

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO  
CONSOLIDATED MISCELLANEOUS CAUSES NO.17 AND 003 OF 2017

1. RIGHTS TRUMPET
2. AMPIIRE AISHA
3. NANSUBUGA SADATI

VS

1. AIGP ASAN KASINGYE
2. SSP EMILIAN KAYIMA
3. SARAH NANKWANGA SHARIFA
4. SAM(policeman Nagalama)
5. ASP BRIAN NYEHANGANE
6. THE ATTORNEY GENERAL

AND

1. MUCUNGUZI ABEL
2. AGABA JOHAB
3. MUTEBI EDRIS
4. SSEMWANGA JACKSON
5. MUSOKE ERIA
6. LUTA FERDINAND
7. ATWINE EDDY
8. MUBIRU BASHIL
9. MUWONGE RONALD
10. MUSHIZIMANA GALASI

VERSUS

1. ATTORNEY GENERAL
2. AS. BRIAN NYEHANGANE
3. NDUNGUTSE ALFRED

BEFORE: HON. LADY JUSTICE. MARGARET MUTONYI, JUDGE HIGH COURT

JUDGEMENT

1. INTRODUCTION

This judgment is in respect of a notice of motion filed by a total number of 13 Applicants who had earlier on filed two separate applications to wit *MC No.003/017* and *MC No. 0 17 of 2017*. MC 003/2017 had 10 applicants while MC 17/2017 had 3 applicants.

The respondents were the Attorney General of Uganda and police officers from Uganda Police Force (UPF).

Both applications were brought under *Article 50 of the Constitution of the Republic of Uganda as amended in 1995, Sections 14 and 33 of the Judicature Act, section 98 of the Civil Procedure Act, The Judicature (fundamental rights and freedoms) (enforcement procedure) Rules 2008* and all enabling laws.

The Applicants in MC 003/017 also relied on *Article 23 of the Constitution and The International Convention on Civil and Political Rights (ICCPRs)*.

The applications were consolidated under *O.11 r 1 of the civil procedure rules* due to the fact that the subject matter and or issues were basically the same. They were complaining about the violation of their fundamental human rights and freedoms guaranteed by the *1995 Constitution of The Republic of Uganda*.

The rights alleged to have been violated by the Respondents were the following;

1. The right to liberty under *Article 23*
2. The right to dignity and freedom from torture, inhumane and degrading treatment under *Articles; 24, 33(1)&(3) and 44(c)*
3. The right to freedom of movement , speech, expression, conscience, opinion, assembly and Association under *Article 29*
4. The right to a fair hearing under *Article 44(c)*
5. The right to just administrative action under *Article 42*
6. The right to be cared for by the parents and those entitled by law to bring them up under *Article 34, Article 31(4)*
7. Freedom from involuntary separation from the family under *Article 42 and Article 44(c)*
8. The right to privacy of their persons, home, and property under *Article 27*

9. The right to protection from deprivation of property under *Article 26*
10. The right to a fair hearing and just treatment under *Article 28, 42, and 44(c)*
11. The right to education under *Articles 30 and 34*
12. The right to safety, information and access to basic services.
13. The right to morally appropriate leisure, participation in sports and positive cultural and artistic activities.
14. The right to effective legal aid.

The grounds were contained in the two notices of motion but briefly are:

1. That the respondents have a duty to respect, uphold or observe, promote and fulfill the fundamental human rights, freedoms and dignity of the applicants and all other persons.
2. That the Uganda Police Force (PPF)/Respondents are enjoined to be patriotic, professional, disciplined, productive and of good character.
3. They also have the mandate to protect life and property, preserve law and order and prevent crime.
4. That the state is obliged to protect women and the rights of children.
5. That the respondents detained, mistreated and tortured, abused, tormented and mocked mothers and children who are victims herein.
6. The Attorney General is mandated to represent government in legal proceedings and that the other human respondents (police officers) are individually and personally liable for their human rights infractions as well.
7. The Respondents arrested, detained, violated the children of Applicants incommunicado for 51 days, 1244 hours from March 21<sup>st</sup> 2017 to May 11<sup>th</sup> 2017 and arrested and detained their mothers for 6 days that is 144 hours.
8. That the respondents' conduct was unbecoming of the public officers and police officers with heightened duties to be civil.
9. That it was fair, just and equitable to allow the application.

The applicants prayed for the following declarations under **MC 003/17 (a) (b) (c) (d) (e) (f)** and under **MC017/2017**:

- a) A declaration that the acts of the Respondents detaining the Applicants beyond the constitutionally permitted 48 hours infringed their fundamental human rights and freedoms guaranteed by the 1995 Constitution of the Republic of Uganda especially :

1. The right to liberty under **Article 23**
  2. The right to freedom of movement under **Article 29**
  3. The right to dignified and just administrative action under **Articles 42 and 24.**
- b) A declaration that the acts of the First Respondents' officers /servants arresting the Applicants for their unarmed ,peaceful protests against the age limit amendment infringed their fundamental human rights and freedom of speech ,expression, conscience, opinion, movement, assembly, and association guaranteed by **Article 29 of the 1995 Constitution of the Republic of Uganda.**
  - c) A Declaration that the Respondent's Acts were unjust and illegal.
  - d) An Order for the Respondents to jointly and or severally pay general compensatory /aggravated or punitive /exemplary damages to each of the Applicants.
  - e) Costs of this Application be paid by the Respondents.

While under **MC 17/2017**, the Applicants prayed for the following declarations:

- a) A declaration that the UGANDA POLICE FORCE /respondents' arrest, **51 DAYS(1224 HOURS)** Incommunicado incarceration torture and mistreatment of Abdul-Rashid Mbaziira's children namely; **Najubu Ainembabazi of 3 years, Abdul Zaake Jamil of 8 years, Anisau Nambazira of 3 years, Swabula Nambazira of 1 year, Anne Nabura of 4 years, Rabiya Nanyonjo of 20 years, Sumaya Nambazira of 10 years, Rashidah Nambazira of 9 years, Abubakare Jamilu of 11 years, Uthman Balinda of 13 years, Akiram Bazuwe of 5 years and Buzu Akilamu** (herein "the children") threatened and/or violated their fundamental human rights and freedoms guaranteed by the 1995 constitution of the Republic of Uganda namely;
  - i) The right to liberty under **Article 23**
  - ii) The right to dignity and freedom from torture, inhuman and degrading treatment under **article 24, and 44(c)**
  - iii) The right to be cared for by their parents and those entitled by law to bring them up under **article 34**

- iv) The freedom from involuntary separation from family under *article 31(5)*
  - v) The right to education under *articles (30) and (34)*
  - vi) The right to a fair hearing and just treatment under *articles 28, 42 and 44(c)*
  - vii) The right to the privacy of their persons, Home &Property under *article 27*
  - viii) The protection from deprivation of property under *article 26*
  - ix) The freedom of movement under *article 29*.
- b) A declaration that the UGANDA POLICE FORCE/respondents' arrest, **6 DAY (144 HOURS)**detention; and their torture, conduct, tormenting, stripping and mistreatment of their children's mothers during and after the six day detention: Bint Salim; Ampaire Aisha and Nansubuga Saidat (herein "**the mothers**") threatened and/or violated their fundamental human rights and freedoms guaranteed by the 1995 constitution of the Republic of Uganda namely;
- i) The right to liberty under *article 23*
  - ii) The right to a fair hearing and just treatment under *article 28, 42 and 44(c)*
  - iii) The right to dignity and freedom from torture inhuman and degrading treatment under *article 24, 33(1), (3) and 44(c)*
  - iv) The right of parents to care for and bring up their children under *Article 31(4)*
  - v) The right to privacy of their persons, Home &Property
  - vi) The protection from deprlvation of property
  - vii) The freedom of movement under *article 29(2)(a)and (b)*
- c) A declaration that the UGANDA POLICE FORCE/respondents' impugned conduct threatened, and/or violated the rights and freedoms of children guaranteed by the **Children Act 2016** and the United Nations Convention on the Rights of the Child namely;
- i) The right to the best interest and welfare of children being primary and paramount
  - ii) The right to live with one's parents or guardian

- iii) The right to access to information deemed critical by a parent, guardian or person in authority
- iv) The right to safety privacy information and access to basic services
- v) Right to morally appropriate leisure participation in sports and positive cultural and artistic activities
- vi) The right to effective legal aid
- d) A declaration that the UGANDA POLICE FORCE's human respondents' herein are unfit to hold public office
- e) An order for the respondents to jointly and/or severally pay general, aggravated and punitive damages to **EACH** of the mothers, the father Abdul Rashid Mbaziira and children victims herein named
- f) Costs of this application be paid by the respondent

### **BRIEF BACKGROUND**

The Applicants in *MC 003/017* allege that they were arrested on 18/9/2017 from Kampala city while having a peaceful demonstration against lifting the presidential age term limit. They were detained from Nagalama Police station beyond 48 hours incommunicado and while under police custody, had several other human rights guaranteed under the constitution violated. The applicants under MC 17/2017 claim 12 children and their mothers, three in number were detained at Nagalama and Kireka Special Investigation Unit Police stations for 51 days and 6 days respectively. During their detention at police, they claim they were tortured and several of their human rights violated.

