THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(ANTI-CORRUPTION DIVISION)

MISCELLANEOUS APPLICATION NO. 53 OF 2023

(Arising from HCT-00-AC-SC-0005-2003)

KITUTU MARY GORETTI KIMONO ::: APPLICANT

VERSUS

ATTORNEY GENERAL ::: RESPONDENT

BEFORE: OKUO JANE KAJUGA, J

RULING

Background

Kitutu Mary Goretti Kimono (hereinafter referred to as the applicant) is the Minister for Karamoja Affairs in the Office of the Prime Minister (OPM) and the Woman Member of Parliament for Manafwa District. On 6th August 2023, she was charged together with Abaho Joshua, Senior Assistant Secretary (OPM) and Naboya Kitutu Micheal with the offenses of Loss of Public Property contrary to Section 10 (1) of the Anti-Corruption Act, 2009 (as amended) and Conspiracy to Defraud Contrary to Section 309 of the Penal Code Act, Cap 120.

The charges relate to the alleged diversion of iron sheets for the Karamoja Community Development Program. They denied the charges and were subsequently committed to the High Court for trial. Before the trial could commence, she filed this application against the Attorney General alleging violations of her non-derogable fundamental rights and freedoms under Articles 21, 23, 28, 44, 50 and 120 (5) of the 1995 Constitution, Sections 4(1) and 17 of the Human Rights Enforcement Act, 2019, and the Human Rights (Enforcement Procedures) Rules 2019 seeking the following declarations and orders;

1. **A DECLARATION** that members and agents of the Uganda Police, the Parliamentary Committee on Presidential Affairs and other state institutions subjected the applicant to torture or cruel, inhuman and degrading treatment during the course of their investigations against her.

2. **A DECLARATION** that the investigations into the alleged theft of iron sheets meant for the Karamoja community empowerment program and the resultant criminal charges were irreparably tainted with gross abuse of the applicant's non-derogable rights with the effect that the trial in HCT-00-AC-SC-0005-2023 is a nullity in law

3. **A DECLARATION** that the applicant's non-derogable right to a fair hearing has been additionally violated through the denial of disclosure of exculpatory exhibits and documents in possession of the State

4. **A DECLARATION** that the malicious, false and targeted media campaign orchestrated by some State institutions against the applicant through state-owned media and social media platforms has irreparably violated the applicant's right to a fair hearing in HCT-00-AC-SC-0005-2023 and no fair trial can ensue from it

5. General damages, exemplary damages and punitive damages be awarded to the applicant for the violation of her non-derogable rights

6. The costs of the application

In accordance with the provisions of **Section 8(1) of the Human Rights Enforcement Act 2019**, the proceedings in HCT-00-AC-SC-0005-2023 were stayed for the court to determine the questions of human rights violation raised.

The facts supporting the application are set out in the affidavit of the applicant and are as follows:

On the night of Monday 3rd April 2023, the applicant received a phone call from the Hon Prime Minister of Uganda directing her to report to the Criminal Investigations Directorate (CID) Headquarters at Kibuli. The next morning, she

proceeded to CID Headquarters at 9 a.m. where she was to her dismay arrested and subjected to an unprofessional, inquisitorial interrogation by nine security personnel about iron sheets procured for the Karamoja region. The officers slandered her and accused her of being a thief.

She alleges that they had prepared notes with information she had no clue about. They wrote a statement with their own pre-arranged answers which they gave her to sign. Owing to her long restraint by the officers and the psychological pressure they applied, she was forced to sign the statement.

She avers that after the questioning, she was escorted to the Parliamentary Committee on Presidential Affairs which was conducting a highly publicized trial on the same matter. She was immediately asked to take oath before a beehive of journalists with TV cameras focused on her. They shouted at her, calling her a thief which was dehumanizing and degrading. She realized that the committee was obviously biased and had prejudged her, so she opted not to testify before them, following which the Chairperson of the committee ordered parliamentary police to arrest her and hand her back to the Director of CID. Her plea for her lawyer to be present was ignored.

She was then arrested and detained in an ungazetted prison where she was kept for over two hours with no access to family or her lawyer. She was threatened and maltreated and later led out of the darkroom at Parliament, bungled into a waiting vehicle and recklessly driven to CID Kibuli where she was detained alone in a dark room, incommunicado.

She was never given any water or food despite being held for the whole day so her health began to deteriorate. She claims this was purposed to break her down psychologically. While in the darkroom, a lady identifying herself as Beata Chelimo harshly communicated that she would not be able to return home as she had to show them the iron sheets. She demanded that she hand over her personal phone which was now the subject of an investigation. She was never told the reason for her arrest and no summons, arrest warrant, search warrants, or court orders were secured to authorize her detention and searching of her phone records. That her phone was accessed unlawfully until its return on 27th July 2023.

Using a torch light, Chelimo gave her a form to sign to confirm the taking of her phone, which she complied with. At 9 p.m. she was marched to two police pick-

ups with armed personnel and ordered to enter. She sat sandwiched between two women who were armed and they told her they were going to Kayunga to look for the iron sheets. She was blindfolded with a dirty cloth and they drove to places she did not know. A male voice kept asking her to cooperate and tell them where the iron sheets were and she answered that she did not know anything about iron sheets. They only removed her blindfold to ask her if that was where she kept the sheets.

At this point in time, she was scared for her life, tired, thirsty and hungry. Her requests for food fell on deaf ears. In the wee hours of the morning, about 3 a.m., she was driven back and taken to Kiira Division police station, kept in a dark, stinking, dirty room where she found an old lady sleeping on a tiny mattress. She was ordered to sit on a stool and she sat the whole night. She later learned that her husband and sister-in-law came to visit her but were not allowed to see her. She ate her first meal since the ordeal the next day at 10 a.m. when her sister-in-law was finally allowed to bring in a hastily prepared meal.

She avers that she was kept in illegal detention for three days until Thursday 6th April 2023 when she was produced in court and charged. Owing to the cruel degrading and inhuman treatment her health deteriorated and she was subsequently diagnosed with severe anxiety, severe depression and post-traumatic stress disorder.

Following her appearance in court, she instructed her lawyers to ask for full disclosure of all documents and exhibits relating to the distribution of iron sheets, but the Office of the Director of Public Prosecutions (ODPP) declined to avail the exculpatory materials which violates her right to a fair hearing.

In a supplementary affidavit deposed on 14th August 2023, the applicant added that the exculpatory material she requires includes the list of those who have returned the iron sheets or paid cash to the Government, and the statements in the cases filed against Hon. Agnes Nandutu and Hon. Amos Lugolobi. It also included the Report of the Prime Minister on the iron sheets distribution. She further detailed what she referred to as negative media coverage which was orchestrated by some negative forces in the Government aimed at making her look guilty in the eyes of the public. Further, having been subjected to a public trial in the media she

has been condemned before hearing her side of the story, hence violating her right to a fair hearing.

As a result of the gross violation of her non-derogable rights, she contends that the criminal trial against her is a nullity and the charges should accordingly be dismissed.

The applicant's case was supported by the affidavits of her husband, Michael George Kitutu, her daughter Mary Lunyolo Kitutu, her sister in law Muhwezi Lunyolo Martha Rose, a brother in law Muhwezi Murari Maurice Alex and Dr. Hillary Irimaso.

The respondent on the other hand submitted that the applicant's affidavits and additional affidavits in support of the motion were full of falsehoods and did not set out the correct account of events. The evidence in rebuttal was adduced through the affidavits in reply of Chelimo Beata, Senior Commissioner of Police and Deputy Director CID; David Bisamunyu, Chief State Attorney from the ODPP; ASP Twesigye Elias, the Assistant Superintendent of Police in charge of Kiira Division Police station where the applicant was detained; D/ASP Mutuwa Juliet who was at the time attached to Parliamentary Police; Hon Adolf Mwesigye Kasaija who is Clerk to Parliament; D/SP Sowed Mohammed an investigator with the State House Anti-Corruption Unit and D/SP Neboshi Sophy, an investigator attached to CID.

