemplary in nature. They represent a sum of money of a penal nature in addition to exemplary damages given to the pecuniary or physical and mental suffering.”

Counsel submitted that the instant case is one in which the Defendant should be punished in an award of damages as a young officer’s career was put to an end by blatant oppressive, arbitrary and unconstitutional actions by servants of government.

Counsel also cited *Agaba Alex vs. Attorney General* (supra) the perpetrators of the unconstitutional acts had been tried, convicted and sentenced, the Court awarded Ug. Shs. 250,000,000 (Two hundred fifty million only) as exemplary damages.

Counsel submitted that no perpetrator of the crime was ever arrested but only promoted according to Pw1. The punishment deserved of the Attorney General in this award ought to be bigger, we pray you award Ug. Shs. 500,000,000 (Five hundred million only) in exemplary damages.

Resolution

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. Per Spry V.P. in *Obongo vs Municipal Council of Kisumu* [1971] EA 91. All circumstances of the case must be taken into account, including the behaviour of the plaintiff and whether the defendant had been provoked. See *O'Connor Vs Hewiston* [1979] Crim. LR 46, CA; *Archer Brown* [1985] QB 401

In awarding damages, both compensatory and punitive aspects of the award must be borne in mind. The court must aim at adequate compensation. If adequate compensation is equally punitive, the court should award that sum. If the award for compensation was not punitive enough, upon ascertaining the wrongdoer's ability to pay, a larger sum, not an additional sum, should be awarded to reflect the punitive element. See *Cassell v Broome* [1972] 1 All ER 801

With due regard to the circumstances of this case and the evidence adduced, I award the plaintiff UGX 20.000.000 as exemplary damages.

The plaintiff is awarded interest at a rate of 15% from the date of filing the suit until payment in full.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA

JUDGE

19th August 2019