THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 179 OF 2020

1. **MUKIIBI HENRY**
2. **WALUGEMBE ASHRAF**
3. **KATEREGGA SADDAM**
4. **KAWOOYA IVAN**
5. **OKETCH JOEL EDWARD**
6. **JUUKO RAJ**
7. **SSAMULA DENNIS**
8. **MAYANJA JACKSON SSENDAGIRE**
9. **SHEEMA RODNEY**
10. **KIFUBA TEVIN HARRIS**
11. **MUHEREZA MARK**
12. **TUSHABOMWE JABEL**
13. **GWAIVU ABBEY**
14. **KIBALAMA ANDREW**
15. **SSENYONGA RONALD**
16. **MUYOMBA YAHAYA**
17. **TUMUHIMBISE DOUGLAS**
18. **TINDYEBWA JAMES**
19. **KUGONZA KELVIN**
20. **YIGA KARIM**
21. **HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF) ::APPLICANTS**

VERSUS

1. **HAJJI ABDUL KIYIMBA**
2. **PRINCIPAL OFFICER PHILIMON WONIALA**
3. **KYENGERA TOWN COUNCIL**
4. **ATTORNEY GENERAL ::RESPONDENTS**

Before: *Hon. Justice Dr Douglas Karekona Singiza*

RULING

1 Introduction

The protection of individual freedoms and liberties enshrined under the Bill of Rights in our Constitution is foundational to Uganda's character as a constitutional state. It is for that reason that mechanisms have been put in place by both the Constitution and legislature to ensure that citizens' rights are not only protected but also firmly enforced. The enactment of the human rights enforcement framework five years ago not only places fundamental rights and freedoms under jealous guard, but also ensures that any persons who violate those rights are held personally liable.[1]

The motion before this court highlights the importance that is attached to human dignity and privacy as constitutional values, the protection of which underpins the sanctity of human worthiness. As will be clear in the ruling below, while torture cannot be justified whatever the circumstances, a higher threshold of evidence than usual is required for its occurrence to be established as a fact. Similarly, the manner in which privacy as a right protects individual private spaces can be problematic. Thus, as has been argued, the protection of privacy is stronger in the private space, but weaker in the public realm; explaining why it is at times difficult to rely on privacy in order to protect certain vulnerable categories of people.

2 Background

The 1st – 20th applicants (supported by the 21st applicant) seek to enforce their fundamental rights and freedoms under the Constitution, which were allegedly breached by the respondents. They also seek damages for the said breach, as well as costs.[2] The background to the application is summarised in the paragraphs below.

During the Covid-19 pandemic and the lockdown measures taken by the President of the Republic of Uganda in March 2020, several stringent measures were adopted that limited the rights of the public. Thus, the suspension of public and private transport, the closure of Uganda's borders, the

1 See section 10 of the Human Rights (Enforcement) Act (HREA) Cap 12.

[2] This application is brought by Notice of Motion under articles 20(1) and (2), 21(1) and (2), 44(a), and 50(1) and (2) of the 1995 Constitution of the Republic of Uganda; sections 3(1), 3(2)(c), and 4(1)(a) of the HREA Cap 12; section 33 of the Judicature Act, Cap 13; Rule 7(1) of the Judicature (Fundamental and other Human Rights and Freedoms) (Enforcement Procedure) Rules 2019; and section 98 of the Civil Procedure Act.

closure of schools and bars, the banning of social events, the closure of places of worship, and the imposition of a curfew were among the interventions to protect the population from the pandemic.

As part of the enforcement of the Covid-19 restrictions, the 1st to 20th applicants, while living in a community residence in Nkokonjeru 'A' village in Kyengera Town Council – Wakiso district, were arrested on 29 March 2020 by police and other state authorities and allegedly tortured. They assert that on the morning of the said date their residence was invaded by a mob, among which were the respondents, that subjected them to all manner of torture because they were practising homosexuality. The alleged actions of torture include beating, hitting, burning using a hot piece of firewood, undressing, tying, binding, conducting an anal examination, and inflicting other forms of physical, mental and psychological violence based on the suspicion that they are homosexuals, an allegation they deny.

Based on the same suspicion, the applicants were then arrested, taken to Nkokonjeru B police station, and charged with doing a negligent act likely to spread infection by disease.[3] On 31 March 2020, the applicants were charged before the Chief Magistrates Court of Mpigi and remanded to Kitalya Mini-Max Prison, where they were again allegedly beaten, examined, harassed, and subjected to discrimination.

2.1 Legal representation

Throughout the proceedings, the applicants were represented by Francis Tumwesige Ateenyi c/o the Legal Aid Clinic of the *Human Rights Awareness and Promotion Forum (HRAPF)*; the 2nd and 4th respondents were represented by Allan Mukama, State Attorney, on behalf of the *Attorney General*; and the 3rd respondent was represented by James Katono c/o *M/s Nambale, Nerima & Co. Advocates*. The 1st respondent was self-represented and filed all his pleadings and submissions personally. All the parties filed written submissions which are considered by this court. There is no doubt in my mind that the pleadings and evidence were reasonably presented. I also found the arguments advanced by all the parties well-articulated and of considerably high quality. As is now the practice of this court, let me note that if some of the arguments and authorities are not considered, it is not out of disrespect but generally due to constraints of space and time.

3 See section 212 of the Penal Code Act Cap 128. This is a 'catch-as-catch-can' provision under our penal laws which is probably not clearly defined and thus open to abuse by law enforcement agencies.

2.2 Summary of the motion

The complaint raised in the motion is straightforward and repetitive, which is unsurprising given the 19 declarations and reliefs that are sought. I proceed to summarise the reliefs sought as follows:

1) A declaration that the respondents' actions of beating, hitting, tying, binding, ridiculing, and subjecting the 1st – 20th applicants to various forms of physical and mental violence and maltreatment violated their right to freedom from torture, cruel, inhuman, and degrading treatment contrary to articles 24 and 44(a) of the Constitution of the Republic of Uganda, as amended.
2) A declaration that the actions of the respondents of unlawfully entering the 1st – 20th applicants' residential premises, conducting unauthorised searches, inviting members of the media and the public into the applicants' residential premises, and subjecting the 9th applicant to anal examination, violated their right to privacy in contravention of article 27(1) and (2) of the Constitution of the Republic of Uganda, as amended.
3) A declaration that the respondents' actions of humiliating, debasing, demeaning, arresting, detaining, and subjecting the 1st – 20th applicants to physical, mental, and psychological violence, on the basis that they are homosexuals, violated their right to freedom from discrimination in contravention of articles 20(1) and (2) and 21(1) of the Constitution of the Republic of Uganda, as amended.
4) A declaration that the 1st and 2nd respondents are personally liable for the violations of the 1st – 20th applicants' fundamental human rights to freedom from torture, cruel and inhuman treatment, to privacy, and to freedom from discrimination.
5) An order for compensation of the applicants by the respondents jointly and severally.
6) An order for general and punitive damages against the respondents jointly and severally.
7) Costs of this application be provided for.

The motion is anchored on 20 grounds, which I have heavily redacted as follows:

1) The 1st – 20th applicants were among a group of 23 youths who were arrested at a residential house in Nkokonjeru 'A' village, Kyengera Town Council, Wakiso District on 29 March 2020 and charged with doing a negligent act likely to spread infection or disease contrary to section 171 of the Penal Code Act.

2) The arrest was carried out after the 1st respondent who was, at the time, the Chairperson Local Council III, Kyengera Town Council, together with the Defence Secretary of Nkokonjeru Local Council One (LC 1), and several unidentified members of the Local Defence Unit (LDU) illegally entered the applicants' residential house and unlawfully conducted a search in contravention of article 27(1) and (2) of the Constitution.
3) The 1st respondent invited journalists and members of the public to enter the premises to witness, observe, photograph, and videograph the 23 arrested youths on the grounds that they are homosexuals, during which time the 1st respondent hurled insults at the arrested persons, alleged that they are homosexuals, and had them tied up. The 1st, 7th, and 14th applicants were allegedly hit with a big stick, after which all the applicants were ordered to march in single file to Nkokonjeru Police Post.
4) The applicants allege that these actions were in contravention of articles 20(1) and (2), 21(1), 24, 27(1) and (2), and 44 of the Constitution.
5) While at Kitalya Min Max Prison, the 2nd respondent separately ordered the 2nd applicant to strip naked in the presence of other prisoners and burnt him between the thighs with a piece of burning wood in contravention of articles 20(1) and (2), 21(1), 24, 27(1) and (2), and 44 of the Constitution.
6) Mr Akankwasa, one of the prison warders, ordered a prisoner to conduct an anal examination of the 9th applicant contrary to articles 20(1) and (2), 21(1), 24, 27(1) and (2), and 44 of the Constitution.
7) The 21st applicant filed a complaint to the Commissioner General of Prisons on behalf of the 1st – 20th applicants requesting that the alleged violations be investigated, but received no response, prompting the applicant to approach this court.
8) In the light of these transgressions, the applicants maintain that the 1st and 2nd respondents are personally liable for their alleged human rights violations and that this justifies the grant of the remedies sought.