They are now seeking relief from this court in form of declarations against the respondents, damages and costs of the suit. They are holding the Attorney General who represents the state to be vicariously liable for the transgressions of the officers in the UPF.

### **ISSUES**

Three issues were framed for determination:

1. Whether there were any human rights violations on the Applicants.
2. Whether anyone of the Respondents is liable for the violations.
3. What remedies are available?

## **REPRESENTATION**

Mr. Aron Kiiza and Mr. Turwomwe Emmanuel represented the applicants

While Mr. Oburu Odoi and Mr. Ojambo Bichachi State Attorneys from AG's chambers represented the Respondents.

## **Submissions**

Both sides filed written submissions that have been put into consideration while writing this judgment; the parties used affidavit evidence and none-appeared for cross examination.

## **LAW APPLICABLE**

1. The 1995 constitution of the Republic of Uganda
2. The Judicature Act
3. The Civil Procedure Act
4. The Children's Act
5. International Convention on Civil and Political Rights and other international instruments
6. The Judicature (Fundamental Rights and Freedoms) (Enforcement procedure) rules 2008
7. The Police Act
8. The prevention and prohibition of Torture Act.
9. Case law.

*[Handwritten signature]*  
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## RESOLUTUION OF ISSUES

I will resolve the issues following their chronological order starting with,

### **Whether there were any human rights violation of the applicants.**

The applicants gave their evidence by way of affidavits and their respective counsel filed written submissions in support of their case which I will refer to as and when necessary. The Applicants alleged several violations of their human rights that are enshrined in the constitution. I will therefore address my mind following the alleged infringed constitutional provisions.

Osborn's concise law dictionary 9<sup>th</sup> edition at page 196 defines Human Rights as:

*"Rights and freedoms which every person is entitled to enjoy possibly deriving from the natural law but more likely to be enforced in international law if founded on for example the United Nations Universal Declaration of Human Rights of 1948. They can be divided into political rights, economic rights and the later are even less likely than the former to be enforceable."*

The National objectives and directive principles of state policy of the Constitution of the Republic of Uganda which commenced on 8/10/1995, Paragraph V considered, the protection and promotion of fundamental and other human rights and freedoms in the following words:

*V (i) "The state shall guarantee and respect institutions which are charged by the state with the responsibility for protecting and promoting the human rights with adequate resources to function effectively;*

*(ii) The state shall guarantee and respect the independent non-government organizations, which protect and promote human rights."*

The promulgators of the constitution went ahead and provided for the protection of fundamental and other human rights and freedoms and their enforcement by the courts of law where infringement has occurred under **chapter 4 Article 20 (1) and (2)** as follows:

**1. "Fundamental rights and freedoms of the individual are inherent and not granted by the state.**

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**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 by all persons"**

The applicants in **MA 003/2017** through Kazibwe Bashir Kiwanuka a friend to the applicants and Muchunguzi Abel, applicant no.1 in the affidavit in rejoinder contend that Muchunguzi Abel A1, Agaba Johab A2, Mutebi Edris A3, Ssemwanga Jackson A4, Musoke Eria A5, Luta Ferdinand A6, Atwine Eddy A7, Mubiru Bashil A8, Muwonge Ronald A9 and Mushizimana Galasi A10 were arrested while peacefully and without fire arms protesting in Kampala on 18<sup>th</sup> September 2017 against the intentions to lift the presidential age limit to 75 years from the constitution by amendment of Article 102(b) of the constitution. At the time Kazibwe Bashir Kiwanuka signed the affidavit in support on 27/9/2017, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants were still in custody. That the others from the 5<sup>th</sup> to the 10<sup>th</sup> Applicants were released on 22/9/2017 after more than 48 hours and were not presented before any court of law within the 48 hours.

In **MA 17/2017**, Ampire Aisha who was the 2<sup>nd</sup> applicant informed court in her affidavit dated 7<sup>th</sup> July 2017 under paragraph 2 and 3 that her husband Abdul-Rashid Mbazira, Bintu Salim her co-wife and herself were arrested on 21/3/2017 around 5 pm.

Her husband was suspected to have participated in the murder of Felix Andrew Kawesi. That they were taken to Jinja road police station, then transferred to Kircka special investigations unit and then to Naguluma police station. See paragraphs 4, 10 and 11 and 12. They were released after spending 6 days under police custody (refer to paragraph 12).

In essence the applicants' complaint is that they were arrested and detained by the police for more than 48 hours without arraigning them before the courts of law thereby violating their human rights to liberty as enshrined under article 23 of the constitution which protects their personal liberty.

On the other hand, the respondents responded to the allegations through affidavits of ASP Brian Nyehangane 2<sup>nd</sup> respondent, who was OC at Nagalama Police station then, Ndugutse Alfred who was at the rank of ASP and in charge of crime intelligence department at the central police station Kampala dated

13/2/2018 and was the 3<sup>rd</sup> respondent in the MA 3/2017 and Sarah Nankwanga, the 3<sup>rd</sup> respondent in MA 17/2107.

In the affidavits of ASP Brian Nyehangane dated 15/2/2015 and 15/9/2017, Ndugutse Alfred dated 13/2/2108 and Sarah Nankwanga dated 15/9.2017, no mention was made at all of the allegation of detaining the applicants beyond the 48 hours and of ever arraigning them before any court of law. No mention is made as to what charges were preferred against the Applicants at all.

In his submission, counsel for the applicants submitted in regard to the violation of personal liberty of the applicants as follows:

"In Miscellaneous cause No.17 of 2017, the mothers and children's suit, the affidavit evidence of the **applicants** shows;

(a) that the children were arrested and kept by or under the directions, knowledge and supervisions of the Uganda Police Forces for 51 days (1,224) hours instead of the constitutional 48 hours. This is in glaring violation of their liberty guaranteed by article 23 of the 1995 constitution of Uganda and relevant international human rights.

(b) That their mothers were detained for 6 days that is 144 hours instead of the constitutional 48 hours. There is no clear violation of personal liberty than such illegal detention.

In response, the learned State Attorney for the respondents submitted inter alia under paragraph 2.9 that the applicants in both Miscellaneous causes have not attached any evidence from the lock up register from any police station or any letter requesting for the same so as to confirm that they were detained for more than 48 hours which is denied by the respondents. The applicants have just alleged without proof.

He submitted that statements contained in an affidavit are not to be taken as gospel truth. The inherent and intrinsic probability and improbability has always to be looked into under the totality of the circumstances before accepting them as prima facie evidence of certain facts. The above was the holding in the case of *Lucas Marisa Vs. Uganda Breweries Ltd [1988-1990] HCB at page 132*.

This court entirely agrees with the above holding as it is the duty of the trial judge to look into the totality of the circumstances of each case before accepting

the affidavit evidence which must pass the test of admissibility and evidential value. That is why a party is at liberty to cross-examine the deponent on any affidavit to discredit it if he so wishes.

Counsel for the respondents did not however apply to have the deponents cross examined. The Respondents who are the custodians of the lock up register, did not respond to the allegations of detention beyond 48 hours and releasing the Applicants without preferring any charges against them.

Before court can determine whether the applicants' rights to liberty were violated, it is important to know the responsibility of the state towards the individuals whose right is alleged to have been violated and under what circumstances.

*The right to personal liberty is essentially a personal freedom in which no government can bridge. This right requires that the arrest and or the detention of an individual must be in accordance with the law. The import of this right is therefore to protect the individual against the excesses of the government and its agents. Right to liberty is broad as it includes the right to life, right to have freedom of thought and expression of that thought because thoughts are internal feelings that can only be expressed externally through words or actions and equality before the law.*

The right to liberty is very essential because of the following;

1. It protects individuals from the tyranny of the majority and usually powerful agents of the state.
2. It establishes a base level of intellectual, spiritual, philosophical and economic diversity that ensures that there is enough free and fair play of ideas in a society for the best solutions pertaining to prevailing political, economic and social or religious circumstances.

The right to liberty is universal and focuses on protecting individual freedom from unreasonable detention or imprisonment without a good cause. In Uganda, this right is provided for under **Article 23 of the 1995 constitution** as a fundamental human right that should be protected.