Representation:

The appellant was represented by **Dr. Akampumuza James**, **Jude Byamukama** and **John Musiime**.

The Attorney General's Chambers was represented by **Johnson Natuhwera (SSA), Jacky Amusogut (SA)** and **Crispus Nakwera (SA)**

Both parties filed written submissions and had the opportunity to support the same with oral submissions. I have carefully considered the pleadings and the submissions and identified the following as the issues for the court's resolution:

1. Whether the applicant's non-derogable right to a fair hearing has been violated through prosecutorial misconduct and the deliberate non-disclosure of exculpatory evidence in the State's possession

2. Whether the applicant's non-derogable right to a fair hearing and freedom from torture, inhuman and degrading treatment were violated by the respondent's agents during her investigation and interrogation

3. Whether the applicant's non-derogable right to a fair hearing has been violated through prejudicial, targeted and malicious media coverage against her

4. Whether the applicant is entitled to the remedies sought

DETERMINATION OF ISSUES

Whether the applicant's non-derogable right to a fair hearing has been violated through prosecutorial misconduct and the deliberate non-disclosure of exculpatory evidence in the State's possession

Applicant's submissions

It was submitted for the applicant that **Article 28 (3) (c) of the Constitution** provides that an accused person must be given adequate time and facilities for the preparation of his defense. These facilities are not limited to the evidence that the prosecution intends to rely on at the trial but extend to the evidence in the knowledge of or in the possession of the prosecution, that points to innocence or would mitigate the charges against the accused. The prosecution, as officers of the court are enjoined to make available to the defense any evidence in their possession that would be pivotal in the preparation of the accused person's defense. **Wilson Ndege and another versus Uganda Court of Appeal Criminal Appeal No 12/1978** and the English case of **Dallison versus Caffery (1965) 1 QB 348** were cited as authorities for this position.

It was contended that the evidence disclosed through the applicant's affidavits in rejoinder and the cross-examination of SCP Chelimo Beata and David Bisamunyu (CSA) demonstrated that the prosecution had withheld or suppressed additional evidence relevant to the preparation of the applicant's defense requested for in their letter to the DPP dated 8th August 2023. This implies that if the trial proceeds

only on what has been disclosed, the applicant would be greatly prejudiced, hence an abuse of her fundamental non-derogable right to a fair trial.

Further, that the conduct of the prosecution was steeped in malice and blatant abuse of prosecutorial power exercised in contravention of **Article 120 (5) of the Constitution** and demonstrated in the targeted and selective investigation and prosecution of the applicant. While the applicant was prosecuted, others who had received iron sheets were allowed to return them and exempted from prosecution.

They contended that prosecutorial misconduct in the form of malicious intent or a prosecution founded on improper purposes is grounds for dismissal of charges against the accused. The rationale is that it amounts to a violation of the accused's non-derogable right to a fair hearing. See **Paul Wanyoto Mugoya versus Sgt. Oumo and another, Civil Appeal No 91/2021, Rtd Dr. Kizza Besigye versus Attorney General, Constitutional Petition No 7/2007, Brady versus State of Maryland 83 S.Ct. 1194 and Regina V Horseferry Magistrates' Exparte Bennet 1994 AC 42.** Based on the authority of the above decisions, this court has the duty to prevent abuse of power by preventing or nullifying such prosecutions.

They prayed that the court finds that the non-disclosure and prosecutorial abuse amounted to a breach of the non-derogable right to a fair trial and accordingly dismiss the criminal charges pending against the applicant.

Respondent's case

Counsel for the respondent on the other hand submitted that given the evidence detailed in the affidavit of David Bisamunyu (CSA), the applicant's right to a fair trial had not been violated. They submitted that on the 29th of June 2023, the prosecution disclosed to the applicant material evidence to be relied upon during the criminal trial in keeping with the authority of Soon **Yeon Kong Kim and Kwang Mao versus AG, Constitutional Reference No 6/2007, Uganda versus Mpanga and 6 others, HCT-00-SC-14-2014** and Rule 8 of the **High Court (Anti-corruption Division) (Case Management) Rules, 2021.**

Thereafter, the applicant through her lawyers made a request for further disclosure and the prosecution provided what they had in their custody. They then informed the applicant that the rest of the requested documents were not in their custody.

Relying on the above authorities, they contended that the accused is entitled to the disclosure of copies of statements made to police by would-be witnesses for the prosecution and copies of documentary exhibits that the prosecution is to produce at the trial (emphasis mine) and that this requirement has been fulfilled.

They further submitted that matters relating to pre-trial disclosure ought to be raised before the trial court.

Resolution of court

The law on pre-trial disclosure in criminal matters stems from **Article 28 (3) (c) of the Constitution** which provides that every person who is charged with a criminal offense shall be given adequate time and facilities for the preparation of his or her defense. This is one of the elements of the right to a fair hearing.

The Kenya High Court in interpreting a similar provision in their own Constitution in the case of **Juma and others versus Attorney General (2003) 2 EA 461; (2003) AHRLR 179** stated as follows;

"In practical terms, this constitutional edict is satisfied only if the accused person is given and allowed or afforded everything which promotes the ease of preparing his defense. He must be given and afforded that which aids or makes it easier for him to defend himself if he chooses to defend the charge. In general terms, it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something, the result of which will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defense or lessen or bottleneck his fair attack on the prosecution case. We say so because we believe the framers of our constitution intended the expression "facilities" in this section to be understood in its ordinary everyday meaning, free from any technicality…that word means the resources, conveniences or means which make it easier to achieve a purpose."

I find the above instructive and applicable. The court and the prosecution are expected to ensure that facilities are accorded to an accused person in a criminal trial to ensure a level playing field where the prosecution does not gain an unfair advantage over the accused hence occasioning a miscarriage of justice. This position has been adopted by our courts as I will explain here after.

The current legal landscape of pretrial disclosure in Uganda is shaped by two decisions of the Constitutional Court. In the **Soon Yeon Kong Kim Case (supra)** the learned Justices observed that **Article 28(1) and (3) of the Constitution** that guarantee the right to a fair hearing must contain in it the right to pre-trial disclosure of material statements and exhibits. They accordingly held that an accused person in a magistrate's court is prima facie entitled to disclosure of copies of statements made to police by the would be witnesses for the prosecution and copies of documentary exhibits which the prosecution intends to produce at the trial (emphasis mine). The right to disclosure is not absolute, but rather subject to limitations to be established through evidence by the prosecution. Such grounds include state secrets, protection of witnesses from intimidation, protection of identity of informers, and where due to the simplicity of the case, disclosure is not justified for purposes of a fair trial.

This is the position reflected in the **High Court (Anti-Corruption Division) (Case Management Rules, Legal Notice 11/2021.** Rule 8 (1) thereof provides as follows:

"A prosecutor shall disclose to the accused person or to his or her legal representative the documents, material statements, exhibits and any information that the prosecutor intends to rely on at the trial.

Sub-rule (2) provides further; Notwithstanding the general principle in sub-rule 1, a prosecutor may, with leave of court, withhold disclosure on grounds of;

a) *State secrets*
b) *Protection of witnesses from intimidation*
c) *Protection of the identity of informers*
d) *Disclosure, if not justified for the purposes of the trial or*
e) *Any other justifiable cause*

The Rules allow a prosecutor to withhold disclosure if the material is not justified for the purpose of trial. The Rules are in sync with the decision in the **Soon Yeon Kong Kim** case. From the preceding, it is clear that under the Rules and the Soon case, disclosure is limited to matters or evidence that is material. The term "material" in simple english means important or significant to determine an issue. It is also limited to what the prosecution wishes to rely on, and it can therefore be presumed that there is no automatic obligation for them to disclose what they do not wish to use at the trial.