3 Deposition in support of the motion

As shall be clear in the discussions of the summary of the evidence below, most of the averments by the applicants are a repetition of the grounds on which the motion is anchored. It is also noted that most of the applicants' affidavits, as well as the respondents' affidavit evidence, speak to

similar factual suppositions which is the reason that much of the evidence has been compressed. The motion relies on the affidavit evidence of Dr Adrian Jjuuko, Mr Mukiibi Henry, Mr Walugembe Ashraf, Mr Kateregga Saddam, Mr Kawooya Ivan, Mr Oketch Joel Edward, Mr Raj, Mr Samula, Denis, Mr Mayanja Jackson Ssendagire, Mr Kifuba Tevin Harris, Mr Muhereza Mark, Mr Kibalama Andrew, Mr Ssenyonga Ronald, Mr Muyomba Ntege Yahaya, Mr Tumuhimbise Douglas, Mr Tindyebwa James, Mr Kugonza Kelvin, Mr Yiga Karim, Mr Kiyegga Andrew, Mr Sheema Rodney, and Mr Tushabomwe Jabel – evidence which is summarised below.

The alleged acts of violation of the applicants' numerous constitutional rights, as described in the different depositions, have been divided into three main parts: 1) the deposition dealing with torture, cruel, inhuman and degrading treatment; 2) the deposition dealing with the right to privacy; 3) and the deposition dealing with the right to equality and non-discrimination. Separately, Mr Kiyega, a senior Medical Clinical Officer of Mayfair Clinic Najjanankumbi Kampala, recounts examining the 2nd, 3rd, 4th, 5th, 6th and 7th applicants and reports his findings and recommended treatment for each of them. He relies on exhibits KA-1, KA-2, KA-3, KA-4, KA-5, KA-6, and KA-7 to corroborate his deposition.

All the depositions in support of the motion speak to the claim that while the 1st – 20th applicants were at home in their private residence, they were unlawfully invaded by a mob led by the 1st respondent and other officials of the 3rd respondent, including the chairperson and Defence Secretary of Nkokonjeru LC1. They were allegedly filmed and photographed against their will by the media and other people with cameras, with all of this occurring at the invitation of the respondents and/or their agents while being taunted for being homosexuals.

In all of their depositions, information is revealed that the1st – 20th applicants, while in Kitalya Mini-Max Prison, were informed by other inmates on 30 March 2020 that they appeared in print and TV news coverage with their faces visible. In particular, paragraph 20 of the 1st applicant's affidavit discloses that, at the point when the applicants went for lunch, a rumour had spread that there were homosexuals in Ward 1. The 1st applicant states that the entire prison population then began shouting at them, hurling insults and threatening to beat them up. Evidence of unlawful body searches is also presented, in particular in paragraphs 20–21 of the deposition of Mr Sheema, who complained of a forced anal examination by Mr Kalisa on the orders of one Akankwatsa while at Kitalya Mini-Max Prison.

The 1st – 20th applicants' narrative consistently speaks of forced separation from other inmates at Kitalya Mini-Max Prison on account of their being homosexuals; this information is particularly clear in in the deposition of Mr Ssenyonga Ronald, specifically in paragraphs 18 and 19. Indeed, the 2nd respondent's deposition in reply, while making general denials to the motion, describes (in paragraphs 13–31) the applicants as homosexuals motivated by ill will, malice, and 'unmitigated lust for unjust enrichment'.

Dr Jjuuko's deposition speaks to his role as Executive Director of HRAPF, and highlights seven key factual suppositions.

1) HRAPF's legal aid clinic received instructions from the 1st – 20th applicants to provide legal representation to them after their arrest and detention at Nkokonjeru Police Post and subsequently in Criminal Case No. 113 of 2020 before the Chief Magistrates Court of Mpigi at Nsangi.
2) When the applicants were taken to the Chief Magistrates Court at Nsangi, the Magistrate told them to stay in the truck and then read to them the charges of doing a negligent act likely to spread infectious disease contrary to section 171 of the Penal Code Act. All of the applicants pleaded not guilty.
3) The Magistrate informed all of the applicants of their right to apply for bail; however, due to the absence of any sureties, they were remanded to Kitalya Mini-Max Prison until 28 April 2020.
4) HRAPF lawyers made efforts to access the 1st – 20th applicants from the time of their remand, but the prisons authorities refused to permit this.
5) HRAPF later filed Miscellaneous Application No. 188 of 2020,[4] seeking an order for its lawyers to access their detained clients. The order was granted on 14 May 2020. The 1st – 20th applicants informed HRAPF of the alleged acts of discrimination, cruel, inhuman, and degrading treatment they had been subjected to while in prison, including insults by inmates, beatings, and denial of basic hygiene items such as water and medication.
6) HRAPF wrote a letter to the Director of Public Prosecutions (DPP) complaining about the arbitrary arrest of the 1st - 20th applicants on charges that, under the guise of Covid-19

4 *Human Rights Awareness and Promotion Forum v Commissioner General of Prisons and Attorney General* Miscellaneous Cause no 81 of 2022

regulations, were motivated by their alleged sexual orientation. Indeed, the DPP withdrew charges against the 1st – 20th applicants on 18 May 2020, resulting in their release from prisons.

7) Given that Dr Jjuuko had personally collected the 1st – 20th applicants from prison, he was able to establish that they all complained of pain, ailments, and hunger, which prompted him to request that the Most at Risk Populations Initiative (MARPI) examine each of the applicants and provide treatment to them, a request which was honoured on 20 May 2020.

3.1.1 Video evidence

Further evidence for these allegations is seen in the video clips marked 'Compact Disk' on page 30 of the application. This evidence, attached by Dr Adrian Jjuuko, contains a transcription and translation by the Centre for Languages and Communication Services, Makerere University. In a three-minute clip from BBS TV, the 1st respondent is seen with a big stick and hitting some of the applicants.

3.2 Respondents' deposition in reply

All of the respondents filed affidavits in reply to the motion, with some filing additional ones. I have summarised what each affidavit speaks to by picking out the key areas that are most relevant, beginning with Mr Hajji Abdul Kiyimba's evidence. Apart from confirming that he was the elected Chairman of LC III of Kyengera Town Council, his averments highlight five crucial points:

1) He received information in his capacity as the chairperson of LC III Kyengera Town Council from Nsangi police station concerning persons in Nkokonjeru 'A' Village who had allegedly violated the presidential directives on Covid-19.
2) These persons were charged with doing a negligent act likely to spread an infectious disease contrary to section 171 of the Penal Code Act. He denied that they had been arrested because they were homosexuals.
3) In response to paragraphs 4 and 5 of Mr Mukiibi's deposition, he denies beating the 1st - 20th applicants, and disputes that the medical forms relied on in the motion point to torture or assault.
4) The medical evidence relied on reveals that the wounds had long healed and were inflicted in June 2020 rather than 29 March 2020, the date of the arrests.

5) In challenge of paragraph 7 of Mr Walugembe's affidavit, Hajji Kiyimba disputes that he ever invited journalists to take photos and video footage of the 1st – 20th applicants.
6) Any such photos or video footage that exist were not taken on his orders.

