

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO. 369 OF 2019

1.THE WOMEN’S PROBONO INITIATIVE (WPI)

2.C.G===== APPLICANTS

VERSUS

1.ATTORNEY GENERAL

2.DR. DAVID BASANGWA

3.DR. JULIET NAKKU===== RESPONDENTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

RULING

Introduction

[1] The Applicants bought this application, by Notice of Motion, under Articles 21, 24, 28, 33, 35, 42, 44 & 50 of the Constitution the of Republic of Uganda, 1995; the Human Rights Enforcement Act, 2019; the Mental Health Act, 2018; and Judicature (Fundamental Rights and other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019.

[2] The Applicants sought for the following orders:

(a) A declaration that the Respondents violated the 2nd Applicant’s right to access basic health services when they omitted to provide her with emergency medical examination when she reported to them that she had been raped while in the care of Butabika National Referral Mental Hospital, contrary to Article 33(2) &(3), 35, 8A and Objective XIV(b), XVI and XX of the Constitution of the Republic of Uganda, 1995.

(b) A declaration that the Respondents violated the 2nd Applicant’s right to equality and freedom from discrimination when they failed to ensure access to justice and access to basic health services for her when she was raped under their care, contrary to Article 21, 28, 33(2) &(3), 35 and 44 of the Constitution of the Republic of Uganda ,1995; Section 53(1) of the Mental Health Act, 2018; and Section 7(1), 28 and 42 of the Persons with Disabilities Act, 2018.



- (c) A declaration that the Respondents violated the 2nd Applicants right to dignity when they failed to investigate and give a report of their findings into allegations of rape as reported by her, contrary to Articles 24, 28, 35 and 44 of the Constitution of the Republic of Uganda ,1995 and Section 52 of the Mental Health Act, 2018.
- (d) A declaration the Respondents violated the 2nd Applicants right to redress and rehabilitation when they failed to provide her with psychological counseling, including rape crisis counselling and trauma therapy, within reasonable distance from her place of residence and with a qualified psychologist independent from the hospital where she was raped upon her discharge from the hospital for the injuries and trauma caused contrary to Article 24, 33(2) & (3), 35, 42, 44 and 45 of the Constitution of the Republic of Uganda ,1995 and Section 10(1) and 28 of the Persons with Disabilities Act, 2006.
- (e) An order requiring the Respondents to make available to the 2nd Respondent psychological counselling, including rape crisis counselling and trauma therapy, at a reasonable distance from her place of residence, by appropriately qualified psychologist independent from Butabika National Referral Mental Hospital and free of costs to the 2nd Applicant.
- (f) An order requiring the Respondents to pay damages to the 2nd Applicant for expenses and trauma suffered in her pursuit for justice and alternative health care.
- (g) An order requiring the Respondents to initiate and promote adequate resources for an independent investigation, to include participation by civil society and the Uganda Human Rights Commission, into past and present sexual violence allegations in Butabika National Referral Mental Hospital and how they are dealt with and to make the findings freely and widely available to the public.
- (h) An order requiring the Respondents to ensure that residents at Butabika National Referral Mental Hospital have regular access on the premises of the hospital to adequately resourced team of fully independent professionals, including lawyers, medical doctors, civil society and psychologists, who are not employed by the Hospital and are empowered to receive and investigate allegations of sexual violence.

- (i) An order requiring the Respondents to make available independent trauma support and aftercare, including trauma therapy and rape crisis counselling, to all residents of the hospital alleging sexual violence at a reasonable distance from their places of residence, upon discharge.
- (j) An order that the steps in (a) and (b) above be completed within 3 months of delivery of the ruling in this application.
- (k) An order that the steps in (c) (d) and (e) above be completed within 2 years of delivery of the ruling in this application.
- (l) An order that progress reports on development in steps in (a) – (e) above be availed to court periodically every after 6 months of delivery of the ruling in this application.

Applicants' case:

[3] The Applicants' case, as per the Notice of Motions and the affidavits in support, is that the 2nd Applicant is a person who was diagnosed with a bipolar condition in the year 1997. In October, 2015 she was admitted at Butabika National Referral Mental Hospital, private wing, after she had experienced a relapse of her mental health. The 2nd Respondent was the Executive Director of the hospital while the 3rd Respondent was the Deputy Executive Director of the hospital.

