

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA (Civil Division)**

**Misc Cause No. 81 of 2020**

**HUMAN RIGHTS AWARENESS AND  
PROMOTION FORUM (HRAPF)                   ===== APPLICANT**

**Versus**

**1. ATTORNEY GENERAL  
2. THE COMMISSIONER GENERAL                   ===== RESPONDENTS  
OF PRISONS**

**BEFORE: HON. JUSTICE MICHAEL ELUBU**

**RULING**

This is an application filed under Articles 23 (5) (b), 28 (3) (a), (c) & (d) and 50 (2) of **The Constitution of the Republic of Uganda**, Sections 3 (1), 3 (2) (c), 4 (1) and 10 of **The Human Rights (Enforcement) Act, 2019**; Section 33 of the Judicature Act Cap 13; Section 98 of **the Civil Procedure Act** and Order 52 Rules 1 and 3 of the **Civil Procedure Rules S.I. 71-1**.

The applicant is the **HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)**. The respondents are named as: 1. The Attorney General and 2. The Commissioner General of Prisons.

In the prayers as stated in a Notice of Motion filed on the 24<sup>th</sup> of April 2020, the applicants seek,

1. A declaration that the Respondents' actions of denying the Applicant's clients: MUKIIBI HENRY, TUMUHIMBISE DOUGLAS, KIBALAMA ANDREW, KATEREGGA SADDAM, JJUUKO RAJ, KUGONZA KELVIN, SSAMULA DENIS, GWANVU ABBEY, YIGA KAREEM, KIFUBA TEVIN HARRIS, TUSHABOMWE JABEL, KAWOOYA IVAN, WALUGEMBE ASHRAF, JAMES TENDIBWA, MUHEREZA MARK, OKETCH JOEL, SSENKONGA RONALD, SHEEMA RODNEY, AND MAYANJA JACKSON (herein after 'The Accused Persons') access to their legal counsel violates and contravenes their right to a fair trial guaranteed under article 28(3)(a), 28(3)(c), 28(3)(d) and article 44(c) of the Constitution of the Republic of Uganda, 1995 as amended.
2. A declaration that the Respondents' actions of denying the Accused Persons access to their legal counsel violates and contravenes their right to liberty guaranteed under article 23(5)(b) of the Constitution of the Republic of Uganda, 1995 as amended.
3. An order that the Accused Persons, who are currently on remand at Kitalya Prison, be allowed access to their legal counsel.
4. Costs of this application be provided for.

The grounds of this application are set out in the Notice of Motion and elaborated in the attached affidavit in support deposed by Dr. Adrian Jjuuko the Executive Director of the applicant.

They are,

- a) That on 31<sup>st</sup> March 2020, the Accused Persons were charged with doing 'a negligent act likely to spread infection of disease contrary to section 171 of **the Penal Code Act**, arraigned before the Chief Magistrates Court of Mpigi holden at Nsangi vide Criminal Case No. 113 of 2020 and remanded to Kitalya Prisons until 28th April 2020.
- b) That the criminal charges arose out of the arrest of the Accused Persons on 29<sup>th</sup> March 2020, following which event they were detained at Nkokonjeru Police Post until 31<sup>st</sup> March 2020.

- c) On the day of their first appearance in court, the Accused Persons were not represented by their advocates due to the travel restrictions imposed the night before to combat the spread of COVID-19, and they have had no access to their legal counsel since then.
- d) That later on the same 31<sup>st</sup> day of March 2020, Advocates from the Legal Aid Clinic of Human Rights Awareness and Promotion Forum (HRAPF) made a visit to Kitalya Prisons, where they were informed by the Officer in Charge that the accused persons were not in custody of Kitalya Prisons, and that in any case, lawyers could be only granted access with express permission from Prisons Headquarters.
- e) That on 2<sup>nd</sup> April 2020, the Advocates visited Kabasanda Prison to find out whether the Accused Persons had been taken to that prison instead of Kitalya Prisons. The Officer in Charge of the Prison informed the Advocates that they did not have the said persons in their custody, and then provided the lawyers with the telephone contact of the Officer in Charge of Kitalya Prison. One of the Advocates, Ms. Patricia Kimera then called the Officer in Charge of Kitalya Prison on the number provided, and he confirmed that he had the Accused Persons in detention, but that he could only provide the lawyers access to them with express permission from Prisons Headquarters because of the COVID-19 restrictions. .
- f) That on 3<sup>rd</sup> April 2020, a letter was written asking the Commissioner General of Prisons for permission for Ms. Patricia Kimera to access the Accused Persons in order to advise them on the legal options available to them.
- g) That the Commissioner General of Prisons responded to that request 19 days later by a letter dated 22<sup>nd</sup> April 2020, in which it was stated that the HRAPF lawyers could not be allowed to access their clients because 'of the current COVID-19 pandemic lockdown.' The lawyers were advised 'to be patient until the situation improves'.
- h) That the Accused Persons' advocates have repeatedly tried to gain access to Kitalya Prisons to discuss the Applicants' bail application and their defence to the charges but have been denied access to the Accused Persons by the prisons authorities.