The complaint before this court is for arrest and detention of the complainants beyond 48 hours for a just or good cause. Article 23 however provides for

exceptions when personal liberty may be infringed upon, but even then, it must be within the confines of the law.

Article 23(1) provides that, ***“No person shall be deprived of personal liberty except in any of the following cases;***

***(c) For the purpose of bringing that person before a court in execution of the order of a court, or upon reasonable suspicion that a person has committed a criminal offense under the laws of Uganda.”***

and Article 23(4) (b) provides that;

***“ A person arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence shall if not earlier released, be brought to court as soon as possible, in any case not later than 48 hours from the time of his or her arrest”***

Ndugutse Alfred D/ASP working with Uganda Police Force a security agent of the state in his affidavit dated 13/2/2018 informed court under paragraph

***“(4) That on Monday the 18<sup>th</sup> of September 2017, intelligence information had been gathered of a group of people that intended to demonstrate and cause chaos within Kampala city in a fight against intentions to lift the presidential age limit of 75 years from the constitution by amendment of article 102(b) of the same.”***

***(5) That this information had been forwarded to the relevant action officers for further handling and necessary deployment.***

***(6) That the demonstrators on 18/9/2017 were arrested by operations officers of which I am not part of and brought to my office for profiling process to acquire bio-data and background checks of suspects as they had been charged. Thus, I have never arrested the applicants.***

***(10) That I carried out my duties as an employee of the government in that capacity and not in any personal capacity since I did not personally own any detention center.”***

D/ASP Ndugutse is the 3<sup>rd</sup> respondent in MA 3/2017.

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ASP Brian Nyehangane a police officer with Uganda Police Force and 2<sup>nd</sup> respondent in MA 3/2017 in his affidavit evidence of 15/2/2017 informed court as follows;

Paragraph 4; That the decision to detain the applicants at Nagalama Police Station was made at the regional office (Kampala Metropolitan East) because of overcrowding of the cells at the Central Police Station Kampala which is a different region (Kampala Metropolitan South).

(6) That I was not the investigating officer in the applicants' case and their detention at Nagalama Police Station was purely on the directives from K.M.P East and thus I had no control over their release personally.

(7) That the applicants were on a general inquiry file (GIF) and I could not establish whether their offence was capital or minor in nature so as to enable me release them on police bond.

(8) That I carried out my duties as an employee of the government in the capacity and not in my personal capacity since I personally did not own any detention center,"

The above respondents' evidence is in respect of MA 03/2017.

As regards MA 17/2017. Sarah Nankwanga a detective constable admits under paragraph 4, 5 and 6 that she was in charge of the female cells in Kireka special investigation unit and knew that the applicants Ampaire Aisha and her co-wife Bint Salim had breast feeding children and were taken to her unit in Kireka from Jinja road police station for investigation. That they were provided with mattresses, blankets and mosquito nets (Which implies they spent nights there).

The relevant evidence from SSP Emilian Kayima's affidavit dated 25/6/2018 confirmed in paragraphs 4, 5,6,7,8,9,10 that the children complained of (14 in number) were removed from their home after their parents were arrested and taken to a place unknown to the parents and without their consent. They were released to the parents on 11/5/2019. Much as they allege that the children were taken to Kyampisi children home there is no evidence that they were ever taken there. According to Ampaire Aisha in her affidavit in support which has not been controverted, they were arrested on 21/3/2017 on suspicion of having murdered Andrew Felix Kawesi.

*[Handwritten signature]*

ASP Brian Nyehangane in his affidavit in reply dated 15/9/2017 paragraph 7 stated,

“that further in reply, I know that after the arrest of Abdul Rashid Mbazira and his wife Ampire Aisha, the applicant, the child and family protection unit of Nagalama Police Station learnt that there were children in the suspect’s home numbering 12 unattended to and so they picked them up and took them to Kyampisi child care Centre in Kyampisi subcounty Mukono District for care and protection.

From the evidence above, there is no doubt that the applicants were arrested and detained under police custody. The respondents do not deny that fact. The respondents who have the custody of their record of arrests and detention did not adduce any evidence in rebuttal of the fact that the applicants and children in question were not detained under the direction of the police for more than 48 hours. The respondents in their affidavits did not adduce any evidence in rebuttal that the applicants were charged and arraigned before any court of law within 48 hours of detention over any criminal charge which would justify their arrest and detention.

Instead, Brian Nyehanganye in his affidavit dated 15/2/2018 *expressed his inability, incompetence and ineptitude to execute his statutory duties as a professional police officer in compliance with article 23( 1)(4)(b) of the 1995 constitution of the republic of Uganda, by claiming that the decision to detain the applicants at his station in Nagalama where he was fully in charge was made at the regional office Kampala Metropolitan East because of overcrowding at the cells at the central police station Kampala, and that their detention at the Nagalama police was purely on directives from Kampala Metropolitan East and thus he had no control over their release personally. He further admitted that the applicants were on a general inquiry and he could not establish whether their offence was of capital or minor nature so as to enable him release them on police bond.*

ASP Brian Nyehanganye’s affidavit evidence proves further that the police did not have any particular charge against the applicants and were in spite of filling up their cells at the central police station in Kampala, obsessed with the violation of individual rights in total disregard of the restrictions under the 1995 constitution of Uganda.

***The right to liberty under Article 23(1) (4) (b) must be protected and upheld by all members of the Uganda Police force in all their units in the execution of their duties as investigating and arresting officers.***

D/AIP Ndugutse in his affidavit dated 13/2/2017 paragraph 3 identified himself as a crime intelligence officer and that on Monday 18/9/2017 intelligence information had been gathered of a group of people that intended to demonstrate against the intentions to lift the presidential age limit of 75 years and that this information had been forwarded to the relevant action officers for further handling and necessary deployment, and demonstrators were on 18/9/2017 arrested by operations officers and brought to his office for bio data. This is an admission on the part of the Uganda Police Force that they deployed to arrest the demonstrators.

***The right to protest is a human right protected under article 29(1) of the 1995 constitution which provides that "Every person shall have the right to freedom of assembly and to demonstrate together with others peacefully and unarmed and to petition"***

The caption under article 29 is protection of freedom of conscience, expression, movement, religion, assembly and association.

It does not provide for the restrictions like article 23 on protection of personal liberty.

***This in essence means that the Uganda Police Force was not justified to deploy with a view to arrest the demonstrators but rather deploy to ensure that the demonstration by the applicants was peaceful and orderly.***

The Applicants were entitled to security by the UPF during the lawful demonstration because no evidence was adduced by the Respondents that the Applicants were violent, unruly or disruptive of normal business in the city or that they infringed on the rights of others.

***Article 6 of the African Charter on human and people's rights provides that,***

***"Every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."***

From the evidence on record and the law protecting the right to liberty which includes the right to demonstrate peacefully, there was no justification for the arrest and detention of the applicants in MA 3/2017.

There was also no justification for keeping them under police custody for more than 48 hours without arraigning them before a competent court of law and neither was there justification for not releasing them on police bond from Nagalama Police Station.

The police did not adduce any evidence to the effect that the applicants in MA 3/2017 were dangerous demonstrators who were armed.

The deployment by Ndugutse was to disperse and arrest peaceful demonstrators who had their constitutional right to express their opinion to the proposed amendment of article 102(b) about the presidential limit.

Counsel for the respondent submitted that the police under the ***Public Order Management Act 2013 particularly sections 2 and 3*** gives unfettered powers to Uganda Police Force to regulate demonstrations be it peaceful or unarmed demonstrations.

With due respect to the learned State Attorney, he did not bring out the import of sections 2 and 3 of the Public Order Management Act clearly.

**Section 2** of the Act provides;

2(1) "The underlying principle of managing public order is to regulate the exercise of the freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition in accordance with article 29(1) and 43 of the 1995 constitution

(2) For purposes of this section, the word "regulate" means to ensure that conduct or behavior conforms to the requirements of the constitution.

Section 3 provides that the Inspector General of Police or an authorized officer shall have the power to regulate the conduct of all the public meetings in accordance with the law"

And section 4(1) defines a public meeting to mean,

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“A gathering, assembly, procession or demonstration in a public place or premise held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.”