[4] On the 31st October 2015, during the day, the 2nd Applicant got into a scuffle with a guard who stopped her from going to withdraw money from a mobile money agent across the gate and her arm got broken in the process. In the night of that day, she woke up from sedation and noticed that her caregiver was not on the bed next to her and the door was open. She decided to look for her caregiver as she was hungry. She alleged that while walking towards the gate, a guard tried to stop her from leaving the ward area. The guard told her that if she accepted to have sex with her he would let her go her way, but she refused. The guard beat her with a cane, punched her, threw her into a trench and had forceful sexual intercourse with her. She became erratic and screamed for help to which another guard came to her rescue. She narrated to the guard what happened and requested for the phone of the guard to call her aunt which he agreed. She telephoned her aunt, Kanjogera Edith, who managed to trace her caregiver who came together with a nurse and took her to the ward. The following morning at around 10.00am nurses came and forced her to take a shower, sedated her and left. She deponed that she told

her caretaker that she was raped and repeated the same to the doctor that came to review her the day after her rape. Kanjogera Edith Kabahuma deponed that the following day after the rape she went to the hospital together with her mother and sister. She had a meeting with the hospital authorities who told her that the 2nd Applicant was involved in a fight with a guard and that is how she sustained the injuries she had. The 2nd Applicant deponed that she was not offered any post exposure prophylaxis or an emergency contraceptive even after severally confiding in the administrative authorities at Butabika National Referral Mental Hospital. She further deponed that after severally insisting that she was raped and needed medical attention, she was tested for HIV and other things. She was found to have UTI which was treated. Upon her discharge from the hospital she narrated what happened to her and also reported to FIDA – Uganda who wrote to the 2nd Defendant. The secretary of the 2nd Respondent verbally assured her that an investigation would be done and the culprit would be brought to book but she did not get any report of the findings into the investigations of her case or a report on who raped her.

[5] The 2nd Applicant contended that at the bare minimum the police should have been alerted to take statements from the nurses and guards on duty the night she was raped. She further contended that she sustained trauma, intense physical and emotional pain from the actions of the staff and agents of Butabika National Referral Mental Hospital. She has spent a lot of finances seeking private professional psychiatric help as she failed to trust the health system at Butabika National Referral Mental Hospital.

Respondents' case:

[6] The Respondents opposed the application. Their case is that the 2nd Applicant was first admitted in Butabika National Referral Mental Hospital in July 2004 with bipolar affective disorder (first episode). She was again admitted in January 2015 (second episode). In both episodes she was being managed as an outpatient at the mental clinic. On the 21st October 2015 the 2nd Applicant was admitted to the private wing of the hospital after she stopped her treatment. She was reinstated and continuously monitored. On the 31st October 2015 the 2nd Applicant left the ward without permission, claiming that she was going to a mobile money booth to send money. She was resultantly restrained by security officers and returned to the ward. She was very abusive and aggressive to the officers who returned her. She sustained a fracture in the process. Later in the night, the 2nd Applicant absconded from the general female ward at around 11.20pm, loitered around the ward until security was alerted. She was found

and returned to the ward at 4.00am by a female security guard and handed over to the nurses. On the 9th November 2015 the 2nd Applicant complained to the clinician that she was angry because she had been raped nine days back in the hospital compound and she was scared that she had been infected with HIV or was impregnated. She insisted that she should be discharged. On the same day she was visited by an uncle Nyiro Denis. She was erratic and was placed on a 24-hour observation after she threatened that if she is not discharged, she would be found dead in her bed. The clinical team at the hospital tried to establish the circumstances around the rape allegations despite the 2nd Applicant's refusal to cooperate with the doctors. HIV and pregnancy test were carried out but they both turned out to be negative. Her urine was tested and she was found to be having an infection which was treated with anti – biotics and anti-fungal. The Respondents adduced clinical notes indicating that the uncle of the 2nd Applicant informed the medical team that the 2nd Applicant had informed him earlier that she could only get out of the hospital if she said that she had been raped while in the ward. According to the clinical notes, Nyiro Denis told the medical team that there was no need for the hospital staff to bother about the complaint of the 2nd Applicant.