- i) That the actions of the Respondents in denying the Accused Persons legal representation contravene and are in violation of the fundamental rights and freedoms guaranteed under articles 23(5)(b), 28(3)(a), 28(3)(c), 28(3)(d) and article 44(c) of **the Constitution of the Republic of Uganda**.
- j) That the actions of the Respondents of denying the Accused Persons access to legal representation are unconstitutional and unlawful.
- k) That it is urgent, equitable and in the interests of justice that the Accused Persons are allowed access to their legal counsel to prepare their defence.
- l) That this Honourable Court is vested with inherent jurisdiction to grant the remedies sought herein.
- m) That failure to grant this application will occasion a miscarriage of justice.

There is evidence on record that the 1<sup>st</sup> respondent was served on the 15<sup>th</sup> of May 2020. A return of service attached to the affidavit of one Tumwesige Francis, who effected the service on the 1<sup>st</sup> Respondent, shows an acknowledgement by received stamped dated the 15<sup>th</sup> of May 2020. It is also deposed that the 2<sup>nd</sup> respondent was duly served on the same day but declined to endorse the same because it was claimed the 1<sup>st</sup> respondent, as A-G, represents the 2<sup>nd</sup> respondent.

In light of the above this court is satisfied that there has been proper service and will proceed to hear the matter ex parte.

At the hearing, the applicant was directed to file written submissions which are on record and which I have studied and referred to in the determination of this matter.

Three issues have been proposed for resolution,

1. Whether the respondents, in denying the accused persons access to their legal counsel, violated their right to a fair hearing?
2. Whether the respondents actions denying the accused persons access to their legal counsel violates the right to liberty guaranteed under 23 (5) (b) of **the Constitution**?
3. Whether the applicants are entitled to any remedies?

**1. Whether the respondents, in denying the accused persons access to their legal counsel, violated their right to a fair hearing?**

It should be noted that at the time of the hearing of this matter this Court had on the 12<sup>th</sup> of May 2020 directed that the accused persons be granted access to their lawyers (vide **Human Rights Awareness And promotion Forum (HRAPF) vs Ag & Anor M.A. 188 of 2020**). According to information from Counsel, which I have no reason to disbelieve, the accused persons have been released from custody.

In specific reference to the present miscellaneous cause, the relevant facts are that on the 29<sup>th</sup> of March 2020, the 19 accused persons were arrested and detained at Nkokonjeru Police Station. On the 31<sup>st</sup> of March 2020 they were produced before a Magistrate and sent to Kitalya Prison on remand. It was not until the order of this Court issued on the 12<sup>th</sup> of May 2020 that the accused persons were granted access to their legal Counsel.

For the entire period between arrest and the 12<sup>th</sup> of May 2020, the accused were not granted access to Counsel. During this whole time their legal Counsel unsuccessfully pursued several avenues to gain access to the accused persons.

It is also true that at the point of arrest of the accused persons there was a nationwide lockdown. Uganda, like the rest of the world, had instituted measures aimed at curbing the dreaded threat posed by the Covid – 19 novel Corona virus. Several guidelines were issued by H.E. the President outlining preventative measures against the spread of the virus and specifically in his address of the 30<sup>th</sup> of March 2020 people to people movement was prohibited.

As stated in the affidavit of Dr Jjuuko, on that 31<sup>st</sup> of March 2020, when the accused persons were produced in Court, they were not represented by their advocates due to the travel restrictions imposed the night before. These limitations imposed on movement meant even advocates had difficulty swiftly getting to clients.