For his part, Mr Woniala, the Principal Officer at Kitalya Mini-Max Prison, depones on a number of factual assertions, which are summarised below:

1) Without making any admissions to any of the allegations in the motion, Mr Woniala points out that the motion in its present form is incompetent, bad in law, and an abuse of court process, in addition to which the supporting depositions are riddled with lies.
2) It is his averment that part of his statutory duty is to ensure the observance of the rules and regulations of the prison and maintain the general discipline of inmates and staff.
3) According to Mr Woniala, the only reason that the inmates were isolated was because of Covid-19.
4) Mr Kajoba David (the Chief Warder) of Kitalya Mini-Max Prison reported to him about alleged acts of homosexuality between the 2nd and 13th applicants (witnessed by some of the inmates in the prison ward).
5) This information prompted him to immediately order the transfer of the 2nd, 4th, 13th, and 19th applicants to other wards to enforce discipline and ensure inmates' security, a transfer which was effected without the occurrence of any torture.
6) According to Mr Woniala, Kitalya Mini-Max Prison does not allow inmates to assault each other. He disputes as factually incorrect any claims that inmates had been assaulted by prison staff on his instructions.
7) He explained that he turned down a request by the 1st applicant (after the latter had disclosed to him that he was in fact a homosexual) to help him campaign among the inmates about the benefits of homosexuality. Furthermore, he turned down an offer of UGX 100,000 from the 1st applicant in exchange for providing all 20 applicants with separate accommodation while in prison.
8) Mr Woniala dismisses the motion as spiteful and supported merely by people with 'an unmitigated lust for unjust enrichment'.

9) In apparent support of Mr Woniala's depositions, Mr Julius Akankwatsa, a corporal attached to Kitalya Mini-Max Prison, starts by explaining that he was 'a mere driver by designation' whose access to inmates was very much limited.
10) In his deposition, Mr Bwambale Egidio speaks to his role as a receptionist at Kitalya Mini-Max Prison, which is to receive inmates' property brought in from outside the prison by their relatives or kin. He denies beating or kicking the 7th applicant, and disputes the evidence that he ever specifically interacted with the 15th applicant.

Leading evidence on behalf of the 3rd respondent, Mr Stephen Mwasanje speaks in his deposition of his role as the Principal Township Officer of the 3rd respondent. His view is that the Kyengera Town Council could not have committed any of the acts complained of by the 1st – 20th applicants in the alleged arrest because the power to arrest any persons falls squarely within the ambit of the state of Uganda.

The 4th respondent (the Attorney General) relies on the deposition of Mr Bitaliwo Onesmus (the Officer in Charge of Kitalya Mini-Max Prison) and that of one Mr Bwambale Egidio to challenge the motion. In the paragraphs below, I summarise their assertions too, beginning with those of Mr Bitaliwo. Mr Bitaliwo insists that the 1st – 20th applicants were not subjected to any torture, cruel, inhuman, or degrading treatment while at the prison, and attests instead that he only found out about the applicants' sexual orientation from their lawyer's disclosure. It was Mr Bitaliwo's evidence that after the 21st applicant was given clearance to access the other applicants in prison, he was shocked that the 21st applicant decided to give the 1st – 20th applicants 'homosexuality material' in order to recruit other inmates into homosexuality. He confiscated the materials, and strongly warned the 1st applicant about the risks of spreading homosexuality in the prison.

In addition to denying the allegations that 1st – 20th applicants were denied access to the sick bay, Mr Bitaliwo asserts that none of the applicants was ever admitted to the prison sick bay and/or any places of convenience in the prison for the treatment of injuries consistent with torture, inhuman, cruel, and degrading treatment.

3.3 Applicants' depositions in rejoinder

In rejoinder, Dr Jjuuko, Mr Mukiibi, Mr Walugembe, Mr Ssamula, and Mr Sheema maintain the previous line of averment, except that Dr Jjuuko and Mr Mukiibi provide the following additions:

1) Dr Jjuuko begins by inviting the court to the strike out the respondents' affidavit with costs due to their generality, evasiveness and lies; according to him, they cannot be considered as forming part of the evidence in challenge to the motion.
2) He disputes the allegations that he distributed 'homosexual materials' to the 1st – 20th applicants. Instead, it was his evidence that he merely gave the 1st applicant a copy of the complaint which HRAPF, in conjunction with Robert F. Kennedy Human Rights and Sexual Minorities Uganda, had filed with the United Nations Working Group on Arbitrary Detention on 14 May 2020 on behalf of the 1st, 2nd, 3rd, 4th, 5th, 6th, and 8th – 20th applicants' right to access their lawyers.
3) He asserts that the 21st applicant's team met Mr Bitaliwo while they were leaving Kitalya Mini-Max Prison and briefed him about the acts of torture disclosed to them. A follow-up complaint about the alleged torture and inhuman and degrading treatment, dated 25 June 2020, was filed with the Commissioner General of Prisons (Annexure F).
4) According to Dr Jjuuko, the video evidence shows not only that Hajji Kiyimba was involved in the arrest and humiliation of the 1st – 20th applicants but that he also beat some of them. That very footage had been downloaded from BBS Terefayina's YouTube channel as well as Sky News's YouTube channel.

According to Mr Mukiibi, he barely spoke to the other inmates due to the stigma attached to him for being the leader of the homosexuals in prison. Separately, Ms. Justine Balya, a Legal Officer at HRAPF Legal Aid Clinic, responded to the 3rd respondent's deposition by insisting that the 3rd respondent is legally responsible and vicariously liable for the actions of its servants and agents, to wit Hajji Abdul Kiyimba, the Chairperson LCIII, as well as the Chairperson of LC1 Nkokonjeru 'A' Village and the village Defence Secretary – who searched the private premises without a search warrant

4 Issues for determination

The motion and the reply thereto were prosecuted by means of submissions in which the following four issues were raised:

1) *Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to freedom from torture, cruel, inhuman, and degrading treatment or punishment guaranteed under articles 24 and 44(a) of the Constitution.*
2) *Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to privacy guaranteed under article 27(1) and (2) of the Constitution.*
3) *Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to equality and non-discrimination guaranteed under articles 20(1) and (2) and 21(1) of the Constitution.*
4) *The remedies available to the parties.*

4.1 Applicants' arguments

Issue 1

The applicants submitted that the respondent's actions amount to violations of the right to freedom from torture, cruel, inhuman, and degrading treatment guaranteed under articles 24 and 44(a) of the Constitution.

According to counsel for the applicants, torture is prohibited not only by the Constitution but also by sections 1, 2, 3, 4, and 7 of the Prevention and Prohibition of Torture Act, which defines and prohibits torture, inhuman and degrading treatment.[5] Counsel for the applicants points out to the court that evidence of torture, cruel, inhuman, and degrading treatment is clearly revealed in the applicants' deposition. According to counsel, during their arrest and while at Kitalya Mini-Max Prison, the applicants sustained beatings or torture at various times by, or at the instructions of, the 1st and 2nd respondents, including verbal abuse in which they were called disgraceful homosexuals who do not deserve to live.

Referring to the 2nd – 20th applicants' medical reports, counsel explains that the reports indeed show evidence of assault through beatings and torture. Counsel refers to the 2nd applicant's evidence that he was beaten with what he described as a *solido* and then burnt between the thighs by the 2nd respondent. Counsel also highlights the 3rd applicant's evidence that he was slapped and beaten by the 2nd respondent, as well as the 4th applicant's evidence that he lost his hearing due to

5 The applicants also rely on *Issa Wazembe v Attorney General* High Court Civil Suit No. 154 of 2016, and *Yahaya Lukwago and 4 Others v James Aiso and 3 Others* HCCS No. 226 of 2015.

beatings by the 2nd respondent and other officers at Kitalya Mini-Max Prison. Indeed, counsel invites the court to consider the video clips by BBS Terefayina and Sky News showing the 1st respondent beating some of the applicants with a long stick as sufficient evidence to prove the allegations.

Issue 2

Counsel for the applicants argues that the actions of the respondents contravene the applicants' rights to privacy guaranteed under article 27(1) and (2) of the Constitution, and insist that the right to privacy prohibits unlawful entry into one's private premises, as well as interference with one's home, correspondence, and communication.[6]

Counsel for the applicants then points to the following factual depositions to illustrate the private nature of the right of the applicants and how that right was violated:

- The premises where the applicants resided at the time was private property.
- The property was invaded by a mob, in the course of which the applicants were filmed and photographed by media cameras and other people with cameras against their will.
- The applicants were 'outed' as homosexuals, with their faces shown in television broadcasts by various media houses; as a result, fellow inmates threatened to beat them up.
- The 1st – 20 applicants were subjected to anal examination to 'confirm' whether or not they are homosexuals.

Issue 3

It is the argument of the applicants' counsel that the respondents' acts contravened the 1st – 20th applicants' right to equality and non-discrimination guaranteed under articles 20(1) and (2) and 21(1) of the Constitution.