Applying the above sections of the public order Management Act to the facts before court, D/ASP Ndugutse Alfred whose main task according to paragraph 3 of his affidavit dated 1/2/2018 was,

(a) To generate and provide intelligence about crime trend/ situations for purposes of identifying criminal plans, crime distribution, criminal actors, culprits, witnesses, possible victims, incriminating evidence and related exhibits,

(b) To collect intelligence related to criminal activities by individuals or organizations,

(c) To compile data and provide analytical assessment of the crime trend based on the data collected,

(d) To compile and maintain a crime data bank to be used as a basis for analytical assessment, planning and deployment and the,

(e) Liaise with other various security agencies and other stake holders to collect intelligence which can be used to fight crime,

*acted in total breach of his statutory duty because the information he received according to paragraph 1 of his affidavit was that on the 18<sup>th</sup> day of September 2017, a group of people intended to demonstrate and cause chaos within Kampala city in the fight against intentions to lift the presidential age limit of 75 years from the 1995 constitution of the republic of Uganda by amendment of article 102(b).*

This was a matter of public interest where the 10 applicants had the constitutional right to demonstrate peacefully and unarmed as provided for under article 29(1) and 43 of the constitution.

The work of the police is to “regulate” which has already been defined above. What Ndugutse as the officer in charge was expected to do was to ensure that the conduct of the applicants, carry out their demonstration peacefully without violence, and use of arms in conformity with the constitution.

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Mr. Ndugutse admits in paragraph 6 "that the demonstrators (*not criminals*) on 13<sup>th</sup> September 2017 were arrested by operations' officers (of which I am not part of and brought to my office for profiling...". His statement portrays him as the officer who treated the Applicants prima facie, as criminals who should be arrested before they could even exercise their constitutional right.

The deployment he mentions in para 5 was to arrest but not to ensure that the demonstration was peaceful which is in total breach of their limited mandate and powers under the Public Order Management Act.

***The unfettered powers of the Uganda Police Force to regulate demonstrations is therefore not to frustrate, prevent or arrest peaceful and unarmed demonstrators. It is to ensure that the demonstrators exercise their right peacefully.***

The respondents did not adduce any evidence to suggest or even prove that the applicants were rowdy, armed, violent and therefore disturbed the peace of other citizens because after profiling them as stated in para 6, Mr. Ndugutse handed them to criminal investigations department which department did a commendable job and did not find any incriminating evidence against them.

In my humble opinion, they could not find any because the applicants were not criminals but were merely exercising their fundamental human rights of freedom of expression of their political opinion which expression includes freedom to demonstrate on issues of public interest like the proposed constitutional amendment.

***Article 221 of the constitution*** provides that,

***"It should be the duty of the Uganda Peoples Defense Forces and any other armed force established in Uganda, the Uganda Police Force and any other police force, the Uganda prisons service, all intelligence services and the national Security Council to observe and respect human rights and freedoms in the performance of their functions."***

All the 10 applicants in MA 3/2017, deponed to the fact that they were arrested while having a peaceful demonstration against the proposed article 102(b) of the age limit of the bearer of the office of the President. They were expressing their political thought, they were not arraigned before any court within 48 hours

and to be specific Mucunguzi Abel, Agaba Johab, Mutebi Edris, Semwanga Jackson, Muwonge Ronald were detained for 192 days and Musoke Fria, Luta Ferdinand, Atwine Eddy, Mubiru Bashir, Mushizimana Galasi were detained for 120 days and released thereafter without any charge.

***The finding of this court is that there was no justification for their arrest and detention beyond 48 hours. Their arrest and detention was a classic case of violation of their right of personal liberty protected under Article 23 because lawful demonstrations do not fall under the ambit of exceptions provided for under article 23(1).***

The respondents who are officers of Uganda Police Force as a security organization acted in total breach of their constitutional mandate under article 221 and cannot be protected under the Public Order Management Act as submitted by counsel for the respondent because articles 2 and 3 of the very act do not give police liberty to violate the constitutional rights of individuals who want to express their political thoughts on issues of national interest or on any other area of public interest which may not be necessarily political.

Their duties and responsibilities under section 2 and 3 are to provide security for the demonstrators to ensure that they peacefully and without arms exercise their right to freedom, movement, conscience, assembly, and association protected under article 29 of the constitution.

In case any individual who has been allowed to demonstrate breaches the peace and is found armed or turns violent and destroys property or injures others, that is when such an individual can be apprehended and arrested by the police that is providing security for demonstrators. Such a person should be arraigned before courts of law within 48 hours, which right is granted under article 23(1) (4) (b).

**Why did the constitution provide for 48 hours as time within which to be arraigned before court?**

Article 23(1) (4) (b) requires the suspect to be arraigned before court in mandatory terms within 48 hours. This time frame was intended to establish the maximum amount of time the police and prosecutors have to place an accused person before the magistrate. Depending on the circumstances, even waiting for 48 hours arraignment could be considered unreasonable. Hence

unreasonable delay between arrest and arraignment may convert an otherwise lawful arrest into an unlawful detention. This type of potential police misconduct (the original sin) is what the constitution forbids.

In other words, the police that has the habit of arresting before investigations has the potential of keeping a suspect under police custody for weeks or even months before concluding their investigations. That kind of detention as they investigate amounts to unlawful detention.

In the Uganda criminal justice system, a suspect can be arraigned before court and the prosecution comfortably seeks for an adjournment as inquiries continue. It is therefore not necessary to keep a suspect beyond 48 hours under police custody before arraignment. The ideal position is to investigate before arresting in order to comply with the 48-hour rule. Once the lawful arrest turns into an unlawful detention, it becomes unconstitutional and a violation of the human rights of the accused person or suspect.

***The applicants further alleged that the respondents violated their constitutional right under Article 24 which provides that,***

***“No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.***

The 10 applicants in MA 003/2017 were arrested, detained for 120 and 193 hours as per the affidavits dated 12/10/2017 which they construed as torture while the applicants in MA 17 2017 complain against torture by separating them from their children for 51 days from 21<sup>st</sup> March 2017 to 11/5/2017, therefore threatening them with death, rape, and physical battering and blindfolding.

The affidavit of Ampaire Aisha dated 7<sup>th</sup> July 2017 was to the effect that she together with her co-wife Bint Salim were arrested on suspicion that their husband Abdul Rashid Mbazira was involved in the murder of the late Felix Andrew Kawesi. They were taken to Jinja Road Police and then transferred to Kireka special investigation unit where they were blindfolded, beaten, threatened by death almost raped, made to sleep on the floor, poked and shoved by the officers of the Uganda Police Force. Ref. para 3, 6, 7.

*Handwritten signature/initials*

That all the torment was intended to force them to say their husband killed Kawesi. They were tortured for 6 days yet they had babies who endured the mosquito bites ref. para 8 and 10.

When they were eventually released, they found their children missing, and on inquiry from Nagalama Police which had arrested the children, they were told to forget their children, get other men and produce other children, since some whites had taken their children. Ref. para 11, 12,13,14,15.

The mothers cried and wondered why they were alive. The children that were removed were 12 in number aged 1, 3, 3, 4, 5, 8, 9, 10, 11, 13 and 20 years and the age of one was not indicated. Ampaire Aisha identified Sarah Nankwanga the 3<sup>rd</sup> respondent, in MA 17/17 as the officer who blindfolded them, tormented them and denied their babies clothing.

Nansubuga Saidat a mother of 3 of the children recounted in her affidavit dated 4/7/2017 how they were tortured, stripped at Nagalama as they went searching for their children with Aisha and her co-wife to the enjoyment of the respondents. It was not until towards the end of April 2017 that they told the media about the plight of their children when Mbazira was taken to court.

When they communicated to Afande Emilian Kayima he admitted that the police had imprisoned their children and told them to return the following day to get them. He sent her transport of Uganda shs 15, 000/= from Kitintale to Nagalama but she was not given her children.

During the incarceration of the children, no relative, lawyer or doctor was allowed to visit the children.

Ayo Angella Ogwang, a human rights activist with Rights Trumpet an NGO narrated how the mothers of the children went through untold suffering for their children who were in custody of the Uganda Police Force. She followed the case and brought out the plight of the children. It was after an interview with NTV that the police released the children after holding them for 51 days including a 2-year-old baby.

In response the respondent relied on the evidence of Emilian Kayima, Sarah Nankwanga, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> respondent in MC 17/2017.

Emilian Kayima confirmed to court that he received a complaint from Nansubuga Saidat on 9/5/2017 that their children had been taken by the police. On 10/5/2017, he went to Nagalama Police Station where he met ASP Nawe Jessica, D/ASP Labu Saidi and OC CID Nagawa and the mothers of the children including Nansubuga Saidat.