This position is rather narrow and restrictive. The Constitutional Court broadened the purview of pre-trial disclosure in criminal matters in the case of **Aniket Patel versus Attorney General, Constitutional Petition No 2/2019.** In that case, the petitioner was charged in the Anti-Corruption Court. In the course of the trial he moved the trial judge to issue an order directing the Prosecution to avail the tally accounting system data and documents in the possession of the State, which he contended contained evidence of accountability for the funds allegedly embezzled. They desired to use the materials to disprove the allegations against them. The trial Judge declined to make the Order hence the petition. The Justices of the Constitutional Court held as follows;

"The refusal by the prosecution and the trial court to avail the petitioner the materials he sought from the prosecution for his defense during trial was a denial of the fundamental and non-derogable right to a fair hearing…so rendered the trial a nullity."

They ordered that *"The prosecution and or the complainant shall grant the petitioner access to all the materials and documents in possession of the prosecution and or the complainant, which the petitioner requires for use in his defense"*

The case was returned for trial De novo, before another trial Judge.

The import of the latter decision is that the prosecution is no longer limited to providing only the documents it was planning to rely on at the trial, or documents in its possession. The prosecution is charged with the duty of disclosing documents that may not be in their possession but are in the possession of the complainant. This emanates from the relationship between the two, with the former prosecuting on behalf of the complainant. Where the defense requests disclosure, as long as the evidence exists, is relevant and in possession of the complainant or the prosecution, then the prosecution is duty-bound to disclose. It matters not, therefore, whether the State wished to rely on the same or not.

Another critical aspect of the decision in **Aniket**'s case is that exculpatory material which the defense requires to defend itself and prove innocence should be disclosed. In that case, it was established by the defense that the tally sheets and accountability records amounted to exculpatory material because they were necessary to disprove the charges of embezzlement brought against them. The

court found that failure to provide them amounted to an abuse of the right to a fair trial, and quashed the proceedings before the High Court.

I am of the considered view that even where there is no such request, the state is obliged to hand over in the interest of justice and fair trial. It is for this reason that suppression of evidence by the State is frowned upon by the courts. The risk of a wrongful conviction based on non-disclosure or suppression of evidence that would otherwise have exonerated an accused person is anathema to the justice system.

Even with this expanded application, it remains clear that disclosure is not absolute. There are also no hard and fast rules about the timing so it can be made at any time of the proceedings. The prosecution has the leeway to withhold disclosure but under Court sanction. In practice, disagreements between the prosecutors and defense team on matters of disclosure are not uncommon, especially in cases of corruption, which often involve bulky and voluminous statements and documentary exhibits. Some of the disagreements relate to the materiality, and or availability of requested documents.

From the submissions of the parties, it is clear that this is one of the issues in the instant standoff. It is the applicant's case that materiality is to be determined from the perspective of the accused. They relied on **Uganda versus Okumu Reagan and others, Criminal Revision No 18/2013** for this position. I understood them to mean that the state must disclose any information specifically requested by the accused, because it is the latter who knows what is material for his case. While this may be true to a large extent, it may not always be the case that what is asked for by the defense must always be automatically provided. Where there is doubt, the question must be resolved by the trial court. It cannot be ruled out that the requirement for disclosure can be abused or used as a fishing expedition in the hands of a mischievous defendant. He may ask for documents that do not exist, or whose relevance is obscure, hiding under the cover that they are exculpatory in nature. It is for this reason that the court has a vital role to play in the process, keeping in mind that the ACD Case Management Rules allow a prosecutor to withhold disclosure on the basis that it is not justified.

I find the decision by the Constitutional Court of South Africa in **Shabalala and others versus Attorney General of the Transvaal and another, 1995 (12) BCLR**

1593 very instructive, persuasive and supportive of this view. They held as follows:

" The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

Even where the State has satisfied the Court that the denial of access to the relevant documents is justified on the grounds set out in paragraph 5 hereof, it does not follow that access to such statements, either then or subsequently must necessarily be denied to the accused. The Court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in paragraph 5 (if such access is permitted) against the degree of the risk that a fair trial may not enure for the accused (if such access is denied). A ruling by the Court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of circumstances disclosed by the further course of the trial.

I agree with the finding thereof and find it applicable in this case.

In the instant case, it is not in contention that the prosecution has disclosed the material on which they wish to rely during the trial. The question is whether the State is obliged to disclose all or any of the documents requested for by the defense in their letter of 8th August 2023. The requested documents include the following; a copy of the report of the Prime Minister on the irregular distribution of iron sheets, copies of all statements made by all interrogated individuals and OPM Staff in relation to the investigation of the iron sheets saga, including the statements of the Vice President, The prime Minister, Hon Rebecca Kadaga, Hon Rukia Nakadama, Hon Matia Kasaija, Hon Dennis Hamson Obua, Hon Amos Lugolobi, Hon Henty Musasizi, Hon Fred Kyakutaga Bruno, Hon. Oboth Oboth Jacob, Hon Judith Nabakooba, Hon. Jennifer Namuyangu, Hon Dr Moriku Kaducu, Hon Agnes Nandutu, Hon Rose Lily Akello and Hon Anyakun Esther Davina. They also request particulars and records of all individuals who returned the iron sheets that they have received from OPM, full particulars of the number of iron sheets and dates returned as well as the list of individuals who paid compensation for

the iron sheets. Lastly, copies of all the disclosed documents and exhibits provided to the defense counsel in the cases involving Hon Agnes Nandutu and Amos Lugolobi.

In the affidavit in reply of David Bisamunyu, he avers in paragraph 15 that the additional evidence requested is not part of the material evidence that the prosecution intends to rely upon during the criminal trial. Further that the complaints regarding pre-trial disclosures are trial issues and no complaint has been lodged with the trial court regarding the same. This aspect was not controverted. Very apparent from his cross-examination is that he does not believe the state has the duty to disclose the information requested for. I do not find his assertion that he did not have the duty to make the defense case to emanate from malice, but rather from his firm conviction regarding the materiality of the requested information, which is by no means a small request. In essence, the defense is requesting for all the evidence in respect of the iron sheets saga.

There is therefore an impasse on what should be disclosed and what should not. In keeping with my earlier reasoning, therefore, this is a matter for resolution by the trial court to exercise its discretion on what is required to meet the ends of the accused's right to a fair trial. I am of the considered opinion that in the **Aniket** case, the documents requested were accountability for the funds allegedly embezzled, hence the justification for faulting the trial court's rejection of the application for the state to disclose them. The relevance and materiality of the requested documents to the right to a fair trial must be determined by the trial court, in the circumstances of this case.

For this reason, I decline to hold that the accused person's right to a fair trial has been offended by the refusal of the state to disclose. This is buttressed by the fact that the trial has not started. No wonder therefore that the applicant's written submission on page 6 reads as follows, *"The respondent has demonstrated unwillingness to provide the additional disclosure implying that if the trial proceeds on the availed disclosure only, the applicant shall be greatly prejudiced since she will not have adequate facilities to prepare her defense under Article 28 (3) (c) thereby violating her non derogable right to a fair trial".*

The trial court is able to determine and protect the rights of the applicant to a fair trial,

I am convinced that the trial court is able to defend and protect the rights of the accused to a fair trial, as far as relates to pre-trial disclosure, especially considering the stage at which the matter is. Attention should be paid to the spirit of the Human Rights Enforcement Act which is to ensure a culture of human rights adherence.

The second limb of the applicant's submission pertains to what counsel for the applicant referred to as selective prosecution of the applicant. The court was asked to find that the DPP's act of allowing some of the implicated persons to return the iron sheets and opting not to prosecute them in courts of law amounted to gross prosecutorial misconduct and an abuse of the rights of the applicant to a fair trial. That prosecutions mounted on such abuse have been held to be a nullity. The respondent's case is that the DPP's powers were exercised appropriately and in accordance with the law.

Article 120 of the Constitution of Uganda gives the DPP the discretion to institute criminal charges against any person. **Article 120 (5)** thereof provides that in exercising his or her powers the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.