The applicants assert that although article 21(3) of the Constitution defines discrimination with reference to treating people adversely on the grounds mainly or only of sex, race, colour, ethnic origin, tribe, creed or religion, social or economic standing, political opinion, or disability, a restrictive interpretation has been rejected both by the Constitutional and Supreme Courts. Counsel

6 The applicants rely on the decision in *Victor Mukasa and Another v Attorney General* HCMC No. 247 of 2006, and *Kasha Jacqueline Nabagesera and Another v Rollingstone Limited and Another* HCMC No. 163 of 2010.

relied on Mwondha JSC's dicta in *Christopher Madrama Izama v Attorney General*.[7] Considering the principles from these authorities, counsel for the applicants argues as follows:

- First, the evidence shows that the 1st – 20th applicants were arrested, detained, and tortured simply because they were suspected to be members of the lesbian, gay, bisexual, and transgender (LGBT) community in Uganda.
- Secondly, during their arrest, they were openly rebuked for being homosexuals and, in Kitalya Prison, separated from other inmates on the grounds that they are homosexuals, occurrences which point to discrimination.
- Thirdly, the video evidence, as transcribed and translated, shows that the 1st – 20th applicants were vilified of suspected being homosexuals, which further highlights the discriminatory nature of the respondents' acts.

Issue 4

Counsel for the applicants rely on a number of authorities to argue that, given the physical and emotional pain and humiliation they endured, the 1st – 20th applicants were entitled to the reliefs sought. Two types of relies are identified as important for an application of this nature:

1) the prayer for the award of the general;
2) the prayer for punitive damages; and
3) costs.

Counsel for the applicants correctly observes that an award of general damages is 'the direct natural result or probable consequence of the wrongful act complained of' and that consideration thereof is discretionary to the court.[8] Counsel also argues that exemplary damages should be considered only where an alleged wrong complained of is oppressive and arbitrary or unconstitutional; moreover, these are usually considered where compensatory awards cannot insufficiently penalise the perpetuator.[9] The point is made that punitive damages are also intended to deter the repetition of transgressions to help ensure 'effective policing of constitutionally

[7] Constitutional Appeal No. 1 of 2016.
8 *Oketha v Attorney General* HCCS No. 69 of 2004.
9 *Stanbic Bank Uganda Limited and Another the Commission General of the Uganda Revenue Authority* MA No. 004 of 2010.

enshrined rights'.[10] Thus, in addition to the declarations sought, counsel for the applicants propose the award of UGX 100,000,000 to each of the 1st – 20th applicants as general damages, UGX 100,000,000 to each of the 1st – 20th applicants as punitive or exemplary damages, and costs.

4.2 The 1st respondent's written arguments

Issue 1

Hajji Kiyimba (the 1st respondent) consistently and emphatically deny the acts of torture allegedly inflicted on the 1st – 20th applicants. Instead, his deposition focuses on the fact that the 1st – the 20th applicants were arrested by the police, arraigned before a court of law, and remanded to a government prison – a statutory process in the criminal justice system of Uganda over which he himself exerted little control. According to Hajji Kiyimba, the applicants had thus failed to discharge their burden of proving the allegations against him, especially considering that no admissible evidence had been presented in the court to prove that he participated in the alleged acts of torture.

In regard to the video evidence relied on by the applicants, he makes the point that it falls short of the criteria laid down in *Amongin Jane Francis Okili v Lucy Akello and The Electoral Commission*, HCT -02-CV-EP No. 0001 of 2014 because

- the source of the video is not known;
- no further evidence was produced to show how the video footage was obtained, stored, and reproduced and thereby satisfy the court that it was not altered; and
- the person who captured and produced the video footage was not called as a witness to testify to the authenticity of the video.

Picking on the above weakness, Hajji Kiyimba insists that the applicants failed entirely to prove the allegations of torture, inhuman, and degrading treatment on a balance of probabilities, as required by the precedents of the courts.

10 *Jennifer Muthoni & 10 Ors V AG of Kenya* [2012] eKLR.

Issues 2 and 3

Hajji Kiyimba also argues that that he cannot be held to have violated any of the applicants' rights to privacy and equality because he did not participate in the arrest. Again, his main argument is anchored on the consideration that the statutory power to arrest persons suspected of having committed offences, as revealed in the motion, was executed by the Uganda Police Force.

Speaking generally about limitations of rights, Hajji Kiyimba reminds the court that the right to privacy may be limited where it is legally and fairly justified. The point is made that it is legally permissible for the police to enter any citizens' premises if there is a reasonable suspicion that an offence has been committed. This power, the argument continues, entails that the police can then carry out a search and, where necessary, arrest anyone suspected of committing a crime, as was the case in the motion before this court. He remains dismissive of the applicants' allegation of discrimination on any of the prohibited grounds listed in terms of article 21(2) of the Constitution.

Issue 4

Hajji Kiyimba argues that no reliefs in law are available to the applicants in the light of the evidence that they had been arrested for violating the law. He insists that, throughout the process of their arrest, detention, and release from lawful custody, no rights known in the law were violated except for the usual suspension of suspects' rights and freedoms upon arrest and detention in the criminal justice system. Indeed, Hajji Kiyimba makes an argument for costs to be paid to him instead, since the false, unsubstantiated, and malicious accusations made by the applicants have 'soiled his good name' as a political leader and lowered his standing in the eyes of voters.

4.3 The 2nd and 4th respondents' written arguments

Issue 1

The first line of argument by the 2nd and 4th respondents is that the allegations of torture arising from the depositions of the applicants are materially false and uncorroborated by any independent evidence. Eight key factual narrations that would seem to weaken the applicants' allegations are presented:

1) The applicants were cordially received and processed on arrival at Kitalya Mini-Max Prison. While there, they were treated fairly and not subjected to any torture, cruel, inhuman, and degrading treatment.
2) The treatment note and Police Form 3 submitted to prove the allegations of torture are not admissible because the makers of those medical reports are unknown.
3) The treatment notes from the Mulago out-patients' department are inadmissible because the authors are not disclosed.
4) None of the applicants is competent to tender the treatment notes.
5) The Police Form 3 is irrelevant and inadmissible since there is no evidence as to which specific police unit requested the medical examination.
6) The forms do not indicate the number of the case filed at the police alleging torture, and as such the authenticity of the forms cannot be verified.
7) The failure to present the oral or written testimony of the authors of the purported treatment notes renders the notes inadmissible.
8) There is no evidence to corroborate the applicant's allegations of torture by the 2nd and 4th respondents.

Issue 2

It is the argument of the 2nd and 4th respondents that the allegations of violation of the right to privacy are unsubstantiated because privacy is not an absolute right. The respondents explain that whenever a claim of invasion of privacy is made, the other competing values at stake must be considered. In this case, the purportedly unauthorised entry into private space argued by the 1st – 21st respondents must be understood in the context of the enforcement of the Covid-19 regulations that were in place at the time.

The argument here turns around the Uganda Police Force's broader mandate that flows from article 212(c) of the Constitution and section 4 of the Police Act on the prevention and detection crime. The argument by counsel for the 2nd and 4th respondents is therefore that the arrest and detention of the applicants (who had gathered in large numbers in violation of the Presidential Guidelines) was well within the allowable exceptions provided in article 43(2)(c) of the Constitution.

Issue 3

It was the argument of the 2nd and 4th respondents that the moment the 1st – 20th applicants were admitted to Kitalya Mini-Max Prison, they were legally required to conform to all the norms adopted by prisons countrywide as part of standard operating procedures.

- In terms of section 68 of the Prisons Act, every prisoner is subjected to routine prison discipline that entails compliance with all laws, orders, and directives for the duration of the time in which a person is in prison.
- In terms of section 81(2) of the Prisons Act, an officer in charge of prisons is empowered, for the good order and discipline of a prison facility, to isolate and confine any prisoner in a separate cell for a specified period.

The argument then went that no allegation of discrimination can be imputed to the 2nd respondent for any acts that fall under the two consideration listed above.

Issue 4

The 2nd and 4th respondent repeated the assertions made by the 1st respondent concerning the issue of the remedies sought by the applicants.

4.4 The 3rd respondent's written submissions

The 3rd respondent's main argument here is that they were wrongly joined in the motion and that this should never have happened. That aside, the 3rd respondent,[11] makes a point that the assertions made by Ms. Balya in rejoinder cannot significantly connect them to the motion. It is also the argument of the 3rd respondent that since the 1st respondent had also been sued, his actions could not be vicariously liability imputed to the 3rd respondent. In any case, the fact that the LDUs and other agents of the 3rd respondent were not identified or named means that no evidence could be presented on which to connect the 3rd respondent to the complaint in the motion.

11 The 3rd respondent went on to cite *Massa v Achen* [1978] HCB 279 to assert that an averment under oath which is neither denied nor rebutted is admitted as a true fact.