That the DPC, OC CID at Nagalama police station in his presence confirmed to the mothers of the children that all the 14 children had never been detained in Nagalama police station but had been in a child care home called Kyampisi child care ministries. He further stated that the DPC, and OC CID Nagalama police station explained to the said mothers that these children were suspected to be victims of trafficking in persons because some of them were discovered not to be children of Abdul Rashid Mbazira or of some of the women claiming them. He then contacted Mr. Moses Binoga and his supervisor AIGP Asan Kasingye who decided that no matter the suspicions, the children should be handed over to their mothers and all mothers had to sign for the children and would be responsible in case any child went missing.

On 11/5/2017 Mr. Kayima called Nansubuga Saidat to meet him at Nagalama Police station with the mothers of the children. He facilitated her with transport and the children were handed over to their mothers at Nagalama police station on 11/5/2017 in his presence. All the above was in his affidavit evidence dated 25/June 2018.

ASP Brian Nyehangane in his affidavit dated 15/9/2017 para 7 admitted that after the arrest of Rashid Mbazira and his wife Ampire Aisha, the applicant, the child and family protection unit (CFU) of Nagalama police station learnt that there were children in the suspects' home numbering 12 unattended to and so picked them up and took them to Kyampisi child care Centre in Kyampisi sub county Mukono District for care and protection.

Sarah Nankwanga the 3<sup>rd</sup> respondent denied ever beating, threatening, making applicants sleep on the floor, poking and shoving them or almost raping them since the female cells are self-contained and exclusively accessed by women. She however admitted under para 9 that,

***"I know that one of the interrogating techniques involves blind folding to ensure that the suspect does not know the specific location of their detention***

*and at the end of the interrogation the blindfolds were removed as the suspects returned to the cells and that she knows this is a recommended form of interrogation and does not amount to torture."*

From the above evidence, it's apparent that the applicant's children were removed from their home by the police of Nagalama and separated from their parents for quite some time. There is no evidence that there was a probation and social welfare report that was prepared before or after the children were removed from their home. The respondent did not attach any care order form issued by the probation officer or court placing the children under the Kyampisi child care home. No evidence whatsoever was adduced to prove that the children were ever received at Kyampisi child care Centre and were in that Centre for all 51 days.

Courts of law resolve issues based on the facts/evidence presented before them. The children were reported to have been removed from their home by the police during the absence of their parents. The police did not have the courtesy of introducing the parents to Kyampisi child care Centre if at all they were there. Why did they not ask for the documents pertaining to their births for confirmation? Why did they not involve the probation and social welfare officer if at all it was a suspected case of child trafficking? What were their findings if at all they investigated the case of child trafficking?

I humbly opine that the allegation of trafficking was just to cover up after they realized that they had grossly violated the rights of these children by arresting their mothers without any justification and keeping them away from their parents and guardians or relatives without any color of right.

No file in respect of the alleged trafficking of children was opened up. It is not uncommon to find 12 children or more in a home of a Muslim man. The dire condition the children were found in if at all it was, was caused by the inconsiderate, unconstitutional conduct of the Uganda Police Force arresting the head of the household of the children suspected in the murder case of the late Andrew Felix Kawesi, with his innocent wives without first establishing their involvement.

The way the Uganda Police Force treated the children and the mothers violated their constitutional rights under Article 33 and 34, which provide for the rights

of women and children respectively. The respondents violated the unique and natural maternal functions of looking after their children some of whom were of very tender age of 3,4,5,10,11 and 13 years,

Another right alleged to have been violated was a right to education provided for under Article 30 of the Constitution. This right was violated by the respondents since there was no evidence that the children attended any form of learning or education during that time.

It is apparent from the affidavits of Emilian Kayima and Brian Nyehangane that the children and their mothers were denied the right of the family provided for under article 31(4) of the constitution. The mothers could not look after their children during the time they were arrested unfairly, detained and their children hidden from them for 51 days. This was in total breach of article 31(5) of the constitution which provides that,

***“Children may not be separated from their families or the persons entitled to bringing them up against the will of their families or of those persons except in accordance with the law.”***

Had the family and Child Protection Unit of Nagalama Police Station followed the law pertaining to placing children in need of care and protection as provided for under the Children’s Act cap 59, they would have not hesitated to inform the mothers about the whereabouts of their children upon their release. It took the exposure of the plight of the mothers on social media particularly NTV that the respondents decided to release the children to them.

***The children’s Act that came in force on 1/8/1997 actualized Articles of the constitution that provides for rights of children and family and in particular it was to provide for the care, protection and maintenance of children, to establish a family and children’s court among others. This law makes provision for the rules and procedures pertaining to issues concerning children with principles that put the welfare of the child as being of paramount importance. The respondents particularly police officers at Nagalama exhibited ignorance of the law or deliberately breached the procedures in relation to the treatment of children thereby violating their constitutional rights.***

**Torture and Inhuman Treatment.**

5/5/20



The applicants in MA 17/2017 alleged torture by the police officers.

Article 44(a) of The Constitution provides for none derogation from the enjoyment of the following rights and freedoms;

(a) Freedom from torture, and cruel, inhuman or degrading treatment or punishment.

To actualize this constitutional provision, Parliament enacted ***The Prevention and Prohibition of Torture Act 3 of 2012*** which was to give effect in Uganda to, the Convention against Torture and other Cruel, Inhuman, OR Degrading Treatment or punishment adopted by the ***General Assembly of the United Nations on 10/12/1984 and ratified by the republic of Uganda on 26/6/1987***. ***Section 2*** of the Act adopted the definition of torture as given by the UN General Assembly to the effect that;

***“In this Act, torture means 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 the 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 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 planning to commit or.***

***(c) Intimidating or coercing the person or any other person to do or refrain from doing any act.***

Section 3 of the Act provides that,

***“Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the second schedule” and the second schedule lists down acts that constitute physical and mental or psychological torture and pharmacological torture.***

***For purposes of clarity and information especially to the law enforcement officers involved in arrests and interrogations, let me reproduce what constitutes torture.***

15/5/20

1. *Physical torture includes:*

- (a) Systematic beating, hard banging, punching, kicking, striking with truncheons, rifle butts, jumping on the stomach.*
- (b) Food deprivation or forcible feeding with spoiled food, animal or human excreta.*
- (c) Electric shocks*
- (d) Cigarette burning, burning by electrically heated rocks, hot oils, acid, by the rubbing of pepper or other chemical substances on mucous membranes acids or spices*
- (e) The submersion of the victim's head in water, water polluted with excrement, urine, vomit or blood.*
- (f) Being tied or forced to assume a fixed and stressful body position*
- (g) Rape and sexual abuse including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of genitals.*
- (h) Mutilation, such as amputation of the essential parts of the body such as the genitalia, ears, tongue*
- (i) Dental torture of the forced extraction of the teeth*
- (j) Harmful exposure to the elements such as sunlight and extreme cold or*
- (k) The use of plastic bags and other materials placed and the victims head with the intention to asphyxiate.*

2. *Mental or psychological torture includes;*

- a) Blind folding*
- b) Threatening the victim or his family with bodily harm execution or other wrongful acts*
- c) Confining a victim incommunicado in a secret detention place or other form of detention*
- d) Confining the victim in a solitary cell against his or her will or without prejudice to his or her security*
- e) Prolonged interrogation of the victim so as to deny him or her normal length of sleep or rest*
- f) Maltreating a member of the victims' family*
- g) Witnessing the torture session by the victims' family or relatives*
- h) Denial of sleep or rest*

5/5/20

i) *Shame infliction such as stripping the victim naked parading the victim in a public place, sharing the head of the victim, or putting a mark on a body of the victim against his or her will*

3. *Pharmacological torture including;*

a) *Administration of drugs to induce confession or reduce mental competence*

b) *The use of drug to induce extreme pain or certain symptoms of disease and,*

c) *Other forms of deliberate and aggravated and, inhuman or degradng pharmacological treatments or punishment.*

Torturous acts are therefore very broad but not limited to the above. Ampiiire Aisha in her affidavit dated 7/7/2017 paragraphs 5 stated that the 3<sup>rd</sup> respondent who turned out to be Sarah Nankwanga together with other police officers *blindfolded, beat, threatened and almost raped them, made them to sleep on the floor, poked and shoved them and the torture was intended to compel them to implicate their husband Abdul Rashid Mbaziira with the killing of Kaweesi if they didn't they would kill them ref. to paragraph 4 to 10. That they were dumped in a cold door less structure full of mosquitoes yet they had the babies.*

The respondent denied these allegations save for blindfolding which was admitted by detective Constable Sarah Nankwanga in para 8 and 9.

She stated:

8, *“That I know that one of the interrogating techniques involves blind folding to ensure that the suspect does not know their detention and at the end of the interrogation the blind folds were removed as the suspect is returned to the cells”*

9, *“That I know that this is a recommended form of interrogation and does not amount to any form of torture”*

She did not however state the source of her recommendation.