I have considered these submissions but have found no evidence adduced to warrant a conclusion that the decision to prosecute the applicant and not the rest of the suspects was exercised in contravention of Article 120 (5) of the Constitution and in a manner that is unfair, oppressive, discriminative and persecutory. I find the facts in the case of **Sundus Exchange and Money Transfer Ltd and others versus Attorney General, Civil Division Miscellaneous Cause 161/2019** which was cited by the applicant as authority, quite distinguishable from the instant case. In the latter, the DPP was alleged to have taken a decision to prosecute without giving the applicants the chance to be heard hence contravening the rules of natural justice. Further that the DPP was both investigator and prosecutor in the case and there was no complaint by anyone. Also, the Police and Financial Intelligence Authority (FIA) had cleared the applicants of wrongdoing inter alia. This is not applicable in the current case. Even then, I must point out that the decision is not binding on me, and I am not in agreement with it entirely.

There is no justification or grounds for the applicant's expectation that all the suspects in the iron sheets case should be treated exactly the same way. There is no indication that the cases against the applicant and the suspects not prosecuted are essentially the same requiring that all are either prosecuted or all are conversely set free and allowed to return the iron sheets. They have failed to establish unjust or prejudicial treatment in the DPP's decision to charge. It is a cardinal point of law that he who asserts has the burden to prove. I am not satisfied that this burden has been met.

Resultantly, this issue is resolved in the negative.

Whether the applicant's non-derogable right to a fair hearing and freedom from torture, inhuman and degrading treatment were violated by the respondent's agents during her investigation and interrogation

Applicant's submissions

It was submitted that the applicant was subjected to torture and that her rights under Article 28 of the Constitution were violated. The specific acts complained of include her arrest and treatment at Kibuli where she alleges she was subjected to inquisitorial questioning, threatened and forced to sign a statement she did not make, she was not informed of the nature of the charges against her, harassment and interrogation in a manner that would cause her to break down, insults and degrading treatment, detention in a dark room incommunicado. They included also, being paraded before the parliamentary committee on presidential affairs whose proceedings were conducted with a beehive of journalists and TV cameras, being blindfolded with a dirty cloth and driven around by armed guards as an interrogation tactic to cause psychological effect, being ordered to sit on a stool and failing to sleep the whole night, lengthy interrogation meant to break her down mentally, denial of access to a lawyer or family members, denial of food and water and detention for over 48 hours.

Several of the acts cited above were said to fit the definition of torture within the meaning of **Section 2 of the Prevention and Prohibition of Torture Act, 2012,** and the second schedule thereto. They cited **John Kagwa versus AG and another, Civil Suit No 273/2016** where the court was persuaded by the plaintiff's evidence that he was detained in a filthy cell with poor ventilation denied his right to a clean

environment, and that the denial of water or food while in detention amounted to degrading and inhuman treatment.

The court was asked to find that the applicant's evidence was not challenged on material or essential points by cross-examination and draw an inference that the same was accepted or true. They pointed out the contradictions, inconsistencies, and incredibility in the respondents' affidavits. Finally, they submitted that there was proof of both psychological and physical torture, which resulted in severe depression and anxiety, plus post-traumatic stress disorder. They prayed that the court would find in the affirmative.

Respondent's case

In reply, the respondent submitted that the applicant has a duty to prove the facts asserted as required by **Section 101 of the Evidence Act** but had failed to do so. They stated that the applicant, on the contrary, was handled with the utmost decorum and respect by all the agencies involved. She was offered drink and she declined the same. She was asked to send her bodyguard for food and drink but she declined. That the applicant's husband and an identified lady were allowed to visit her while her statement was being recorded, she was never threatened or coerced to make a statement rather the statement was read back to her and she confirmed it by signing, that she was never arrested at Parliament, never detained in a dark room as she spent only 20 minutes in the CID at Parliament and that she was produced in court within 48 hours of her arrest.

It was contended that the applicant had not presented any iota of evidence to substantiate her claims of torture and that the same did not reach the mark of severity required to constitute torture. They relied on the authorities of **Issa Wazembe versus AG, Civil Suit No 154/2016, Paulo Baguma Mugarama versus URA Civil Suit No 93/2014, Dr Laghu Charles versus AG, Miscellaneous Cause 370/2020, Ireland versus United Kingdom ECHR Application No 5310/71.**

Resolution

Article 24 of the Constitution guarantees freedom from torture, cruel, inhuman or degrading treatment or punishment. **Article 44(a)** further provides that there shall be no derogation from the enjoyment of this freedom.

Section 2 of the **Prevention and Prohibition of Torture Act, 2012** defines torture as follows;

(1)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 other person acting in an official or private capacity for such purposes as—(a)obtaining information or a confession from the person or any other person;(b)punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or(c)intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

(2)For purposes of this Act, "severe pain or suffering" means the prolonged harm caused by or resulting from—(a)the intentional infliction or threatened infliction of physical pain or suffering;(b)the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;(c)the threat of imminent death; or(d)the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Without limiting the effect of subsection (1), the acts constituting torture shall include the acts set out in the Second Schedule.

Schedule 2 of the Act provides the acts constituting torture and they include physical torture in the form of systematic beating, food deprivation and being tied or forced to assume a fixed and stressful body position. Mental or psychological torture, on the other hand, includes blindfolding, threatening the victim or his or her family with bodily harm, confining a victim incommunicado, in a secret detention place or other form of detention; confining the victim in a solitary cell or in a cell put up in a public place; confining the victim in a solitary cell against his or her will or without prejudice to his or her security; prolonged interrogation of the victim so as to deny him or her normal length of sleep or rest; denial of sleep or rest and shame infliction such as stripping the victim naked and parading the victim in a public place.

In order to meet the standard in Section 2, the acts constituting torture in Schedule 2 must be inflicted intentionally and must cause severe pain and suffering. They

must be also inflicted for the purposes cited in section 2, though the list is by no means exhaustive. This is owing to the use of the phrase "for such purposes as"

Article 28 (1) of the Constitution on the other hand provides for the right to a fair hearing as follows;

"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent court or tribunal established by law.

Under **Article 44 (c),** there can be no derogation from the right to a fair trial under Article 28 and the freedom from torture, and inhuman and degrading treatment. Once the court finds that the right to a fair trial has been infringed, it must declare the trial a nullity.

I will start my analysis by considering the affidavit in support of the application deposed by **Dr Hillary Irimaso**, a psychiatrist practicing with Kampala Medical Chambers Hospital where the applicant is an outpatient. His expertise was not contested. He averred that on 1st May 2023, he attended to the applicant and diagnosed her with severe anxiety, severe depression and post-traumatic stress disorder. He accordingly prescribed medication for her.

I note that this examination took place after the applicant's release on bail, because by her own admission in paragraph 34 of her supplementary affidavit, she was produced in court on 6th April 2023. The examination thus took place about one month from the time the alleged torture occurred.

During cross-examination, he stated that the incarceration of a person can lead to depression and anxiety and that there was no identifiable cause for the same for the applicant. He explained that there are biological risk factors and these can be genetic or hereditary. There are also psychological risk factors, of how a person perceives the world and thinks. He confirmed that arrest, detention and prosecution can cause anxiety.

It is true that the process of facing criminal charges, being investigated and prosecuted, arrested and detained is sufficient in itself to cause severe stress and depression, even in the absence of torture or harassment. In light of these

admissions under cross-examination, it cannot be ruled out that the applicant's severe anxiety and severe depression could have built up from the criminal charges. Other factors, hereditary or biological which were not investigated by the deponent could have predisposed or exacerbated her condition. I am fortified in my position by the statement of Martha Mary Lunyolo that before her mother went to the police she was not well. In that regard, I do not attach much weight to the doctor's findings in resolving the question of the alleged torture.