[7] The Respondents contended that the 2nd Applicant was not offered any Post exposure Prophylaxis or emergency contraceptive because the matter was reported 9 days after the incident and the emergency treatment would only be effective within a period of 72 hours. The Respondents further contended that the 2nd Applicant was seen by a clinical psychologist on the 21st November 2015 for the purpose of providing support during that period. The psychologist noted that her mood was fluctuating and her story of rape was inconsistent. Cognitive Behavioral Therapy was recommended. According to the Respondents, the 2nd Applicant was discharged on the 24th November 2015 and advised to return for review after 2 weeks for further hospital management but she did not return. The Respondents contended that Butabika National Referral Mental Hospital investigated the allegations of the 2nd Applicant however due to inconsistencies and lack of adequate information such as the perpetrator's description or name, the investigations were not conclusive.

Issues:

[8] The issues for the determination of the court are;

1. Whether the 2nd Applicant's right to access basic health services was violated by the Respondents.

2. Whether the 2nd Applicant's right to equality and freedom from discrimination was violated by the Respondents.
3. Whether the 2nd Applicant's right to dignity was violated by the Respondents.
4. What remedies are available to the parties.

Legal representation and submissions:

[9] The Applicant was represented by Ms. Prima Kwagala while the Respondents were represented by Mr. Franklin Owizera, a state Attorney from the Attorney General's Chambers. On issue 1, counsel for the Applicant submitted that the failure on the part of the Respondents to provide basic medical services of a physical check to confirm if the 2nd Applicant was raped and to provide her with an emergency contraceptives and post exposure prophylaxis within 72 hours violated the 2nd Applicants right to access basic health services. On issue 2, she submitted that when the 2nd Applicant reported of the rape, no action was taken immediately as it is the usual case with women who report sexual violence cases to health facilities in Uganda. According to counsel, she was discriminated against on the basis of her mental status. On issue 3, counsel submitted that the 2nd Applicant had to endure shame and stigma in her pursuit for justice when she reported that she was raped but no one cared to subject her to a test to confirm whether or not it was true.

[10] In reply, counsel for the Respondents submitted, on issue 1, that the 2nd Applicant reported of the alleged rape 9 days after it occurred which made it impossible to avail her with PEP as it was already after 72 hours. She was tested for HIV, pregnancy and UTI. She was given anti – biotics and anti – fungal for the UTI that she was found with. She was also given mental counseling by a clinical psychologist. On issue 2, counsel submitted that the 2nd Applicant was not discriminated against. She was offered the same treatment as any other citizen who reports a rape case in a medical facility. On issue 3, counsel submitted that the Applicants did not demonstrate how the 2nd Applicant's right not to be subjected to cruel, in human and degrading treatment was violated.

Consideration and determination of the court:

Issue 1: Whether the 2nd Applicant's right to access basic health services was violated by the Respondents.

[11] The right to health is not one of the human rights specifically mentioned in Chapter 4 of the Constitution. However, Article 45 of the Constitution provides that rights, duties,

declarations and guarantees relating to fundamental and other human rights and freedoms specifically mentioned in Chapter 4 shall not be regarded as excluding others not specifically mentioned.

[12] Firstly, the above-mentioned additional rights, are provided for in the National Objectives and Directive Principles of State Policy of the Constitution. The right to health is specifically provided for in Objectives XIV and XX. Under Objective XIV, the State is under the duty to ensure that all Ugandans access health services and under Objective XX, the state is under obligation to ensure the provision of basic medical services to all Ugandans. Article 8A of the Constitution provides that Uganda shall be to be governed based on principles of national interest and common good enshrined in the national objective and directive principles of state policy and Parliament is mandated to make relevant laws for the purpose of giving full effect of the objectives. In **Centre for Health, Human Rights and Development (CEHURD) and 4 others versus Attorney General, Constitutional Petition No. 16 of 2011**, the Constitutional Court, at page 18, held that;

“The National Objective and Directive Principles of State Policy in objectives XIV and XX read together with Article 8A of the constitution which states that Uganda shall be governed based on principles of state policy oblige the government to provide health and basic medical services to the people of Uganda.” Underlined for emphasis.

[13] Secondly, other additional rights are found in human rights treaties, agreements and conventions to which Uganda is party, such as the **African Charter on Human and People’s Rights** (Ratified on the 10th May, 1986) and the **International Covenant on Economic, Social and Cultural Rights** (Ratified on the 21st January, 1987). Article 16 of the **African Charter on Human and People’s Rights** provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. The state parties are enjoined to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Article 12 of the **International Covenant on Economic, Social and Cultural Rights** provides that the States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The state parties are enjoined to take steps to achieve the full realization of this right.