Issue 4

Like the other respondents, the 3rd respondent called for the motion to be dismissed with costs in view of how scanty the evidence against it is.

4.5 Applicants' written submissions in rejoinder

The applicants' written submission in rejoinder was in reply to particular averments of the respondents and was therefore not structured according to issues earlier framed by this Honourable Court. The submission addresses the participation of the 1st respondent; the admissibility of medical reports; the admissibility of the video recordings; proof of torture; the 3rd respondent's liability; and the limitation of the right to privacy. I have summarised the arguments as follows:

1) The medical reports and Police Form 3 are admissible. The medical reports are admissible because of the affidavit sworn to by Mr Kiyegga Andrew explaining his qualifications, experience, and the methods he used to examine the 1st – 20th applicants. The Police Form 3s are also admissible because the absence of a police case number or police request for examination is minor procedural detail.
2) The video recording is admissible. Counsel asserted that it meets the test laid down in *Amongin Jane Francis Okili v Lucy Akello and Electoral Commission* (*supra*) because Dr Jjuuko explained in his affidavit how he accessed, stored, and preserved the integrity and authenticity of the contents.
3) There is ample proof of torture. The proof can be seen in the affidavits of Dr Jjuuko, the affidavit in rejoinder by Justine Balya, the affidavit of Andrew Kiyegga and its annexures, and the video recording.
4) The 3rd respondent is vicariously liable for the actions of its agents – namely, the 1st respondent who is also the Chairperson LC III – as detailed in the various affidavits. The fact that the 1st respondent was sued personally does not absolve the 3rd respondent of vicarious liability under section 10 of the HREA.
5) The burden of justifying that the limitations of a right are reasonable and justifiable in a free and democratic society rests on the respondents, who have to do so by showing genuine, special, and exceptionally strong reasons for the limitation. In this case, there was no justifiable reason for the respondents to enter the premises and interfere with the affairs of the applicants.

5 Examination

As already highlighted, there is a total prohibition both worldwide and in Uganda against any form of torture and/or inhuman treatment of any person, one which flows not only from the international framework but also from our country's constitutional and statutory provisions. A number of precedents equally take this line by holding that no form of torture or inhuman and degrading treatment can ever be justified.[12]

In this decision, the approach is one of attempting to give context to the events that took place between 29 March 2020 (when the 1st – 20th applicants were first arrested and detained at the police station and later arraigned in the court) and subsequently released from Kitalya Mini-Max Prison. It is noted, for a start, that the recent Anti-Homosexuality Act Cap 117 (AHA)[13] had neither been enacted, nor become the subject of litigation in the Constitutional Court. In this ruling, I will steer clear of any examination of the possible violation of the right to non-discrimination of persons considered 'homosexuals', in the light of pending litigation in the Supreme Court in this regard.[14]

It is to be stressed that the present AHA is grounded in the 'conversion approach' that seeks to deploy both legal as well as medical interventions against persons who exhibit homosexual tendencies.[15] It is true that many communities in many African countries hold a sincere belief that homosexuality is an ailment that can be 'cured' through medical interventions using an enabling legal framework,[16] a belief often reinforced by conservative societal attitudes and judicial

[12] Later in this ruling, a discussion will be made explaining how different courts in Uganda (including both the Constitutional and Supreme Courts) have extensively dealt with the question of torture by borrowing heavily from the international law and other countries' courts' decisions.
[13] The 30th of May 2023 was the date commencement of the AHA.
[14] See *Hon. Fox Odoi & 21 Others v Attorney General & 3 Others* (Consolidated Constitutional Petition 14 of 2023; Consolidated Constitutional Petition 15 of 2023; Consolidated Constitutional Petition 16 of 2023; Consolidated Constitutional Petition 85 of 2023) [2024] UGCC 10 (3 April 2024). See the *Hon Fix Odoi- Oywelowo and 21 others v Attorney General and 3 others* Constitutional Appeal No 07 of 2024.
15 See 'What is conversion therapy and when will it be banned?' BBC 20 September 2024 available at https://www.bbc.com/news/explainers-56496423. Accessed on 04-11-2024. "Conversion therapy" is a broad term that refers to therapeutic techniques or other activities that attempt to change or alter sexual orientation or reduce a person's attraction to other persons of the same sex and instill conventional gender roles. Such practices include psychotherapy, religious counseling, and aversion therapy aiming to change sexual orientation or gender identity.
16 T Naidoo and A Sogunro 'Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ rights in Africa' *African Human Rights Policy* Paper 3. Pretoria: Pretoria University Law Press (2021) 10.

reasoning.[17] It is in this context that three fundamental rights that have allegedly been violated by the respondents are examined:

- freedom from torture, cruel, inhuman, and degrading treatment or punishment;
- violation of the right to privacy; and
- violation of the right to equality and non-discrimination.

6 Dealing with preliminary question on admissibility of evidence

All of the respondents raised questions about the admissibility of the evidence adduced in support of the motion. They argued that some of the depositions were technically problematic, considering that the witnesses who spoke to the Police Form 3, the medical reports, and the video evidence did not have the requisite authority or skills to do so; moreover, some affidavit evidence became incurably defective due to the many lies contained in it and its motivation by spite and greed, as pointed out below:

1) Hajji Kiyimba, in challenging paragraph 7 of Mr Walugembe's affidavit, disputes the allegation that he called on journalists to take pictures of the applicants, given that no such pictures were ever presented to prove that they were indeed taken and so ordered by him.
2) In their supplementary written submissions, the 2nd and 4th respondents cast doubt on the depositions of Mr Kawooya, Mr Mayanja-Ssendagire, Mr Jjuuko, Mr Kifuba, Mr Tumuhimbise, Mr Yiga, and Mr Kiyegga because the jurats appear on a separate page even though there was ample space left to fit the jurats.
3) Specifically, it is argued that the fact that the jurats were typed and signed independently of the main body of the depositions points to the possibility of concoction of evidence.
4) The depositions are in any case characterised by various inconsistencies and discrepancies that render them unreliable.

It is noted that some of the challenges to the motion's supporting evidence were raised in the 2nd and 4th respondents' supplementary written submissions, which were filed rather late and thus

17 See D Kaplan et al. (1972) 'Culture theory', in K Sriramesh & D Vercic (eds) *The Global Public Relations Hand Book*. Englewood Cliffs: Prentice-Hall (2003) 5. The authors' strong assumptions that the expressions of social-cultural bias (for example against homosexual behavior) could be altered through changes in economic development and socio-structural opportunities, are still heavily contested in the Ugandan context.

made it difficult for the applicants to present contrary arguments. That said, in the paragraphs below I will make a brief determination.

6.1 Determination

Technically irregular depositions may be saved by the detailed provisions in article 126(2)(e) of the Constitution, as has been clarified in many of the decisions of the Supreme Court of Uganda. In a host of such decisions, the Supreme Court has tended to adopt a liberal approach when dealing with depositions that may be partly false. The principle seems to be that if parts of a given deposition, and not the whole, are untruthful and/or irrelevant, then those parts may be severed off so that the rest of the averments can be considered. [18] Indeed, the requirement for attaching the jurats on separate pages to every deposition is clear, and I do not need to undertake any detailed discussion here.[19] However, concerning the depositions in question, it is impossible to challenge the deposition in support of the motion before me on account of the jurat not being included on the same page, since it is obvious that there was a lack of space. I also take comfort in the knowledge that the framework on enforcement of human rights in Uganda does not allow mere technical breaches to invalidate a motion like the one before me.[20]

6.2 Questioned Police Form 3

The purpose of Police Form 3 is to enable the police to conduct thorough investigations that can assist in the investigation and prosecution of criminal cases. The form is structured in such a way that a police officer must give instructions so that a medical probationer can document physical or other injuries. The form is divided into two sections. The first is filled in by the police and includes basic details of the crime; the second is filled in by the doctor, who documents physical injuries observed on the survivor of the crime during the examination. The medical examination is carried

18 Odoki CJ as he then was in *Col. Kizza Besigye v Museveni and Electoral Commission* Presidential Election Petition No. 1 of 2001. This position was reiterated by Mulenga JSC in *Yona Kanyomozi v Motor Mart (U) Ltd* Supreme Court Civil Application No. 6 of 1999.

19 In *Twinamasiko Onesmus v Agaba Aisa and Another* HC Election Petition 702 of 2021 and *Junaco (T) Limited and 2 Others v DFCU Bank Limited* (Miscellaneous Application 27 of 2023) 2022 UGCommC 100 (29 March 2022), Justice Ajiji and Justice Mubiru observed that having jurats appear on different pages when they could have fitted on the same page with the last text of the paragraphs is a sloppy practice with fraudulent intent. The assumption is that the affirmant did not appear before the commissioner of oaths and that the affidavit was not read to him or her.