*25/12/20*

*It is a shame and immoral for a police detective whose occupation is to investigate crime and who is attached to crime intelligence at the headquarters, to not know the law pertaining to interrogation of suspects. D/C Sarah Nakwanga exhibited ignorance of the existence of the Prevention and Prohibition of Torture Act which was passed in 2012 to give effect to Articles 24 and 44 of the constitution, in respect of human dignity and protection from inhuman treatment by prohibiting any form of torture or cruel and degrading treatment.*

Blindfolding is the first mental and psychological torture under the second schedule of the Act.

*Denying a suspect knowledge of the specific location of their detention as admitted by the police officer, implies that the suspect is incarcerated incommunicado and the intention is to ensure that his or her family does not know where their relative is detained from. It helps to conceal the tormentor because the suspect cannot identify a particular person/ officer with the torturous act in case other forms of torture mentioned under the schedule are applied to avoid individual liability. It instills fear, which is an unpleasant feeling triggered by the perception of danger whether real or imagined. This kind of treatment is torture on all fours.*

This kind of archaic form of interrogation was outlawed internationally way back in 1984 by the general assembly of the UN. It is absurd that it is still used in Uganda Police Force by uninformed police officers like Sarah Nankwanga who does not deserve to be a detective. Any evidence obtained by torture is not admissible as provided for under section 14 of the Prevention and Prohibition of Torture Act to wit: ***“Any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceedings”***

It is therefore useless for any police officer to attempt to use any of the above-mentioned acts of torture during investigations. Any single act of torture amounts to torture. One does not have to use all the listed acts of torture.

It's therefore my finding that the applicant Ampire Aisha was tortured under police custody in Kireka special investigation Unit as admitted by A/C Sarah

5/5/20

Namkwanga thereby violating her constitutional right under article 44(a) of the constitution.

**Violation of right to privacy of a person, home, and other property.**

The Applicants in MC 17/2017 alleged their Constitutional Right to privacy of a person, home and property was violated by the Respondents.

This right is enshrined under Article 27 of the constitution. Apart from the 2<sup>nd</sup> applicant Ampaire stating that the police have not returned the house hold property and food they stole from their home; she did not mention the house hold properties that were stolen. She did not also attach evidence from neighbors who claimed the police kept on surveilling the home.

Much as the respondents who were arrested then did not attach any copy of the warrant of arrest or search warrant, it is trite law that the police have the right to arrest any person, enter any premises upon reasonable suspicion that an offence has been committed or it is about to be committed. (Ref: The Police Act and Criminal Procedure Code Act)

In the case before court, arrest of the Applicants and one Mbazira is not contested. They must have conducted a search in his house. The respondents did not attach any search warrant yet the applicants alleged they stole their household properties. For the respondents to avoid such allegations, the law provides for a search certificate in case the police goes out to arrest a suspected murderer. In this case, court takes judicial notice that Kawesi Felix was killed by several gunshots. A search for the murder weapon from the home of any suspect is a must. In the absence of any search warrant and copy of the warrant of arrest, the respondents acted outside the confines of the law. They therefore violated the Applicant's right to privacy of their person, home and property thereby violating their constitutional right enshrined under Article 27.

I don't however find sufficient evidence about the alleged violation of Article 26 in the absence of particulars of the items that were removed from the house.

In view of my findings above, it is apparent that the Applicants constitutional and human rights were violated as alleged. The issue is therefore resolved in the affirmative.

10/15/20

***Whether the respondents are liable?***

Counsel for the applicants in both applications submitted that the respondents were liable relying on Articles 221 and 20(2) of the Constitution.

Article 20(2) provides that,

***“The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all agencies and organs of government and by all persons.”***

While Article 221 provides in mandatory terms as follows:

***“It shall be the duty of the Uganda Peoples’ Defence Forces and any other armed force established in Uganda, the Uganda Police Force and other police force, The Uganda Prisons Service, all intelligence services and the National Security Council, to observe and respect human rights and freedoms in the performance of their functions.”***

In his submission he placed liability on each and every respondent individually while the Attorney General was held vicariously liable from two angles.

The first angle was that he is vicariously liable for the legal transgression of the officers/ respondents conducted in the course of their work as police officers which fact is admitted by all in their affidavits where they deponed that whatever they did was in their official capacity as police officers and therefore should not be personally liable.

The 2<sup>nd</sup> angle is from the human rights law especially from the international human rights instruments particularly part 2 ,Articles 1 and 3 of The International Covenant on Civil and Political Rights of 1976, African Charter on Human and People’s Rights, Article 1 and Article 30 of The Universal Declaration of the Human Rights.

It is important to look at the relevant provisions.

***Article 30 of the UDHR***, provides as follows:

***“Nothing in this declaration may be interpreted as implying for any states, group or person, any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set herein”***

5/5/20

The rights and freedoms adopted under UDHR that were infringed in this application, are under Article 1 that provides that

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

Article 3: Everyone has a right to life, liberty and security of person

Article 5: ***“No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment and***

***Article 12, No one shall be subjected to arbitrary interference with his privacy, family, or home...***

Article 20: ***Everyone has the right to freedom of peace, assembly and association.***

Counsel submitted that all these rights have been domesticated in the 1995 constitution of the republic of Uganda and places the responsibility to protect, respect and uphold on the state hence the liability of the Attorney General as the legal representative of the state.

On the other hand the learned state attorney from the Attorney General's Chambers submitted inter alia that the respondents were purely doing and exercising their duties and responsibility as provided for under the law and as already submitted, the applicants have not attached any evidence from the lock up register from any police station to confirm that they were detained for more than 48 hours which is denied by the respondents or evidence of torture.

That as such the applicants are not entitled as against the respondent be it personally, vicariously or jointly or severally for the alleged claims for general damages, aggravated and punitive/ exemplary damages, declaration, interest and costs.

With due respect, I do not agree with counsel for the respondent that section 101(1) of the evidence act applies in this case where whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she arrests must prove that these facts exist”

5/3/20

It is an established principle of the law that the Burden of proof in this kind of claim is on the respondents as was held in the *case of R versus Oakes 26 DLR( 4<sup>TH</sup> ) 200 by Dickson C.J.C* in the Supreme Court of Canada that:

*“The onus of proving a limit on right or freedom guaranteed by the charter is responsible and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation”.*

Lady Justice Byamugisha C.K applying it *in Muwanga Kivumbi versus AG, CONSTITUTIONAL PETITION NO 9 OF 2005* held that section 1 of the Canadian charter of rights and freedoms are in similar terms with Article 43 of our constitution which sets out the standard of justification of limitation on the enjoyment of rights guaranteed.

*The applicants have the right to claim a violation of their rights and respondents have the burden to prove the existence of limitations.*

It is inconceivable that the learned state attorney for the respondents faulted the applicants for not attaching evidence from the lock-up register from any police station, while not perceiving failure by the respondents to produce such a register as evidence of concealing the truth. In any case, the respondents had the burden to prove that they did not violate the rights of the applicants.

In the case of *Muwanga Kivumbi Vs AG (SUPRA), Hon Lady Justice C.K Byamugisha* wrote the lead judgment that was adopted by the majority. At page 15 she held as follows:

*“In every society there is always tension between those who desire to be free from annoyance and disorder on one hand to those who believe to have the freedom to bring to the attention of their fellow citizens matters which they consider important.*

*Peaceful assemblies and protests are a vital part of democratic society. They can be a very powerful tool and some of the rights and freedoms that some countries enjoy today were gained because some people were to go out on the street and protest.*

*The way therefore, any legal system strikes a balance between the above-mentioned competing interests is an indication of attitude of the society towards the value it attaches to different sorts of freedom.*



*A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression, particularly political expression. The right to peaceful protest is not absolute. The police here have a wide range of powers to control and restrict the actions of protestors. These powers should not be exercised by the police in an unaccountable and discriminatory manner...*

*She went on to hold that section 13 of the United Kingdom Public Order Act 1986, section 13 gave to the chief officer of the police power to prohibit a procession if he had reasonable ground to believe that the holding of the public procession would result in public disorder. The prohibition was limited to a period of not exceeding three months. It should be remembered that the United Kingdom had no written constitution.*

*This position had changed with the enactment of the Human Rights Act 1998 which domesticated the European Convention on human rights with regard to political protests the convention emphasized four key areas namely;*

- a) The right to peaceful assembly in article 11*
- b) The right to freedom of expression under article 10*
- c) The right to freedom of thought, conscience and religion in article 9 and the right to respect for private and family life in article 8*

*Article 29 of our constitution is modeled along the lines of the European Convention on Human Rights. And I must add that our constitution is modeled along the UDHR, African Charter on Human and Peoples Rights, I.C.C.P.R.*

