THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF APPEAL OF UGANDA

AT KAMPALA.

Coram Hon Justice C.N.B Kitumba, JA
Hon Justice S.B.K Kavuma, JA
Hon Justice A. S. Nshimye, JA

CIVIL APPEAL N0. 02/2008

(ARISING FROM HC MISC. APPLICATION

N0. 180/2004

MWESIGWA HANNINGTON & 3 OTHERS ::::::::::::APPELLANTS

VS

ATTORNEY GENERAL ::RESPONDENT

JUDGMENT OF A. S. NSHIMYE, JA

This is an appeal by the appellants arising from the ruling of Hon Justice Akiiki-Kiiza of 30.8.2007 sitting in Kampala High Court Miscellaneous application N0. 180/2004.

The brief background to the appeal is that the appellants were employees of M/s Uganda Railways Corporation. They were arrested by the Military at gun point and were subjected to a series of acts of mistreatment, torture and detention incommunicado. Their various property like money were taken away from them.

They jointly filed a miscellaneous application against the Attorney General by a notice of motion under Article 50 of the Constitution and Statutory Instrument 26/92.

In the motion, they sought enforcement of their constitutional rights by claiming damages for the unconstitutional treatment occasioned to them by the agents of the state.

The Attorney General, by affidavit in reply, admitted the arrest and detention of the applicants/appellants but denied torture. The respondent pleaded that the arrest and detention were lawful.

When the application came up for hearing, a preliminary objection was raised by the respondent that the procedure of proceeding by Notice of Motion was wrong. It was contended that it should have been by plaint to enforce Fundamental Human Rights under Article 50 of the Constitution.

The Learned State Attorney representing the Attorney General cited the authority of this Court CACA 61/2002 Charles Harry Twagira V Attorney General in which this court held (lead Judgment of Hon Justice Twinomujuni) that enforcement of Fundamental Human Rights under Article 50 of the Constitution should be by plaint.

In reply, counsel for the applicants cited a number of authorities including rule 3 of SI 26/92 now revoked. He contended that the procedure provided therein was by motion. The trial judge upheld the objection and dismissed the application with costs, hence this appeal.

There are two grounds of appeal namely:-

(1) *The learned trial judge erred to have held that the fundamental Human rights and Freedoms guaranteed under the constitution can only be enforced by an action on a plaint and not by notice of motion.*

(2) *The learned trial judge erred to have relied on the case of Charles Twagira VS Attorney General CACA 61/2002 in order to hold that the Fundamental Human Rights and freedom are enforceable by an action on a plaint and not by notice of motion, whereas the decision* was per incuriam.

When this appeal first came up for hearing on 7th July 2008, counsel for the respondent successfully applied for stay of the hearing to await the judgment of the Supreme Court in Twagira's case (supra) which was appealed against and would act as a test case.

On 9th July 2008, the Supreme Court gave its judgment and held that where an applicant seeks enforcement of Fundamental Human rights under Article 50 and is seeking recovery of damages, the procedure should be by plaint while for declarations it should be by Notice of Motion.

Counsel for the appellant submitted that the law applicable for enforcement of Fundamental Human rights & Freedoms under Article 50 was SI 26/92 which provided that it shall be by Notice of Motion in the High Court. He requested in a supplementary submission, that this court should refuse to

be bound by the judgment of the Supreme Court in Twagira Vs Attorney General (supra)

He referred us to The Judicature (Fundamental Rights and Freedoms Enforcement Procedure) Rules, 2008 (SI 55/2008) which were gazetted on 12.12.2008. They provided that all applications under Article 50 of the Constitution were to be by Notice of Motion. He prayed that the appeal be allowed with costs.

In her written submissions counsel for the respondent stated that the appellant's application by way of Motion in the High Court seeking, interalia, redress of compensation can not stand in view of the Charles Harry Twagira case (supra). Learned counsel quoted from the lead judgment of Hon Justice Tsekooko JSC in which he said.