[20] See section 6 (5) of the HREA.

out either by police doctors or other authorised medical personnel, who must note down physical findings and draw conclusions.

6.3 Determination

While the information in the questioned Police Form 3s is relevant, the very form is inadmissible because of the absence of the initial instructions from the police officer who ordered the examination of the victims of the alleged torture. The failure of a police officer to indicate the police unit, the police case number, and the name of the police officer, as well as his or her force number, rank, signature, and telephone number, as required by the form, impeaches its reliability.

6.4 Medical notes

Generally speaking, the medical reports and treatment notes that are relied on in the motion like the one before this court would ordinarily have been inadmissible. The rule on documentary evidence is that any alleged fact must be proved by primary evidence, unless such a document is brought under the exceptions of section 64 of the Evidence Act.[21] I do not need to reproduce the detail of the provisions here, except to reiterate that, given the complaint at hand, this is properly a case where the exceptions to the rule may be considered.

6.5 Determination

The fact that the 1st – 20th applicants were allegedly tortured and detained and considered themselves disempowered is sufficient in itself to suggest why those original medicinal treatment notes from a national hospital could not have been produced, notwithstanding that these are documents of a private nature that patients usually present every time they visit a hospital.

This conclusion is bolstered by the decision in the *Kigoye Francis v Uganda*,[22] where the Supreme Court made it possible for the courts to rely on carbon copies of documents in the absence of primary evidence. Likewise, the decision in *Lalwak Alex v Opio Mark* suggests that where a Photostat copy of a document is produced and there is proof of its accuracy, it may indeed be considered as secondary evidence. This is true especially where other information is on record to

21 According to section 61 of the Evidence Act Cap 8, primary evidence means the document itself is produced for inspection by the court.
22 Criminal Appeal No. 31 of 2019.

explain the circumstances under which the Photostat copy was prepared.[23] Given, as noted above, the unique circumstances in which the 1st – 20th applicants found themselves, it is the finding of this court that the copies of the medical reports and treatment notes are admissible under the exception rule.

6.6 The video evidence

All of the respondents, particularly the 1st respondent, question the video evidence submitted by the applicants as inadmissible because it falls short of the criteria laid down in *Amongin Jane Francis Okili v Lucy Akello and The Electoral Commission*[24] because of two main reasons:

- The source of the video is unknown, and no further evidence was produced to show how the video footage was obtained, stored, and reproduced, and thereby satisfy the court that it was not altered.
- The person who captured and produced the video footage was not called as a witness to testify as to the authenticity of the video.

In response, the applicants in rejoinder insist that the video evidence meets the test laid down in *Amongin Jane Francis Okili v Lucy Akello and Electoral Commission*. This is so because Dr Jjuuko explained in his deposition how he accessed, stored, and preserved the integrity and authenticity of the contents, by doing the following:

- explaining how he downloaded, stored and preserved the video recording on his personal computer and then copied it to the disk which was tendered in court;
- attaching the video evidence together with its transcription;
- attaching the expert translation from the Centre for Languages and Communication Services, Makerere University; and
- noting that the video evidence is a three-minute clip in which the 1st respondent is seen with a big stick hitting some of the applicants.

The fact that Dr Jjuuko himself downloaded the videos from BBS Terefayina's YouTube channel and Sky News's YouTube channel is then emphasised.

23 Civil Appeal No. 078 of 2018.
24 [2015] UGHCCD 47.

6.7 Determination

The admissibility of electronic data evidence and the weight that must be attached to it is regulated by the Electronic Transactions Act 2011 (ETA). Section 8 of ETA provides that no evidence may be rejected on the grounds that it is merely in the format of a data message or electronic record. Consequently, persons who intend to rely on such evidence cannot reasonably be expected to obtain it in its original format. Further guidance on the admission of video evidence is provided in paragraph 15 of the Constitution (Management of Exhibits) (Practice) Directions of 2022.

Courts are required, as a matter of prudence, to consider the following three essential elements before admitting and/or attaching any value to electronic data evidence:

1) the manner in which the data message sought to be relied on was generated, stored or communicated;
2) the reliability of the manner in which the authenticity of the data message was maintained; and
3) the manner in which the originator of the data message or electronic record was identified in addition to the other relevant factors.

The Court of Appeal in *Matata Bwambale and Ors v Uganda*[25] has previously held that video evidence prior to 2022 is admissible provided it has the same chronological narration as that of the statements of the persons tendering the evidence for as long as it is intelligible. Thus, as is required by section 88 of the Civil Procedure Act, if the recording is in any other language, the transcript of the recording should be translated into English before it can be received into evidence.[26]

I have watched the video on the disk A provided, read the transcript, read the translation, and even watched the video found on the YouTube channel of Sky News. It is the firm determination of this court that the recording passes the rules on admission of electronic evidence as established by statutes and precedents of the court.

25 Criminal Appeal No. 248 of 2019.
26 (Civil Appeal No. 0006 of 2013) [2016] UGHCCD 63 (29 September 2016). The learned judge relies on the decision of *R v Daye* 1908 KB 330 at 340 and *Seccombe v Attorney-General* 1919 TPD 270 at 272, 277–278.

7 General exceptions to the enjoyment of rights and freedoms

It is noted that, other than the right to freedom from torture, the rights to equality and privacy may be limited under the general framework on limitations of rights laid down in article 43 of the Constitution.[27] For example, the person claiming that his or her rights was infringed has to prove that he or she reasonably expected to have his right protected in particular circumstances. Thus, any inquiry into the alleged violation of rights is subject to the following considerations, with the recognition that, as a protected value, may be restricted in well-defined circumstances. Three considerations usually adopted by courts are singled out:

1) there is a legitimate state interest in restricting the right;
2) the restriction is necessary and proportionate to achieve the interest; and
3) the restriction is allowed by law.

Issue 1: Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to freedom from torture, cruel, inhuman, and degrading treatment or punishment guaranteed under articles 24 and 44(a) of the Constitution.

Worldwide, in the debate on torture, the best point of reference is the United Nations Convention against Torture (CAT).[28] The CAT prohibits in absolute terms all forms of torture by setting a standard of the phrase 'torture, or inhuman or degrading treatment or punishment'. Similarly, articles 4 and 5 of the African Charter on Human and Peoples' Rights guarantee the sanctity of the human body by expressly prohibiting torture.[29]

7.1 The Ugandan context

In Uganda the term 'torture' is not restricted to physical harm but includes a long list of acts constituting torture, such as physical, mental, and pharmacological torture. The protection against torture also includes the habitation to any victim of torture who may be satisfied by the property

27 In *Charles Onyango Obbo and Anor v Attorney General* at 27, Justice Mulenga JSC called article 43 'a limitation within a limitation' because it sets a limitation on the limitation of the enjoyment of rights.
28 The Convention was adopted by the United Nations General Assembly on 10 December 1984 and came into force on 26 June 1987. Uganda ratified it on 3 November 1986.
29 The African Commission passed Resolution 275 (*supra*) which recognises that violence against LGBTI amounts to torture and cruel, inhuman, and degrading punishment contrary to the African Charter.

of the person convicted of torture.[30] The definition of the term 'torture' is clear and detailed, to the extent that there are no exceptional circumstances whatsoever that could justify it.[31]

Articles 24 and 44(a) of the Constitution provide the non-derogable right to dignity and protection from inhuman treatment or punishment. The oft-cited decision of the Ugandan Supreme Court in *Kyamanywa Simon v Uganda*[32] (a decision which has been the subject of much scholarly comment) considered corporal punishment as a sentence for a crime as unconstitutional and as a prohibited act of torture that should never be employed as a disciplinary measure in any penal institution in Uganda. Arguably, Parliament codified the above decision of the Supreme Court,[33] by now prohibiting in section 81(2) of the Prison Act acts such as stripping a prisoner naked, pouring water in the cell of a prisoner, depriving him or her of food, and administrating corporal punishment and torture.