The position of the law is that torture may be proved without medical evidence. The Court of Appeal guided in **Paul Wanyoto versus Sgt. Oumo and AG, Civil Appeal No 91/2021** that the requirement for medical evidence to prove torture has no legal basis and that it should be noted that it is rare to have direct evidence of torture because of the nature of the crime. Most torture cases are carried out in secret.

In light of the foregoing, I will proceed to scrutinize the applicant's claims of rights abuses under specific headings

a. <u>Blindfolding as psychological torture and deprivation of food while on alleged drive to Kayunga</u>

The applicant's case is that at about 9 p.m. on 4th April 2023, she was marched out and ordered to enter one of the trucks where she was sandwiched between two armed women who told her that they were driving her to Kayunga to look for the iron sheets. She was then blindfolded with a dirty cloth and the truck began to move in directions she did not know. Occasionally, a male voice from the car window demanded that she tell them where the iron sheets were. She responded that she did not know. At that point, she was extremely scared for her life. She states that during this tribulation, the only time the blindfold was removed was when they reached places she did not know and she was asked if that was where she kept the iron sheets. She claims she was finally taken to Kiira Police in the wee hours of the morning, at 3 a.m.

Blindfolding as an instrument of torture has the effect of impressing great fear in the person blindfolded, and a sense of loss of control. One cannot see anything, their imagination runs wild and they cannot defend themselves because they are

not able to see and cannot react to mitigate any danger that's coming their way. It can be used to secure information or for any of the purposes cited in section 2 (1) of the Act against Torture. This is why it appears on the second schedule among the acts of torture. Not every blind folding amounts to torture.

SCP Beata Chelimo avers that she signed the detention order at 9 p.m. on the 4th of April 2023 and assigned **D/SP Neboshi Sophy** and **D/SP Nakatudde Winnifred** who were unarmed to escort the applicant to Kiira Division Police station on Vehicle No UP 5439. At 10.50 p.m. Neboshi informed her of their arrival and the applicant's booking in. She states that the applicant was never driven to Kayunga, nor was she blindfolded or subjected to any torture. Under cross-examination, she was emphatic that there was no justification to take the applicant to Kayunga.
The applicant correctly contends that **SCP Chelimo** was not on the truck, or at the police station therefore she is incapable of giving any evidence on whether there was any torture or blindfolding. I however find her evidence on the time and circumstances under which the applicant left Kibuli that evening very relevant.

D/SP Neboshi Sophy avers in paragraphs 17 to 25 that she received a detention order from Beata Chelimo at 9 p.m. on 4th April 2023, and she together with Nakatudde Winfred ASP escorted the applicant to Kiira Division Police station. Owing to the heavy traffic they used the Kisaasi Kyanja route and they arrived at their destination at 10.45 pm. She was searched, her details captured and booked in at 22:46 hours. She was never driven to Kayunga, nor was she threatened or blindfolded along the way.

D/ASP Twesigye, the officer in charge of the police station confirms that the applicant was taken to Kira Division police station at 10:46 hours by two female officers and booked in. Her details were entered in the police lock-up register marked Annexure B to his affidavit. I carefully considered the same, which shows that Twesigye booked out to Najjera at 22:01 hours, and the applicant was booked in at 22;46 hours. The entry reads, *"D/ASP Neboshi Sophy and party attached to CID Headquarters book in their presence on duty of handing in one Mary Goretti Kitutu for safe custody pending further instructions."*

I have found no evidence impeaching the integrity of Annexure B and it speaks for itself. I have no doubt of its authenticity. I find that it sufficiently corroborates

the respondent's case and casts doubt on the credibility of the applicant's assertions that she was driven around and taken to Kiira Division Police station in the wee hours of the morning. It validates the relevant averments in the affidavits of three police officers. Under cross-examination she clarified that she was taken to Kiira Police station at 3 am. Annexure B shows she was booked in at 10.56 p.m. and the evidence of SCP Chelimo Beata is that she signed the detention order at 9 p.m. This translates into under two hours' duration from the time of signing the detention order and her arrival at Kiira Division Police station.

Under cross-examination, D/SP Neboshi stated as follows;

"It is true we took one hour and forty-five minutes with a lead car. We took this time but it's not because we were driving the applicant around blindfolded. It is about twenty kilometers between Kibuli and Kiira Division Police Station… We left Kibuli, and passed through Jinja Road, Kololo and the bypass. From Lugogo to Kisaasi turning took us so long, thirty minutes because there was a jam. The driver of the lead car turned on Kisaasi Road because Ntinda was heavy. We went to Kyanja, the ring road, then Najjera. The Minister was not blindfolded"

I find this a reasonable time frame for the movement to Kiira Division Police. I find the respondent's account of events to be truthful. I find the appellant's claim that she was threatened, blindfolded, and driven around unknown places through the night to locate the iron sheets incredible. I dismiss it as such. This renders suspect all that she claims happened on the alleged trip to Kayunga, including her claim that during the trip she demanded food and water and was denied, and I choose not to rely on it. Furthermore, in light of her claim that she did not tell the police officers anything during the interview, it seems rather odd that they would set off for an unknown destination in the night, and then randomly stop, remove her blindfold, and ask if they had reached the places which she did not know. I find her averments in paragraphs 25 to 29 which concern the alleged trip to be false. I choose not to rely on them because the account of events offered is incredible. The court has the right to disregard incredulous evidence.
The evidence tendered fell short of the requisite standard.

b) <u>Denial of food</u>

The second schedule of the Prevention and Prohibition of Torture Act 2012 lists the denial of food among the acts of torture.

Micheal Kitutu, Muhwezi Lunyolo Martha Rose and Muhwezi Muraali Maurice who were the applicant's husband, sister-in-law and brother-in-law respectively aver in their affidavits that they were allowed to see her on 5/4/2023 and gave her food to eat at 1 p.m. In paragraph 14, Micheal Kitutu avers;

"We were unable to access the applicant until at around 1 p.m. when the police officers finally allowed us to see her and give her the food that had been prepared by Martha Muhwezi after she had spent over 24 hours in detention without food or water"

Muhwezi Lunyolo avers in paragraph 6 of her affidavit;

"That I and my husband decided to go back home upon failing to see the applicant. That early in the morning I prepared breakfast and headed to the police station and was only able to see the applicant at 1 p.m. despite reaching much earlier. By that time, she was very weak as she had not had anything to eat or drink for over 24 hours."

Muhwezi Muraali avers in paragraph 9 of his affidavit as follows;

"That it was only late around 1 pm that we were allowed to see the applicant and give her breakfast" and in Paragraph 11 *"that she was looking very weak and hungry."*

I find it noteworthy that none of them stated that they had faced any difficulty in being allowed to give the applicant food when they saw her, or that she made any complaint to them about having been denied food and drink. They claim she had not had anything to eat for 24 hours, yet they were not with her and could therefore not confirm the same. They failed to disclose the source of their information or belief that she had not eaten for 24 hours. It is a cardinal rule of law that affidavits based on information must disclose the source of information. Disclosing the source of information of facts deponed to information, and giving ground of belief where facts are deponed on belief is a fundamental requirement in drafting affidavits, and the omission goes to the root of the affidavit. See Spry J's holding in **Premchard Raichard vs Quarry Services Ltd (1969) EA 514** at page 517. That notwithstanding, what they stated under cross-examination was that the applicant had told them *"she had not eaten for 24 hours"* This does not shed light on why she had not eaten.

I note a contradiction between the above witness' statements and that of the applicant on the matter of the time when her visitors were allowed to see her, and when she got food to eat. In paragraph 33 of the affidavit in support of the application she avers, *"I was never given any food or water and did not eat for the whole*

day and the whole night until the following day at around 10 a.m. when my sister-in-law was finally allowed in to bring me some hastily improvised meal." Under cross-examination, she was emphatic that the first person who visited her came at 10 a.m. on 5th April 2023 and that's when she had some food.