*She went on to hold that,*

*“The right of peaceful assemblies is entrenched in the United States’ constitution. The act gives powers to the police to arrest persons who engage in disorderly conduct or who threaten violence etc.*

*It does not give powers of prohibition to the police (Emphasis mine)*

*The reason for this is obvious freedom. Freedom of assembly is an entrenched right in the US constitution. To restrict or prohibit would be a violation of the rights of the protestors.*

*15/1/20*

*In the matter now before court, there is no doubt that the power given to the Inspector General of Police (IGP) is prohibitive rather than regulatory. It is open ended since it has no duration. This means that rights available to those who wish to assemble and therefore protest would be violated.*

*The justification for freedom of assembly in countries which are considered free and democratically governed in my view is to enable citizens express their views without government restrictions. The government has a duty of maintaining proper channels and structures to ensure there're legitimate protests whether political or otherwise to enable citizens to find a voice.*

*Maintaining the freedom to assemble and express dissent remains a powerful indicator of the democratic and political health of the country.*

*I therefore find that powers given to the IGP to prohibit the convening of an assembly or procession is an unjustified limitation on the enjoyment of a fundamental right. Such limitation is not demonstrably justified in a free and democratic country like ours (Uganda)"*

The above lengthy quotation was in respect of the constitutionality of section 32 of the Police Act cap.303 which gave the police the power to regulate assemblies and processions. The constitutional court in the majority of 3 declared the section null and void.

In the recent decision in *constitutional petition No.5/2007 Moses Mwandha Vs A.G* while resolving the issue of whether sections 33 and 34 of the police act are still law in light of the constitutional court decision in *Muwanga Kivumbi vs A. G(Supra)*, all justices of the constitutional agreed with their brother justice Kakuru who wrote the lead judgment holding that,

*"Section 33 relates directly to the repealed section 32 of the Police Act. In turn section 34 relates to sections 33. I find that the three sections 32, 33, and 34 cannot be read in isolation of section 32. I therefore find that this court having declared sections 32 of the Police Act unconstitutional, sections 33 and 34 no longer stand above and hereby declare them too unconstitutional for the same reason that this court declared sections 32 unconstitutional."*

15/12/20

*Sections 33 and 34 of the Police Act* provides as follows;

**33: Power to stop and to order to disperse assemblies and processions unlawfully is convened** *“Where an assembly is convened or procession formed in contravention of prohibition under section 32, the Inspector General or officer in charge of police may require the assembly to be held or the procession to be stopped and may order the immediate dispersal of that assembly or procession”*

**34: Unlawful assemblies**

*“Any assembly or procession of three or more persons which neglects or refuses to obey any order for immediate dispersal given under section 33 shall be deemed to be unlawful assembly within the meaning of section 65 of the penal code”*

By 2017, the constitutional court had declared section 32 unconstitutional and therefore null and void. The respondents cannot therefore hide under the police Act as submitted by the learned State Attorney that they were purely doing and exercising their duties as provided under the law which law he carefully omitted to quote.

**Ndugutse Alfred**

In his affidavit para 4 and 6 he clearly stated that the demonstrators (who included applicants) intended to gather to demonstrate and cause chaos within Kampala city in a fight against intentions to lift the presidential age limit of 75 from the constitution by amendment of article 102(b) of the same.

The action or conduct of the applicant was purely an exercise of their right of freedom to assemble and to demonstrate together with others peacefully and to petition.

In total contravention and contempt of the court decision in the Muwanga Kivumbi (supra) case, where the police is expected to regulate assemblies or procession of peaceful demonstrators, and not to prohibit, Ndugutse Alfred the 3<sup>rd</sup> defendant in MA 3/2017 initiated the process of arresting the applicants through his wrong information in his capacity as crime intelligence officer by causing the arrest of the applicants as he proudly admits in para 6 that,

15/5/20

“The demonstrators on 18<sup>th</sup> December 2017 were arrested by operational officers”

Whether he actually participated in the actual arrest or not, they were arrested on his instruction, false information and later on taken to his office for profiling.

The Respondent Ndugutse Alfred inclusive did not adduce any evidence that the applicants were not peaceful or were armed or turned violent.

He simply prohibited them instead of regulating as regulating does not include wanton arrest of demonstrators.

In view of the above, I find him to be;

- i) Ignorant of the law which is no defense.
- ii) In breach of his statutory duty to regulate by providing security to the demonstrators (applicants).
- iii) And involved in wanton arrest of the peaceful demonstrators, there by violating their constitutional Rights under the constitution in particular Article 29(1)(d) to which he is personally held liable.

**ASP Brian Nyehangane**

He was in charge of Nagalama Police station. He denied the applicants the right to be released on bond and or the right to be arraigned before court within 48 hours. He did not detain the Applicants for 48 hours but rather for 192 and 120 hours respectively for no justification whatsoever.

His excuse that the decision to detain the applicants at Nagalama was made at the Regional office because of overcrowding of cells at CPS Kampala and that he was not the investigating officer and that the applicants were on General Inquiry File (GIF) so he could not establish whether their offence was capital or minor in nature so as to enable him release them on bond is self-defeating. (Refer to paragraphs 4, 6 and 7 of his affidavit).

Uganda Police force for which he works is one force with different units which units are all bound by the constitution. Articles 20 and 221 of the Constitution apply to all agencies of government and security organizations. He had a constitutional duty to observe and respect human rights and freedoms in the

5/5/17

performance of his functions as a person in whose custody the applicants were placed.

Paragraph 7 of his affidavit under MA 03/ 2017 clearly shows that the applicants were not being held of any minor or capital offences which further affirms my finding that Mr. Ndugutse had false information about the applicants and merely intended to arrest them for no reason and dump them in Nagalama police station that has become a dumping station for persons who have divergent political views.

ASP Brian Nyehangane continued intentionally with the violation of the Applicants' constitutional rights that was started by his co Respondent Mr. Ndugutse Alfred.

My finding is based on the following;

1. He is a trained police officer who is not ignorant of the law more so the supreme law of the land. But even if he is ignorant, it is no defence.
2. He is an independent individual with personal responsibility of his actions.
3. He has every right to make intelligent legal decisions.
4. He is protected under the law not to follow illegal and unconstitutional directives from his superiors under **Article 221 of the Constitution** which requires him to observe and respect Human rights and freedoms in the performance of his functions.

ASP Brian Nyehangane's testimony is that he could only execute his statutory functions after instructions from someone with greater power and authority as he had to wait for orders "from above" which is common in the Uganda Police force and other security agencies.

*Whereas waiting for orders from above or acting on the instructions from above may be acceptable and applicable in reference to routine administrative functions within the Ugandan Police force and other security agencies or forces, it is archaic, unacceptable and extraneous in the modern constitutional and human rights regime where states and their agencies are mandated by the constitution to observe, uphold, protect and promote the universal human rights of the citizens. Any officer who violates the rights of citizens on orders from above or under the pretext that he or she was waiting for orders from above does so at his own peril.*

If the Regional office dumps citizens under the custody of a police unit because they have caused overcrowding which is usually a result of violation of human rights, the receiving police unit in this case, Nagalama had every right to act professionally and observe the human rights of the Applicants.

I am adopting the same argument in MA No.17/2017 where the children and their mother suffered at the hands of police officers under the superintendence of Mr. Brian Nyehangane.

He violated the rights of children and their mothers already mentioned under the first issue.

I therefore find him personally liable for the violation as pleaded by the Applicants in both applications.

#### **Sarah Nankwanga D/C**

D/C Sarah Nankwanga admitted to blindfolding the Applicant Ampaire Aisha and her co-wife which was a torturous act.

Brutal and inhumane means are prohibited during interrogation. Reasonable interrogation must be free of torture, cruel and inhumane treatment.

This court does not find her a fit and proper person to work as a police detective, she is immoral, inconsiderate and afflicted a lot of physical, mental and psychological torture to the 2<sup>nd</sup> applicant and her co-wife in MA No. 17/2017.

In that regard, I find her liable for her torturous conduct prohibited under the Prevention and Prohibition of Torture Act.

#### **Emilian Kayima.**

I have read the affidavit of Emilian Kayima. He received a complaint from Nansubuga Aidat and Ampaire Aisha on 9<sup>th</sup> May 2017, followed up the matter with Mr. Binoga after Nagalama police officers under Brian Nyehangane had claimed the children were suspected to have been trafficked.

The children were arrested/remanded from their home around 21<sup>st</sup> or 22<sup>nd</sup> of March 2017 and released to their mothers on the 11<sup>th</sup> May 2017 after 51 days.