> *"In my view, the rules set in SI N0. 26/1992 can only apply in limited cases such as bail and Habeaus corpus applications."*

Later, she again quoted him as saying:-

> *"In my experience at the bar and the bench, I can not understand how by his Notice of Motion the appellant would be able to call evidence to establish such damages without filing an ordinary suit.*

Learned counsel concluded by submitting that the appellant's clearly stated that they also sought redress by way of damages. That puts their case in

the bracket of the Twagira's case (supra) hence forth, the High Court would still have no jurisdiction to hear a matter brought by Notice of Motion seeking damages among others.

Finally, she submitted that the issue of whether a Notice of Motion or plaint should be used had been a long standing point of confusion. In her view, the Supreme Court left no stone unturned in settling that matter. She humbly submitted that this Court is obliged to follow the decision in the Twagira case (supra). She prayed that the appeal be dismissed with costs.

The copy of supplementary submission of the appellant bear a stamp of the respondent dated 10th February 2009 and the submission of the respondent was received by this court on 13.Febraury 2009. Counsel for the respondent did not address us on the new rules, which I said earlier, came into force on 12.12.2008. We, therefore, lost that benefit of knowing her view on the effect of the new rules of procedure.

I have taken time to consider the submissions of both counsel. I have read the record, the Supreme Court judgment in the Twagira case (Supra) and also perused the new rules.

The new rules were signed and published by his Lordship the Chief Justice Benjamin J. Odoki in his capacity as Chairperson of Rules Committee.

His Lordship the Chief Justice was also the Chairperson of the coram of Justices of the Supreme Court who decided the Twagira case (supra) five months before the new rules came out.

Rule 2 of the new rules (SI 55/2008) provides:-

> *In these rules, unless the context otherwise requires "application" means an application to a competent court under article 50 of the constitution for redress in relation to the fundamental rights and freedom referred to in articles 20 to 45 of the constitution*"

Then rule 3 states:

> *"Every application shall be made by motion and shall be heard in open court by a single judge"*

Redresses for violation in relation to fundamental rights and freedoms referred to in Articles ranging from N0. 20 to 45 are either declaratory or compensatory in nature. For example Article 23(7) states:

> *"A person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is by the state or an agency of the state or other person or authority"*

In the case before us, the appellants among other prayers, sought for damages which is the same as compensation mentioned above. It is my humble view that the new rules have overtaken the Twagira case and made it clear that the procedure is by notice of motion.

It is worth mentioning that the rules have addressed the observation of his Lordship Hon. Justice Tsekooko JSC referred to us by counsel for the respondent quoted above. His Lordship had reflected on his time at the bar and bench and wondered how by a notice of motion, the appellant would be able to call evidence to establish such damages without filing an ordinary suit.

Rule 6 of the new rules states:-

> *'Evidence at the hearing of an application shall be tendered by affidavit <u>but the court may of its own motion or on the application of a party to the application direct that evidence be given orally on any particular matter</u>"*

It is evident from the above rule, that the Rules Committee has made an innovation for a simpler way of adducing evidence to prove anything including damages.

I am highly persuaded that there is merit in the appeal and the appellants should be the first beneficiaries of the new rules. In the result, I would allow the appeal and make the following orders:-

(1) That the High Court order dismissing the appellant's application be set aside.

(2) That the High Court is directed to hear the appellant's application and dispose of it on merit.

(3) The appellants to have costs of the appeal.

(4) Costs of objection in the High Court to abide the result of the main application.

Dated this ……01st ……day of ……April…….2009.

A.S. NSHIMYE
JUSTICE OF APPEAL

JUDGMENT OF KITUMBA, JA

I have read the judgment of Nshimye, JA, in draft. I agree with it and the orders proposed therein. Since My Lord Kavuma, JA also agrees, this appeal is allowed on the orders proposed by Nshimye, JA.

Dated at Kampala this …. 01st day of …..April…..2009

C.N.B.Kitumba,
Justice of Appeal

JUDGMENT OF S.B.K.KAVUMA

I have benefited from reading in draft the judgment of my learned brother A.S.Nshimye, JA.

I agree with the reasoning and orders proposed in that judgment and have nothing useful to add.

Dated at Kamapal this …1st..... day of ……..April ……2009

S.B.K.Kavuma
Justice of Appeal