I find this a significant departure from the relatives who stated that they saw her at 1 p.m. and I conclude that it is proof of deliberate untruthfulness in the applicant's case. I am unable to conclude from the applicant's affidavit that the meal she had at 10 am was the only meal she had for the period under detention because she does not state so, neither does she state that when visitors came to see her in the morning at 10 am, they were denied the opportunity to give her food.

The respondent on the other hand made averments to the effect that the applicant was offered water and declined it, further that she was given the opportunity to send her bodyguard for food and she also declined it. In paragraph 22 of **SCP Chelimo Beata's** affidavit, she avers that she offered bottled water or water from the dispenser to the applicant during the interview and she declined. In paragraph 23 she avers that she told the applicant that she was free to send either her guard or driver for food or drinks from outside if she was uncomfortable with what they had to offer, and this too was declined. In cross-examination, she was firm that she did not offer any food. She had not stated otherwise. **A/SP Neboshi Sophy** in paragraph 13 states that she asked the applicant whether she had eaten and she said she was fine. She also informed her she could send her bodyguard for food and she declined. She further states that the applicant replied that she could even spend two days without eating. **Sowed Mohamed** in paragraphs 24 and 25 of his affidavit confirms or corroborates Sophy Neboshi's assertions.

I find that the version of events offered by the respondent's witnesses was credible and truthful, as compared to the applicant's case, on a balance of probabilities. I am not satisfied that there was a deliberate and intentional denial of food for any of the purposes cited in **Section 2 (1) of the Prevention and Prohibition of Torture Act.**

There was a break in the period when the police was in control of the applicant. From the evidence, she was released to go to Parliament and only returned at around 4 p.m. I am therefore considering the period between 10 p.m. and 10 a.m.

the next day when the applicant ate her breakfast. The witnesses for the respondent affirm that they did not offer her food, but they gave her the opportunity to send her bodyguard for food which she declined. This does not amount to a denial.

c) Detention for over 48 hours

Counsel for the applicant contend that she was not produced in court within 48 hours of arrest. They allege that from 9 a.m. on the 4th of April 2023 until her production in court at 2.30 pm on 6th April 2023, over 48 hours had passed.

Article 23 (4) of the Constitution provides that a person arrested or detained shall if not earlier released be brought to court as soon as possible but in any case not later than 48 hours from the time of his or her arrest.

In paragraph 6 of the applicant's affidavit in support, the applicant narrates what happened when she went to the office of the Director of CID on 4th August 2023 at 9 a.m. She avers that;
"To my dismay when I arrived at his office, I was immediately arrested and subjected to inquisitorial questioning by a mob of 9 security personnel who interrogated me about issues to do with stores with iron sheets….

In Paragraph 10, *"That after the questioning Major Magambo Tom told me to go and meet the Parliamentary Committee on Presidential Affairs…"*

Paragraph 16 *The Chairperson of the committee without considering my request, ordered the Parliamentary Committee to arrest me and hand me back to the CID Head, Major Magambo"*

The applicant's version of events is that she was arrested immediately after she arrived at the CID headquarters in Kibuli. This differs from the respondent's version. The only aspect not controverted is that the applicant went to the police by herself, with her driver and bodyguard.

SCP Chelimo Beata states as follows;

Paragraph 25: *"At some point during the statement recording, D/SP Sowedi Muhammed came and called me from the boardroom indicating that someone urgently needed to talk to me on phone."*

Paragraph 26: *"We hurriedly moved to my office where the statement was being recorded*

Paragraph 27*: "I know the applicant was called on her phone which she handed to me to confirm to the caller that the applicant was at the Directorate of Criminal Investigations Department at the time, which I did*

Paragraph 28*: "I know the person I talked to on phone introduced himself as the Deputy Chairperson of a committee of Parliament on Presidential Affairs and informed me that the applicant was required to appear before the Committee*

Paragraph 29*:" After the call, having understood the purposes of the meeting at Parliament, I allowed the applicant to go and meet up with the Committee and thereafter return to complete her statement recording"*

Paragraph 30*:" That the applicant was left to proceed to Parliament in her personal car"*

Paragraph 31*: That at about 16.30 hours the applicant returned in the company of a female police officer who brought her back to the Directorate of Criminal Investigations*

The import of the foregoing is that the applicant was never arrested or detained when she first appeared at Kibuli as she alleged. There is corroboration of this in the affidavits of D/SP Neboshi Sophy and D/SP Sowed Mohammed. The first evidence of detention of any form is when she was handed to Parliamentary Police to take her back to Kibuli. This is confirmed by Hon Adolf Mwesigye, Clerk to Parliament who stated that the applicant refused to take oath or answer questions put to her, as a result of which she was handed over to the Parliamentary police. The parliamentary committee did so because they were aware of the limitations to their investigative powers and so they referred her to the Police for further investigations.

D/ASP Mutuwa Juliet states that at about 3.30 p.m. on 4th August 2023, she was called to the Committee room and requested to escort Hon. Kitutu Mary Gorretti

to CID Headquarters. She called CP Chelimo and informed her that she had been directed to bring the applicant back to Kibuli. The applicant used her own vehicle and travelled along with her bodyguard back to Kibuli, under the escort of D/ASP Mutuwa. Under cross-examination, she confirmed that at this point, the applicant was under arrest.

I am of the considered view that the above facts support the conclusion that the applicant was not under arrest or detention at the time she went to Parliament. If she was under arrest she would not have been permitted to drive alone, with the bodyguard and driver to Parliament. There is no evidence that the applicant was led to the commission by the Kibuli team. No wonder when there was a decision taken for her to be returned to the police for further investigations, they had to find a police officer to escort her. I find the applicant's bare and unsupported claim that she was taken to Parliament by police unreliable.

Mutuwa states that she was handed the applicant at 3.30 pm. This was not challenged. I am satisfied that at this point she was no longer a free person. This is the point at which the 48 hours begin to run.

There is no contention regarding the date when the applicant was produced in court. Counsel for the applicant submitted that their client was produced in court at 2.30 pm. The applicant herself states so in her affidavit. This demonstrates that the applicant was in fact produced in court within 48 hours of her arrest or detention.

c) Access by lawyers and next of Kin:

Article 23 (3) of the Constitution provides that **a** person arrested, restricted, or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice.

The applicant successfully established that the accused was not informed of her right to legal counsel. None of the police officers in charge of her interview informed her of this right. She was not also informed of the same at the point of

her detention at 9 p.m. on 4th April 2023. I will deal with this aspect at the conclusion of my analysis.

Article 23 (5) (a) of the Constitution provides that where a person is restricted or detained, the next of kin of that person, shall at the request of that person, be informed as soon as practicable of the restriction or the detention.

Article 23 (5) (b) provides that the next of kin, lawyer, and personal doctor of that person shall be allowed reasonable access to that person, while **Article 28 (3) (b)** provides that every person who is charged with a criminal offense shall be informed immediately, in a language that the person understands, of the nature of the offense

There is no evidence on record that the applicant requested to be allowed to notify her next of kin of her whereabouts and detention. I am convinced that she in fact did not request to call anyone about her detention because they were already aware. This lends credence to the evidence of the investigators at Kibuli, that in the course of her interrogation, her husband and an unknown lady came to the station. Both claim that had received the information about her arrest from other parties.

Under cross-examination the applicant stated as follows; *"I was visited by people during that time till trial. I did not know that the police have visiting hours for suspects. If I knew this, I would not complain if someone is denied a chance to see me if they come at that time. The first person who visited me came at 10.00 am".*

The applicant's relatives all testified under cross-examination that they were at Kiira Division Police station at about 3 am together with her lawyer. Under cross-examination, Martha Rose Lunyolo stated that she was aware that there are visiting hours but still believed it was okay to visit the applicant at 3 am. I find that rather ridiculous. Micheal Kitutu on the other hand testified under cross-examination as follows;
"I went to Kibuli CID Headquarters to see my wife. I went to Kiira Division Police Headquarters to visit the applicant between 3 am and 3.30 am on 5/4/2023. I am not aware that the police have visiting hours. If I had known that it was not the right visiting time I would not have gone there".