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Mr. Emilian Kayima acted with reasonable speed unlike Nyehangane who tortured the mothers by not disclosing to them where the children were until Emilian Kayima intervened.

I therefore do not hold SSP Emilian Kayima the Kampala Metropolitan police spokesperson then for the violation of the mothers and children's rights. He went an extra mile to facilitate Nansubuga Saidat with transport to report to police and receive her children.

He deserves to be commended for the timely intervention.

### **Sharifa and Sam**

The two are stated to be police officers at Nagalama. In the absence of their second names and or force numbers and ranks, I have no evidence against persons who are not properly identified.

### **AIP Asan Kasingye**

He is the 1<sup>st</sup> respondent in MC 17/2017 and police spokesman then. , I did not find evidence faulting him for violating the Rights of the Applicants.

I therefore do not find him liable.

### **The Attorney General**

Vicarious liability is a form of strict secondary liability that arises under the common law doctrine of agency.

The police officers being agents of the executive arm of the state fall under this ambit. The attorney General who is the legal representative of the state can therefore be held vicariously liable for the constitutional breaches of the police officers.

The lawful detention that became unlawful for extending before 48 hours was in Government police cells.

The torturous acts committed by the police officers were done in police stations while the Applicants were under police custody.

It is the responsibility of the state to recruit and train police officers on human rights.

*Handwritten signature and date*  
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The presumption therefore is that the Uganda police is comprised of men and women who know their functions and duties under the constitution. Any abuse and violation of human rights and freedoms places the state in that vicarious liability.

Consequently, I find that the Attorney General is vicariously liable for the acts of D/ASP Ndugutse Alfred, ASP Brian Nyehangane OC Nagalama police station then, Sarah Nankwanga for the violation of the constitutional rights of the victims and applicants in MC No. 03/2017 and MC No.17/2017.

### WHAT REMEDIES ARE AVAILABLE

The Applicants in both Applications prayed for declaratory orders, damages and costs.

Counsel for the Applicants submitted in support of all the prayers while counsel for the Respondents submitted that since the Respondents were merely executing their lawful duties, the Applicants are not entitled to any remedies.

This court found that the Respondents save for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> violated the constitutional rights of the victims/ Applicants.

***Article 50 (1) of the 1995 constitution empowers this court to provide a redress to persons whose constitutional rights and freedoms have been infringed and the redress may include compensation.***

Article 23 (7) enjoins this court to award compensation. The wording about the entitlement to compensation is in mandatory words; it is written,

***“A person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority”***

Article 8 of the UHDRH guarantees the right to an effective remedy in the following words;

***“Everyone has the right to effective remedy by the competent national tribunals for the acts violating the fundamental rights granted to him by the***



*constitution or by the law and Article 2 (3) of the ICCPRs enjoins states to ensure effective remedies for human rights violations in the following words”.*

Under Article 2 (3) each state party to the present covenant undertakes:

- a) “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity.*
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by a competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy.*
- c) To ensure that the competent authorities shall enforce such remedies when granted.”*

And Article 3 of the ICCPRs enjoins the state parties to the present covenant *“to undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present covenant.”*

Our constitution domesticated the above articles in the 1995 Constitution hence the right to seek for remedies before the courts of law for violation of human rights and freedoms complained against herein.

In response to the Children, Article 3 of the United Nations Convention on the Rights of the child provides that;

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration.”*

The above article has also been domesticated under the constitution and the children Act cap 59.

Article 137 (4) (b) allows this court to determine the appropriate redress after investigating violations of human rights and freedoms of individuals.

*5/5/12*

In the *Constitutional Petition No. 7/2009 Dr. Kizza Besigye and Others Vs The Attorney General*, the honorable justices of the court of Appeal sitting as a constitutional court following the Kenyan case of Republic Vs Amos Karuga Kavatu Kenya High Court Cr. Case No. 12/2006 where judge Mahandia stated;

*“The time is near for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person. A prosecution meted in breach of the law is a violation of the rights of the accused and is therefore a nullity.*

*It matters not the nature of the violation ... it matters not if the evidence available against him is overwhelming. As long as there is a (violation of the rights of the accused person) the prosecution remains a nullity.”*

Held that,

*“this call is very relevant to courts in Uganda because in the process of producing and prosecuting suspects in our courts, the police and prosecution do violate numerous constitutional rights, of an accused persons, yet even where such violations are brought to the notice of the courts, the prosecution goes ahead as if nothing has gone a miss.”*

*We think it is high time the judiciary reclaimed its mantle and apply the law to protect the fundamental rights and freedoms of our people as the constitution requires.”*

The Applicants before me were arrested and detained save for Nansubuga Saidat by the police for exercising their constitutional right to demonstrate and for the case of Ampaire Aisha for being a wife to a suspected murderer of Felix Kawesi (RIP).

The police admit they opened a GIF for 10 applicants. This is because they really had no particular case against them.

In the end they were released without any charges, children of the mothers tortured by removing their parents from them, detained beyond 48 hours for which they are entitled to damages.

*Handwritten signature and date: 15/11/20*

*If the Uganda Judiciary is to remain relevant, it has to rise to the occasion and reclaim its mantle by accepting its responsibility for the maintenance of the rule of law that embraces the willingness to check executive action by awarding general damages as against the Attorney General who represents the state and all its reckless or incompetent staff and punitive damages against individuals who deliberately behave in a manner that violates the human rights and freedoms of other individuals in the course of performing their duties.*

*One of the main functions of court is to ensure that the executive arm of Government which is responsible for enforcement of the written law, like the Police in this case which is responsible for arrests and detention exercises its mandate responsibly before, during and after the arrest.*

Arrests unless effected during the commission of crime should not be arbitrary before any investigations and concrete conclusions that any breach of the law has been occasioned by the suspect. This was not the case with the Applicants. Their arrest was arbitrary in total breach of the law by the police.

Any arrested person should be treated with the dignity and within the confines of the law. This was not the case with the Applicants.

*It is this courts humble opinion that in order to hold the police officers or any other security agencies that are notoriously known for violating the rights of individuals accountable, adequate compensation should be awarded to serve as a deterrent to them and others because it is a notorious fact that some are rewarded and or applauded for acting with impunity against the citizens which amounts to gross abuse of authority and must therefore be discouraged and condemned by this court.*

In the result, this application is allowed with the following orders;

1. All the declarations prayed for under MC 17/2017 save for the right of protection from deprivation of property under Article 26 because no particular property was proved to have been stolen are allowed.
2. All the declarations prayed for under MC 003/2017 are allowed.

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3. Second Applicant Ampaire Aisha and 3<sup>rd</sup> Applicant Nansubuga Saidat are awarded general damages of Shs. 30,000,000/= (thirty million shillings) each as against the Attorney General for the pain, mental and psychological anguish, emotional stress they suffered when they were arrested, tortured, separated from their children and denied access to their 11 (eleven) children for all that time by the Uganda Police Force Personnel in the course of their duties.
4. The 2<sup>nd</sup> Applicant Ampaire Aisha is awarded punitive damages of shs. 5,000,000 (Five million shillings) as against Sarah Nankwanga D/C for the torturous act of blind folding her during interrogation inflicting mental and psychological torture.
5. The 2<sup>nd</sup> Applicant Ampaire Aisha and 3<sup>rd</sup> Applicant Nansubuga Saidat are awarded punitive damages of shs 1,000,000/= (one million shillings) each as against ASP Brian Nyehangane O.C Nagalama police station then for the torturous act of concealing the whereabouts of their children and violating the children's rights as enumerated in the application under his superintendence as in charge.
6. General damages of shs.30,000,000 (thirty million) to each of the 10 applicants in MC 003/2017 are awarded against the Attorney General for violating the right to a peaceful demonstration, unlawful arrest and detention for no offence committed; and infringing on their fundamental rights and freedoms enumerated in the application and for the psychological torture, and mental anguish they were subjected to at the hands of security state agents, the Uganda Police Force personnel in the course of their duties.
7. Punitive damages of shs.1,000,000/=(one million) each as against ASP Brian Nyehangane OC Nagalama then for detaining them beyond 48 hours for no justification and
8. Punitive damages of shs.1, 000,000/= (one million) each as against Mr. Ndugutse Alfred for ordering for the arrest and detention of the applicants for no justification well aware that they were exercising the right to demonstrate as allowed under the constitution.
9. Costs of this application are awarded to the Applicants as against the Attorney General and I hereby issue a certificate of two counsel since they were represented by two advocates.

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I so direct.

DATED AT MUKONO THIS 15<sup>TH</sup> DAY OF MAY 2020

MARGARET MUTONYI  
JUDGE.