The Judiciary realised the import of this type of restrictions on persons who were in conflict with the law. For that reason The Honourable The Chief Justice

of Uganda issued guidelines, on the 19.3.2020, designated **Administrative And Contingency Measures To Prevent And Mitigate The Spread Of Corona Virus (Covid-19) By The Judiciary**. Clause 4 read as follows,

Courts will continue to handle certificates of urgency and taking plea for serious cases and bail applications. Only the applicant and his/her lawyer, or in the case of bail application, the sureties will be allowed in Court.

This application is filed against the background outline above.

The question as stated is therefore whether the respondents, in denying the accused persons access to their legal counsel, violated their right to a fair hearing as guaranteed in Article 28 (3) (a), (c) and (d) of **The Constitution of the Republic Of Uganda?**

Article 28 of the Constitution, broadly provides for the right to a fair hearing. The particular provisions cited are,

- (3) Every person who is charged with a criminal offence shall—
- a) be presumed to be innocent until proved guilty or until that person has pleaded guilty
  - b) ...
  - c) be given adequate time and facilities for the preparation of his or her defence
  - d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice

In Article 44, **the Constitution** states,

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

- (a) ...
- (b) ...
- (c) the right to fair hearing
- (d) ...

When it comes to the interpretation of the constitution with regards to fundamental rights it was held by the Supreme Court in **Constitutional Petition No 18/2005 The Attorney General v The Uganda Law Society** that,

A constitutional provision which relates to a fundamental right must be given an interpretation that realises the full benefit of the guaranteed right.

Therefore the most generous and purposive interpretation of the cited provisions is that the framers aimed to ensure that the freedoms enshrined in Article 44 are inalienable whatever the circumstances. Fair trial rights remain inviolable.

In **HRAPF M.A. 188 of 2020** this court, following the above decision of the Constitutional Court held that the law holds the right to fair trial sacrosanct.

I have considered all the above and from a reading of the guidelines by H.E. the President and the contingency measures of the Hon the Chief Justice, it is evident that a blanket ban on access to Counsel was never the intended. It was for that reason that provision was made for applications for bail and for the production of, and appearance in Court of suspects. It would be counterintuitive to put such measures in place and not allow access to legal counsel.

Therefore when the accused persons in this case were held for about a month and ten days and access to Counsel denied, it was a violation of the their rights as guaranteed in Article 28 (3) (c) and (d) and Article 44 (c) of the Constitution.

The first issue is answered in the affirmative.

**2. Whether the respondents actions denying the accused persons access to their legal counsel violates the right to liberty guaranteed under 23 (5) (b) of the Constitution?**

As already found by this Court, the accused persons were arrested on the 29<sup>th</sup> of March 2020 and produced in Court on 31<sup>st</sup> March 2020. From the date of arrest up to 12<sup>th</sup> May 2020, they were held in detention with no access to their legal Counsel.

The Court takes note that legal Counsel made several attempts to see their clients but failed.

It is submitted for the applicant that when the accused persons were held in this manner it infringed their right to liberty particularly Article 23 (5) (b) of **The Constitution** which stipulates that,

Where a person is restricted or detained—

(a) ...

(b) the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person;

This Court has already established, in resolving the 1<sup>st</sup> issue, that the right to fair trial and legal counsel was infringed.

The question in this next issue is whether the above also amounted to an infringement of the right, of the accused persons, to reasonable access to a lawyer.

At the time of filing this matter, there were two pertinent positions.

The applicant was informed that denial of access to counsel was a precaution by the prison authorities based on the danger posed by the COVID – 19 virus. Secondly, although the accused persons had not met their lawyers, the date for their trial was set for 29<sup>th</sup> of April 2020.

Commenting on fundamental rights, the Supreme Court in **Charles Onyango Obbo vs Attorney General Constitutional Appeal No. 2 of 2002** held,

... protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances



set out in clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest.

In **Hon. Sam Kuteesa V Attorney General Constitutional Petition No.46 Of 2011** it was held that,

The subject of the preservation of personal liberty is so crucial in the Constitution that any derogation from it, where it has to be done as a matter of unavoidable necessity, the Constitution ensures that such derogation is just temporary and not indefinite. The Constitution has a mechanism that enables the enjoyment of the right that has been temporarily interrupted to be reclaimed through the right to the order of habeas corpus which is inviolable and cannot be suspended, as well as through the right to apply for release on bail.