I have considered the uncontested evidence of **D/ASP Twesigye** who averred in paragraph 10 of the affidavit in reply that inmates are not allowed to receive visitors at night for security reasons. This evidence was not controverted and is more logical than the claim by the witnesses that access was denied on the instructions of the Director CID.

The Constitution allows reasonable access to next of kin and lawyers, the police are imbued with the power to regulate access to persons in their detention, within reasonable bounds. In the instant case, I find a justifiable reason, for the police to have turned them away when they went to visit in the night and reject that evidence as proof of incommunicado detention and breach of the right to legal representation.

Regarding the latter, it is not enough for an applicant to claim that she was not allowed access to her lawyer. There should be proof to satisfy the same, or else the sky would be the limit to claims of this nature. I do not find any. The applicant, knowingly went to the police by herself anticipating she would be interviewed minus any legal representation is proof that she did not think she needed one. There is no proof that she asked for one, or made any effort to contact one. There is no proof that any came to the police and was denied access. I note she had access to her phone until its removal just before the detention Order was made at 9 a.m.

I have considered the evidence of the Hon. Adolf Mwesigye Kasaija Clerk to Parliament which I produce here below:

Paragraph 6: *That I know that the Parliamentary Committee on Presidential Affairs conducted an enquiry into the procurement and distribution of iron sheets meant for the Karamoja Region.*

Paragraph 8: That I know that at all material times during the proceedings, the Committee upheld and protected the fundamental rights of the applicant and accorded the applicant a fair hearing during the enquiry into the procurement and distribution of iron sheets meant for the Karamoja Region

Paragraph 9: *That I know that the applicant appeared before the committee on 3rd March, 2023 and requested to be heard in closed doors which request was granted.*

Paragraph 10: *That I know the applicant was on 15th March 2023, 17th March 2023 and 31st March 2023 called to appear before the committee for the closed-door hearing but she declined to appear before the committee*

Paragraph 11: *That I know the applicant appeared before the committee on the 4th of April 2023 but she declined to take oath or answer any questions put to her by the members of the Committee*

Paragraph 12: *That I know that when the applicant declined to take oath or answer the any questions put to her, the committee handed the applicant back to the parliamentary police*

Paragraph 13: *That I know that taking oath is part of the processes that witnesses are subjected to prior to giving evidence before parliamentary committees and is provided for by the constitution of the Republic of Uganda.*

Paragraph 14: *That I know that the applicant was invited to the committee as a witness to facilitate investigations in line with the constitutional powers accorded to Parliament*

Paragraph 16: *That the applicant was not called a thief by any member of the committee as alleged, the committee proceeded with decorum at all material times.*

Paragraph 17: *That I know that the applicant never elected or requested to appear with any counsel before the committee*

I have considered the various Annexures to his affidavit including the letters inviting the applicant to appear before the commission, the invitation to the requested closed-door meeting and the Minutes of the proceedings of 4th April 2024.

The Minutes show that the meeting started at 2.15 pm, and several witnesses appeared before the committee including Hon Agnes Nandutu, Dr Joyce Moriku Kaducu, Hon. Rose Lily Akello and Hon. Judith Nabakooba. They reflect that when asked to answer questions, the applicant declined prompting the chair to

put her under oath which she also declined. Owing to what is termed her recalcitrance, she was handed to the police to record a statement.

I find the above to be a true version of events as there is sufficient evidence in support. Under cross-examination, he confirmed that the committee proceedings are covered by the media. He could not recall if the media advised her of the right to counsel.

There is no proof that she was abused and called a thief either at the police or parliament or harassed by the respondent's agents.

d) Solitary confinement

Regarding the conditions of her detention at Kiira Division Police Station, it is the applicant's case that she was put in solitary confinement. This submission runs contrary to her averments in paragraph 31 of her affidavit that *"I was put in a very dirty, cold and stinking room where I found a lady sleeping on a tiny mattress. I was then ordered to sit on a stool and failed to sleep the whole night"* It also runs contrary to her evidence under cross-examination, that she in fact received visitors while in detention, starting at 10 am on 5th August 2023.

Being alone in a cell does not by itself amount to solitary confinement within the meaning of the Prevention and Prohibition of Torture Act. Solitary confinement is defined in **Black's Law Dictionary, 8th Edition at page 1428** as separate confinement that gives a prisoner extremely limited access to other people, the complete isolation of a prisoner. There is evidence from the applicant herself that she was visited by people during the time she was in the cells. This is confirmed by her witnesses.

D/ASP Twesigye avers in paragraph 5 that he received instructions to prepare a VIP room for the applicant, which he did. The applicant was kept in a special self-contained cell that contained a five-by-six mattress, bedsheets, and a blanket that had been organized for her. Under cross-examination, he firmly stated that it was the female cells' guard who prepared the room for the applicant and that the applicant was given a single room. As the officer in charge of the station, the court can safely presume that he knows what is at his station. He states he was the one who instructed the cells' guard. Failure of the respondent to include her as a

witness in my view is not fatal. The assertions of Twesigye are supported by CP Chelimo Beata who explained under reexamination that she chose to detain the applicant at Kiira Division Headquarters which is a new facility and is less congested. She was of the view that it would afford the applicant a more suitable environment. I am aware that photos were not presented of the room where she was detained. Nevertheless, I find the available evidence sufficient.

It is interesting that the applicant turns around, or changes position and uses the respondent's evidence of being kept alone in a cell by herself as grounds for solitary confinement which is an act of torture, when she had previously stated on oath that she was not alone in her cell. It would appear that the applicant is accepting this piece of evidence of being accorded a private room because it suits her ends and forgets that it contradicts her earlier averments.

In light of the foregoing, I dismiss the applicant's claims that she was intentionally forced to sit on a stool the whole night as an act of torture for the purposes specified in the Prevention and Prohibition of Torture Act.

e) Forced recording of statements, non-notification of charges

I have considered the above submissions. I have also looked at the impugned statement. It is a very detailed 12-page statement signed by the applicant. It shows that it was read back to the applicant who signed it, wrote her name and dated it. The last page starts as follows; **"***I wish to add…***"**, and ends with *"This is all I can add for now. It is correct and true"* and is again signed and the name Kitutu Mary Goretti Kimono is written in separate ink and dated.

The applicant does not deny appearing before police at CID and being asked questions. She however alleges the team had pre-arranged answers, and wrote what they wanted, despite her claims that she did not know anything about the case. That, thereafter, she was forced to sign what she did not know. Under cross-examination, she stated that she was interrogated by the police from 9 am to the time when she left for Parliament. Why would an interview last that long if she had failed to cooperate or say anything?

Considering the details, especially of personal information I am not convinced that the Minister said nothing to the detectives in all that period of time. I balance this against the consistent and undiscredited evidence of SCP Chelimo, D/SP Neboshi

and D/SP Sowedi that what they wrote in the statement is information she provided.

As regards the number of officers and the conduct of the interrogation, am unable to find for the appellant as there is no restriction to the number of investigators that can conduct an interview.

Conclusion

The evidence of the applicant has established that she was not informed of the right to have a lawyer present at the interview. I have also found that at this point she was not under arrest, contrary to the submissions of counsel for the applicants. She was also not informed of the reason for her detention. This was in contravention of the rights enshrined in Article 23 of the Constitution. No statement was recorded from her as a suspect. The question that this court is to determine however, is whether this resulted in an infringement of her right to fair trial, as pleaded.