7.2 Determination

Aside from the above detailed framework, it is generally accepted that courts must apply a very strict test when considering whether there has been a breach of an individual's right to freedom from torture or inhuman degrading treatment. It has been argued that the court should, on a case-by-case basis, take into account factors such as the duration of the treatment, its physical and mental effects, and the age, sex, health, and vulnerability of the victim.[34]

In most prisons systems, whether described as correctional services or prison authorities, the inmates are, as a rule, "institutionalized" for proper management. This is done mainly through a combination of measures, such as giving inmates numbers, subjecting them to strict rules of order and discipline, controlling their diet, and limiting the time that they may spend in open spaces. A

30 See the second Schedule to the Prevention and Prohibition of Torture Act (PAOTA). Section 2 of the Ugandan Prevention and Prohibition of Torture Act prohibits any acts of torture committed by non-state actors. The Act specifically disqualifies persons accused of torture from consideration of a grant of amnesty. See section 23 of the Act. The framework affords extensive protection to victims of torture, such as restitution, compensation, and habitation to any victim of torture which may be satisfied by the property of the person convicted of torture.

31 Section 6 of PAOTA. In regard to the so-called 'ticking-bomb scenario', the Supreme Court of Israel rejected the idea that torture can be justified when there is an imminent danger to the state or its people. For detailed discussion, see M Amand 'Public Committee against Torture in Israel v. The State of Israel et al: Landmark human rights decision by the Israeli High Court of Justice or status quo maintained?' *North Carolina Journal of International Law and Commercial Regulation* (2000) 25(3) 656–684.

32 Constitutional Reference No. 10 of 2000, 14 December 2001.

33 Act 17 of 2006. It came into force on 24 May 2006.

34 See *Nakaziba v Attorney General* per Bashaija; J's (Miscellaneous Cause No. 295 of 2018) [2020] 31.

court of law should therefore be careful when inquiring into the nitty-gritty operations of prison managers for fear of jeopardising the orderly management of inmates unless there are good and sufficient reasons for doing so.[35] Simply because an inmate has been medically examined while in prison, told to be isolated, or openly rebuked does not imply that somehow he or she has been subjected to psychological torture falling under the ambit of anti-torture legislation. This court therefore has not been convinced that there is sufficient evidence to implicate the 2nd respondent in the alleged acts of torture to the required evidential standard.

In the present case, the medical treatment notes, together with video evidence that clearly shows the 1st respondent beating some of the 1st – 20th applicants with a cane, is considered cogent enough. Indeed, the video also shows the victims being paraded while tied with ropes like cattle. The allegation that Mr Mukiibi was probably beaten by the 1st respondent because he was a suspected homosexual, or rather had supposedly masterminded and initiated the rest of the 1st – 20th applicants into homosexuality, cannot be a justification for any acts of torture. Further evidence as shown in paragraphs 5, 6, and 7 of Mr Mukiibi's deposition that speak of the 1st respondent's alleged violent acts towards the 1st – 20th applicants has been considered. In fact, paragraph 5 of Mr Oketch deposition speaks of verbal harassment in which the 1st respondent asked him nasty questions as to why he was a homosexual, a line of questioning that evidently is considered a form of emotional violence. However, this court rejects the evidence of Mr Oketch, who in paragraph 4 of his deposition states that he was slapped by the LDU officers and made to sit down as so weak to vicariously implicate the 4th respondent.

On the whole, therefore, there is evidence that the 1st – 20th applicants were, on balance, subjected to mistreatment of an inhuman kind by the 1st respondent in the course of the employment of the of the 3rd respondent. It is the finding of this court that the LDU officers, together with the police officers, were at the very least mere body guards of the 1st respondent. There is no evidence that they actively participated in the alleged torture or superintended over and supported the wrongful acts of the 1st respondent.

35 W Luyt 'The transformation of corrections in the new South Africa' *Acta Criminologica: African Journal of Criminology & Victimology* (2001) 14(3) 26–33.

Issue 2: Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to privacy guaranteed under article 27(1) and (2) of the Constitution.

The right to privacy is provided for under article 27(1) and (2) of the Constitution, a constitutional provision that has been canvassed in detail by all of the parties. The uniqueness of the framework on the right to privacy is found in the value it has in protecting an individual's space from unlawful searches of his or her home or unauthorised entry into his or her premises.[36]

It is noted that the protection of the right to privacy under article 27(2) of the Constitution is narrower than the protection of the same right under article 17 of the International Covenant on Civil and Political Rights (ICCPR). Arguably, the protection of privacy as a value under the ICCPR covers the person's privacy to the extent even of prohibiting attacks on his or her honour and reputation. Although article 27(2) of the Constitution is not exhaustive and focuses on the person's property and home rather than his or her body, Uganda is a signatory to the ICCPR, which entails that the extensive protections thereunder can be read with modification with what article 27(2) of the Constitution provides.[37] Privacy as a protected value is best understood when taken as a 'continuum interest' in which privacy as a right is visualised in terms of a collapsed pyramid, such that protection is sharper in the private arena but blunter in the wider public space.[38]

The negative wording of article 27(2) implies that the state's major obligation is to respect the enjoyment of the right in a 'hands-off' way that prevents it (the state) from infringing on such intimate spaces as one's residence. For instance, unauthorised searches of an individual's body or his or her home, as well as any unauthorised entry into a person's premises, are prohibited.

7.3 Limitation to the right to privacy

The right to privacy is not absolute and is subject to such action as may be lawfully taken for the prevention of crime or public disorder, or the protection of health or morals. The right to privacy

36 Victor *Juliet* Mukasa *and Yvonne Oyo v Attorney General* Misc Cause No. 24/2006.
37 A 'right to privacy' is a generic term encompassing various rights recognised as inherent in the concept of ordered liberty that prevents government interference in intimate personal relationships or activities. The right is simply the freedom of an individual to make fundamental choices concerning himself, his family, and his relationship with others.
38 The judgment and views of the Constitutional Court of South Africa in *Bernstein and Ors v Bester NO and Ors* 1996(4) CLR 44 are helpful in interpreting the right to privacy in Uganda. The Court held that the importance of a right to privacy may be analysed in two ways: first, in relation to privacy in a private sphere, and, secondly, in relation to privacy in the public realm. The right to privacy provides strong protection in the intimate private sphere, and any interference with it attracts a higher level of scrutiny than interference with privacy in the public arena.

is also subject to such action as may be lawfully taken for the protection of the rights of others. Section 27 of the Police Act allows a police officer who is not lower in rank than a sergeant, and who has reasonable grounds for believing it necessary for purposes of an investigation into any offence, to search a premises or cause a search to be made. Madrama J, in *Sikuku v Uganda Baati*,[39] adopted a restrictive approach to article 27 of the Constitution by considering first whether the applicant had a reasonable expectation of privacy on the grounds that the level of privacy protection depends on the context. Courts in this country continue to assert that an infringement of a person's privacy can never be justified on account of curbing sexual deviants.[40]

7.4 Determination

The 1st – 20th applicants were arrested at their residence during the Covid-19 pandemic. As already noted, Hajji Kiyimba and Kyengera Town Council tried to distance themselves from the acts of arrest complained of. Somewhat mistakenly, they seem to think that the power and obligation to arrest is an exclusive province of the police.[41] Besides, it is the respondents' argument that the act of detaining the 1st – 20th respondents, out of which the alleged infringement of their right to privacy arose, was justified because there had been a reasonable suspicion of the commission of crime.

Before the final determination can be made, I have been compelled, for ease of reference, to bullet-point five key events that took place on the date of the alleged arrest:

- Hajji Kiyimba and Local Council I officials from Nkokonjeru A in Kyengera Town Council, in the company of the LDU and police personnel, moved into the 1st – 20th applicants' residence.
- They looked for persons who were allegedly 'hiding' in the said residence.
- They tied up the 1st – 20th applicants using ropes.
- They paraded the 1st – 20th applicants en route to the police station.
- They publicly exposed and rebuked the 1st – 20th applicants as 'homosexuals'.

39 HCCS No. 298 of 2012.
40 See *Kasha Jacqueline & Ors v Rolling Stone Ltd & Anor*, per Musoke-Kibuuka J Miscellaneous Cause No. 163 of 2010.
41 See section 15 of the Criminal Procedure Code Act Cap 122.

In my view, the five events above offer the clearest evidence of the breach of the 1st – 20th applicants' privacy rights. Using the collapsed-pyramid metaphor stated earlier, there is clear evidence that the 1st – 20th applicants' private space, which is deeply protected by the law, was violated by the 1st respondent, as the agent of the 3rd respondent, and without any justification in the absence of a search warrant. In any case, the 1st and 3rd respondents do not cite any legal provision that made it possible for local government politicians and/or any managers to 'raid' any designated residences of any persons during Covid-19 without following the requisite laws.