It would be important to cite here **the United Nation's Inter-Agency Standing Committee (IASC) *Interim Guidance on COVID-19: Focus on Persons Deprived of Their Liberty*** which was developed by the World Health Organisation and the Office of the High Commissioner for Human Rights.

Uganda as a member state would have to be bound by these guidelines.

The relevant aspects of guidance are listed under measures taken to prevent outbreaks in detention centres which are,

- a. While measures needed to prevent outbreaks of COVID-19 must be taken in places of detention, authorities need to ensure that all such measures respect human rights. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation ...
- b. Ability to meet with legal counsel must be maintained, and prison or detention authorities should ensure that lawyers can speak with their client confidentially ...

The above cited authorities show that there may be limitations on the enjoyment of certain rights such as the right to liberty. In this case the limitation was said by the respondent to be occasioned by the Covid-19 pandemic. In this case the

accused persons were unable to meet Counsel for more than 40 days and yet such limitations must only be permitted in exceptional circumstances and should be temporary. Although their right to liberty was impaired because of the pandemic, the right to fair trial remained inviolable. Therefore denying access to counsel was unconscionable.

The Court takes that opinion because the threat of the pandemic placed a duty on the respondents to take appropriate measures to respect human rights of inmates in detention facilities. This court is aware of a constant stream of information availed by state and non-state actors on safety measures that could have been employed to protect the accused persons, other detainees and Counsel to enable them to meet. Therefore the 40 day denial of access to counsel was unreasonable and unjustified. It was aggravated when in those circumstances a hearing date was set to trial the accused persons.

Denying the accused persons access to their legal counsel violated the right to liberty guaranteed under 23 (5) (b) of the Constitution.

The second issue is answered in the affirmative.

**3. Whether the applicants are entitled to any remedies?**

- a. It is hereby declared that the denial by the respondents of access to legal counsel for the accused persons violated and contravened their right to a fair trial guaranteed under Article 28(3)(a), 28(3)(c), 28(3)(d) and article 44(c) of **the Constitution of the Republic of Uganda**.
- b. It is hereby declared that the denial by the respondents of access to legal counsel for the accused persons violated and contravened their right to liberty guaranteed under Article 23(5)(b) of **the Constitution**.
- c. The applicant prayed for an order of compensation. Article 50 (1) of the Constitution stipulates,

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or

threatened, is entitled to apply to a competent court for redress which may include compensation.

In view of my findings in issues 1 and 2 the accused persons suffered an infringement of, or injury to, their fundamental rights enshrined in the Constitution. Redress sought has been given by means of the declarations granted in (a) and (b) above. Article 50 (1) in addition gives Court the jurisdiction to award other redress including compensation.

**In Osotraco Limited Versus The Attorney General HCCS No.1380 of 1986**, Egonda Ntende J (as he then was) held that:

*Article 50(1) of the Constitution assures ... redress before the courts. Redress, in my view, refers to effective redress, and nothing short of this. A less than appropriate remedy is not effective redress.*

It was held by Justice Sekaana Musa in **Agaba Kenneth vs Attorney General HCCS 247 of 2016** that compensatory damages may be assessed on the proved loss. But where the victim of violation has not only suffered assessable physical loss, but has also suffered loss of dignity, intrusion on his bodily integrity, shame and inhuman treatment, such as not the kind of loss compensable by assessable loss, damages awardable as redress are to vindicate the right or freedom violated, and to deter future violation.

In *General Principles of Constitutional and Administrative Law* 4<sup>th</sup> Edition (Palgrave Macmillan) by **John Alder** pg 440, the learned author stated that under the jurisprudence of the European Court of Human Rights, compensation is based on restoring the victim as far as possible to his original position, including an award of legal costs, and also includes compensation for non-pecuniary loss such as humiliation.

This Court finds these decisions and opinions persuasive.

I am in agreement with all the above. To ensure effective redress for the accused persons it is deemed fair and just that they receive damages as a

measure of vindication for the rights this court found had been infringed and the non-pecuniary loss occasioned.

In my view appropriate atonement here should take into consideration the fact that the country was dealing with a novel situation of the pandemic. Some of the extreme measure resulted from inappropriate knee jack reaction to the situation by the authorities. While that may be unjustified it will mitigate damage in this case.

In the result I would award 5,000,000/- in compensation to each accused person.

d. The applicant will have the costs of this application.

Dated at Kampala this 5<sup>th</sup> day June 2020



.....  
**Michael Elubu**

**Judge**