The right against self-incrimination by an accused means that it is not a blanket requirement that a suspect must have a charge and caution statement recorded. I disagree with the decision in **Cairo International Bank versus AG HCMA 52/2014** that failure to record a charge and caution statement from an accused person infringes the right to a fair trial. Though she was not informed of the case against her at the point of arrest and detention, she had a fairly good idea why she was being detained. Clarity on the nature of the charges has been made with her appearance in court. It cannot be said that her right to a fair trial has been affected by the failure to be notified of the specific charges against her at the police. The applicant in this case was generally aware of the nature of the case against her, even if she did not know the specific offenses. She had been earlier interviewed as a witness. From her affidavits she was aware of the investigations into the iron sheets saga. The same applies to failure to be notified of her right to counsel, especially since no statement was taken from her as a suspect. The evidential value to be attached to the witness statement is questionable. I would have found the failure to advise her of the right to counsel as affecting the right to a fair trial if she had been interrogated as a suspect and statement recorded from her.

I find against the applicant on this issue.

Whether the applicant's non-derogable right to a fair hearing has been violated through prejudicial, targeted and malicious media coverage against her

The applicant contends in the Notice of Motion that the malicious, false and targeted media campaign orchestrated by some state institutions through state-owned media and social media platforms has irreparably violated the applicant's right to a fair hearing and no fair trial can ensue from it.

Applicants submissions

It was submitted by the applicant that the presumption of innocence is a procedural safeguard to the right to a fair hearing which must be respected by the State, private individuals and bodies including the media, judicial officers, investigators and other persons in society. The case for the applicant is that prior to charges being instituted against her, she was subjected to prejudicial media campaigns, especially in the state-owned "New Vision" beginning on 13th February 2023 to 28th March 2023. These publications sought to portray the applicant as the villain and the guilty party in the diversion of iron sheets. Articles allegedly riddled with inaccuracies and outright distortions were furnished in evidence. It is contended that the publications gravely injured the applicant's presumption of innocence and the possibility of receiving a fair trial for the following reasons:

1. That the media disclosed facts or opinions which pose a threat to fairness in the trial
2. That her presumption of innocence was abused by the papers
3. That they contained misinformation intended to incite the public against the applicant.

Respondent's submissions

They submitted that no state-owned media or social media platform has orchestrated a malicious false and targeted campaign against the applicant. That the Respondent does not and cannot control what the media does. Furthermore, it is contended that the applicant had failed to adduce evidence in support of its allegations.

It was argued that freedom of speech and expression is a fundamental right and the media plays the accountability role of monitoring and investigating actions of those granted public trust, including the applicant.

Resolution

Article 29 (1) of the Constitution guarantees the right to freedom of speech and expression, including freedom of the press.

This right is not absolute. **Article 28 (1) and (2) of the Constitution** provides that;

"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

The court has the authority to direct how the media handles proceedings before it to ensure that the right of the accused person to a fair trial is protected. The trial court has already entertained the applicant's concerns relating to the conduct of the media at the trial and issued directions which include exclusion of live coverage, and pictures in the courtroom. In the case of **Sheppard versus Maxwell, Warden 384 US 333 (1966)** supplied by the applicant, the trial began just before hotly contested elections where the chief prosecutor and trial judge were candidates. Newsmen were allowed to overrun the court and pervasive publicity was given, much of it including incriminating matters not introduced at the trial. The trial Judge announced that neither he nor anyone else could restrict the prejudicial news accounts and failed to take measures against the same. He was faulted for this and the massive prejudicial publicity attending the prosecution was said to have affected fair trial.

I note that the applicant's allegations of abuse of the presumption of innocence do not emanate from the conduct of the trial and court reporting of the proceedings,

but rather from newspaper articles written for public consumption. The applicant submits that there should be secrecy in investigations.

The Respondent aptly stated the law regarding the freedom of the press and relied on the authorities of **Reynolds V Times Newspaper Ltd (2001) AC 127 and Gulf Oil (GB) Ltd v Page and others (1987) 3 ALL ER 14** for the principle that the right of speech is for the public interest and should be exercised so long as no wrong is done, and there is no wrong done if it is true or fair comment.

The question is whether such wrong has been committed in the instant case as to affect the right to fair trial.

I have scrutinized the articles presented, along with the evidence in the affidavits and the submissions. I have seen and analyzed articles headed; OPM orders probe into the diversion of relief items, New details emerge on OPM saga, OPM Releases report on iron sheets Bonanza, Parliament kicks off probe into Karamoja iron sheets- goats saga, OPM Orders Ministers to account for iron sheets, Three districts did not see iron sheets, Kitutu pleads for more time to explain the iron sheets saga, Detectives raid Minister Lugoloobi's farm and seize iron sheets, Iron sheets minister (Akello) under probe over the arrest of youth, President Museveni directs CID over iron sheets, Police gives Kitutu more time, Karamoja iron sheets-CID to complete investigations, Minister's brother, nephew held over selling relief items, Nabbanja asks Kitutu to explain Karamoja iron sheets saga, I rightly took iron sheets (PM Nabbanja), Officials who took iron sheets from OPM.

These articles do not reflect that the applicant was targeted and portrayed as guilty. She was not singled out neither is there any report that says she is guilty. As the Minister responsible for Karamoja it is expected that she would be at the centre of the investigations. The media cannot be gagged from reporting matters of public concern fairly.

Failing to prove that the applicant was portrayed as a guilty person, I am unable to find that her right to a fair trial has been infringed and that she is not likely to receive justice in the trial court on account of the reporting.
I must observe, however, that the level of information in the hands of the media, especially regarding ongoing investigations is a matter for concern. The Director

of CID and other similar investigating authorities are urged to exercise caution not to conduct investigations in the media.

In **Dr. Charles Lagu and others versus Attorney General, Misc. Cause No 370/2020,** the Hon. Justice Ssekana rightly guided as follows; *"Public officials including judges, prosecutors, the police and government officials, all of whom must avoid making public statements of the guilt of an individual prior to conviction or after an acquittal. It is permissible, however for the authorities to inform the public of the name of a suspect and that the person has been arrested or has made a confession, as long as the person is not declared guilty"*

Lastly, I agree with the respondents that the enquiry of the parliamentary committee is not for the purpose of criminal sanctions, and cannot be equated to the functions of the CID. Different bodies may investigate a matter, though for different purposes. For this reason I have not found it necessary to address the issue of right to counsel during proceedings.

The critical question here is whether wrong has been done by the media coverage and the parallel investigations to the extent that the applicants right to a fair trial has been compromised.

I answer this in the negative.

Conclusion

The Hon Justice Dr Henry Peter Adonyo perfectly summarised the right to a fair trial in the case of **Dr Stella Nyanzi versus Uganda, Criminal Appeal No 0079/2019** as follows:

"It should be noted that a fair trial is not just about protecting suspects and perpetrators of offenses but it is a representation of a safe and strong democratic society. Without fair trials, victims of crime can have no confidence that justice shall be done."

Where it is infringed, the court must declare the trial a nullity. Any person alleging such violation has the duty to court to prove, on the balance of probabilities, that her non derogable rights have been violated as pleaded. The applicants have failed to discharge the burden.

I accordingly find that:

1. The investigations into the alleged theft of iron sheets meant for the Karamoja community empowerment program and the resultant criminal charges were not irreparably tainted with gross abuse of the applicant's non-derogable rights with the effect that the trial in HCT-00-AC-SC-0005-2023 is a nullity in law

2. The applicant's non-derogable right to a fair hearing have not been violated through the denial of disclosure of exculpatory exhibits and documents in possession of the State

3. The media reporting in the iron sheets case has not irreparably violated the applicant's right to a fair hearing in HCT-00-AC-SC-0005-2023 that no fair trial can ensue from it

4. Members and agents of the Uganda Police, the Parliamentary Committee on Presidential Affairs and other state institutions did not subject the applicant to torture or cruel, inhuman and degrading treatment during the course of their investigations against her.

The application therefore fails and is dismissed with no orders as to costs.

The trial in HCT-00-AC-SC-0005-2023 is to proceed.

Jane Okuo

Judge

28.11.2023

Delivered in open court in the presence of:

Jude Byamukama and Zahara Tumwikirize for the applicant
Johnson Natuhwera SSA, AGs Chambers
Amina Namale SA AGs Chambers