The possibility that the 1st respondent, as the 3rd respondent's political leader, was looking for alleged homosexuals is so weak a defence that no court could ever take it seriously and is thus legally untenable. However, for the reasons already stated in section 7-2 of this ruling, I find the evidence against the 2nd and 4th respondents on the alleged violation of the 1st – 20th applicants' right to privacy to be so weak that it is not even necessary to offer any further explanation at this point.

Issue 3: Whether the respondents' impugned actions violate and contravene the 1st – 20th applicants' right to equality and non-discrimination guaranteed under articles 20(1) and (2) and 21(1) of the Constitution.

Article 21(1) of the Constitution restates the classical equality doctrine that calls for equal treatment of all persons before the law regardless of their standing in society. Article 21(2) goes so far as to list 12 prohibited grounds of discrimination. The equality doctrine is rooted in the idea that the human race as a family is characterised by the attribute of oneness in dignity and worth. Therefore, no group of human beings should be taken as inferior and hence as less deserving of certain legal rights and entitlements than others and meriting being treated with hostility and denied the full enjoyment of fundamental rights and freedoms. [42] The approach of many Ugandan courts has therefore been to examine the prohibited grounds on discrimination listed in article 21(2) insofar as those grounds may nullify or impair the enjoyment or exercise by all persons, on an equal footing, of any of the rights and freedoms under the Bill of Rights.

42 (Constitutional Petition No. 15 of 2006) [2011] UGSC 13 (8 August 2011).

7.5 Context

The framers of the 1995 Constitution crafted article 21(2) in flexible terms, given the adoption of the words 'without prejudice to clause 1 of this article'. It is argued that the wording of article 21(2) suggests that the grounds its lists are merely examples and not exhaustive. As has been pointed out elsewhere, the protection afforded by the Constitution's non-discrimination provisions does not nullify differentiation per se in the treatment of persons, considering that at times the recognition of differences may have protective value for those in weak or vulnerable situations.[43] Thus, the standard in international law is that no discrimination exists if the difference in treatment has a legitimate purpose and/or bears to reason.[44]

As a rule, a party pleading discrimination bears the burden to demonstrate that discrimination occurred, upon which the burden shifts to the respondents to produce evidence which shows that no such breach ever occurred, or that if it ever occurred, then it was legitimate and justified.

7.6 Determination

There is evidence, as already found by this court, that the 1st – 20th applicants were subjected to several acts of torture, inhuman and degrading treatment, and violation of their privacy. They additionally argue that all this was done to them because they were considered homosexuals. However, it has not been proved that the way in which they were treated differed from how other persons who breached the Covid-19 restrictions, or indeed any other criminal suspects, are ordinarily treated. This court takes cognizance of the fact that oftentimes acts of discrimination take place behind closed doors and that all that is left for evidence are the complainants' verbal accounts and recollections vis-à-vis the respondents' denials. But it would be a dangerous precedent to treat every unsupported claim of discrimination as a violation of article 21. The applicants had a duty to prove that their mistreatment was differential and specific to them on the basis of specific characteristics unique to them, a duty which they failed to discharge.

As regards the import of article 21(2), following the provisions of the AHA and the precedents of the Constitutional Court, I am unable to determine, at least for now, whether a person's sexual

43 See *Carolyne Turyatemba & 4 Ors Vs Attorney General & Anor* Constitutional Petition No. 15 of 2006.
44 See the decision of the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, (Application Nos. 9214/80; 9473/81; 9474/81).

orientation is among the prohibited grounds of discrimination.[45] As already observed above, it is clear to me that article 21(1) is wider in scope and application than article 21(2), as confirmed by the presence of the words 'without prejudice to article 1 above'.

Issue 4: The remedies available to the parties.

This court has made a finding that Hajji Kiyimba and Kyengera Town Council, are liable for infringing the 1st – 20th applicants' right to privacy and to freedom from torture, cruel, inhuman, and degrading treatment or punishment. What then remains is to determine the nature of reliefs that should be granted.

It is noted that in terms of section 10 of the HREA, liability for the infringement of rights and freedoms may at times be of a personal nature, except that such personal liability does not absolve the principal of the wrongs committed by the agent. In *Victor Mukasa*, a decision made prior to the enactment of HREA, the court makes the point that where violations are committed by agents of the different orders of government, liability must be imputed to a specific order of government.[46] Considering that Kyengera Town Council, as a hybrid part of Uganda's system of local government, is a legal person, the actions of its agents must be imputed vicariously to it as the principal.[47] In the light of the framework under the HREA, this court takes the view that liability for human rights violations ought to be shouldered proportionally by the individual perpetrators and their principals, usually government agencies, so that the pain and cost of violations is distributed and felt across the board as opposed to leaving it to the taxpayer.

7.6.1 Guidance from other courts

Generally speaking, damages are a form of costs for litigation in the determination of the reliefs available in cases of this nature. The consensus of the courts seems to be that damages are intended to give the wronged persons compensation for the loss or injury suffered.[48]

When the reliefs sought take the nature of general damages, as in the case before me, it becomes almost certain that their consideration is a discretionary exercise of judicial power and that such

45 See *Hon. Fox Oywelowo Odoi and 21 others ibid* (n 14) at 93–125.
46 Victor *Juliet* Mukasa *and another (n 35)*.
47 See *Muwonge v Attorney General*, (1967) EA 7.
48 *Robert Cuosesens v Attorney General* SCCA No. 8 of 1999.

damages should always be awarded with caution.[49] In determining the nature and extent of general damages, courts are called upon to consider the value of the subject matter, the economic inconvenience suffered, and the extent of the breach.[50] In summary, general damages are restitutive in nature, such that the injured person may be returned to the position that he or she was in before the wrong. Arguably, it is advisable that the court also consider whether a wrongful party ever attempted to mitigate the wrong. Where, alternatively, the reliefs sought take the nature of punitive damages, what must be examined is whether the infringement complained of was oppressive, arbitrary, or unconstitutional.[51] Notionally, punitive damages are not confined solely to compensation but must also have the power to deter the repetition of similar infringements.[52]

In determining the amount payable in damages, I have considered four decisions of the High Court that have dealt extensively with similar infringements:

1) In *Nsereko Musa v Attorney General and Ors*,[53] the court considered an award of UGX 100,000,000 as sufficient.
2) In *Hon. Francis Zaake v Attorney General & Ors*,[54] an award of UGX 75,000,000/- was justified on the grounds that it could atone sufficiently for the pain inflicted on the victim given the duration of the infringement.
3) *In Victor Mukasa and Another,* an award of UGX 3,000,000 was considered sufficient for violating the right to property, and UGX 10,000,000, as sufficient for the humiliation, injury and trauma suffered.[55]
4) In *Ronald Reagan Okumu and others v Attorney General* MA 63 of 2002, UGX 10,000,000 was considered a reasonable amount in compensation for the violation of personal liberty and human dignity.

49 *Fred Kamugira v National Housing & Construction Company* CS No. 127 of 2008 per Bashaija J.
50 *Uganda Telcom v Tanzanite Corporation* [2005] 351.
51 *Deylon Johnson Wilson v Attorney General* HCCS No. 0027 of 2010.
52 In *Nakaziba v Attorney General* at 52 Justice Bashaija cited with authority *Jennifer Muthoni & 10 Ors v Ag of Kenya* [2012] eKLR.
53 Miscellaneous Cause No.386 of 2020.
54 Miscellaneous Cause No.85 of 2020.
55 Ibid (n 35).

7.7 Determination

In my view, in a case like the one before me, an extravagant award might be counterproductive. The consensus seems to be that as long as an award of general and punitive damages can be justified, it remains sufficiently protective of the rights infringed. I have taken into consideration the natural and probable consequences of the actions of Hajji Kiyimba (as the political leader of Kyengera Town Council) and make the following final orders:

1) I consider an award of UGX 5,000,000 as general damages for each of the 1st – 20th applicants payable equally by HajjiAbdu Kiyimba and Kyengera Town Council as sufficient.
2) Considering the circumstances under which 1st – 20th applicants were arrested and the debasing language that was used at a time when every segment of society was vulnerable due to the Covid -19 pandemic, I consider that the award of UGX 2,500,000 as exemplary damages to each of the 1st – 20th applicants, payable equally by Hajji Kiyimba and Kyengera Town Council, to be deterrent enough.
3) The orders in sections (1) and (2) of this order shall attract a commercial rate of interest from the date of this ruling until payment in full.
4) Costs are also awarded against the 1st and 3rd respondents.

Douglas Karekona Singiza

Judge

22 November 2024