[14] According to the **CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12)**, the Third Committee of the United Nations General Assembly

adopted the definition of health contained in the preamble of the Constitution of World Health Organization to mean,

“a state of complete physical, mental and social well – being and not merely the absence of disease or infirmity.”

[15] In the Kenyan case of **Patricia Asero Ochieng and 2 others versus the Attorney General and Another, High Court Petition No. 409 of 2009**, which was cited with approval in the **CEHURD** case (supra), Mumbi Ngugi J., at page 34 held that;

“The state’s obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines.”

[16] In this case, the Applicants contended that the Respondents violated the 2nd Applicant’s right to basic medical services when they failed to conduct a physical check to confirm if the 2nd Applicant was raped and to provide her with an emergency contraceptives and post exposure prophylaxis within 72 hours. The Respondents on the other hand contended that the 2nd Applicant reported of the alleged rape 9 days after it occurred which made it impossible to avail her with PEP as it was already after 72 hours. However, when she made the report, she was tested for HIV, pregnancy and UTI. She was given anti – biotics and anti – fungal for the UTI that she was found with. She was also given mental counseling by a clinical psychologist.

[17] In my view, the evidence of the 2nd Applicant that on the same night when she was raped, she narrated to a certain guard what happened to her and that she repeated the same to the doctor that came to review her the day after her rape is not believable. The 2nd Applicant did not mention the name of the guard or the doctor to whom she made the report. I note that the 2nd Applicant had a caretaker to whom the 2nd Applicant stated she narrated what happened to her. The said caretaker did not depone any affidavit to clarify whether what the 2nd Applicant stated was the truth and to positively identify the guard and the doctor mentioned by the 2nd Applicant. I also find it very strange that when 2nd Applicant telephoned Kanjogera Edith immediately after the alleged rape, she did not mention to her that she had been raped. Had she mentioned to her, probably when Kanjogera Edith, her mother and sister came to the hospital the following day, they would have requested the hospital to give her emergency contraceptives

and post exposure prophylaxis or discussed with the hospital authorities of the alleged rape or gone to the police to report the case. The fact that she did not reveal to Kanjogera Edith the night of the alleged rape and the fact that Kanjogera Edith, her mother and sister did not have any discussion with the hospital authorities or better still, report the matter to the police the following day when they visited 2nd Applicant in the hospital casts serious doubt as to whether she was actually raped and made any report to the hospital on the night of the alleged rape.

[18] Indeed, the Respondents adduced clinical notes indicating that on the 9th November 2015 when the 2nd Applicant complained to the clinician that she was raped nine days back, her uncle Nyiro Denis informed the medical team that the 2nd Applicant had informed him earlier that she could only get out of the hospital if she said that she had been raped while in the ward. The Applicants did not rebut this evidence or adduce the said Nyiro Denis to deny the words which were attributable to him. In my view, the Applicants failed to prove on the balance of probabilities that the 2nd Applicant informed the hospital authorities immediately after the alleged rape. It is undisputed fact that after the 2nd Applicant informed the medical team that she was raped, she was given the basic medical service. I therefore find that the Applicants failed to prove that the 2nd Applicant's right to access basic health services was violated by the Respondents.

Issue 2: Whether the 2nd Applicant's right to equality and freedom from discrimination was violated by the Respondents.

[19] Article 35 (1) of the Constitution provides that persons with disabilities have a right to respect and human dignity, and the State and society is enjoined take appropriate measures to ensure that they realize their full mental and physical potential. Objective XVI of the National Objectives and Directive Principles of State Policy of the Constitution also provides that society and the State shall recognize the right of persons with disabilities to respect and human dignity. Specifically, on the right not to be discriminated against, Article 21 of the Constitution provides that:

“21. Equality and freedom from discrimination.

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*
- (2) Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe,*

birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this Article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Underlined for emphasis.

[20] In addition, Article 4 the **United Nations Convention on the Rights of Persons with Disabilities** enjoins all State Parties to undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.

[22] In this case, the Applicant did not adduce any evidence to prove that the 2nd Applicant was discriminated against on the basis of her disability. The submission of counsel for the Applicants that when the 2nd Applicant reported of the rape, no action was taken immediately as it is the usual case with women who report sexual violence cases to health facilities in Uganda is not founded on any evidence. As I have already pointed out while resolving issue 1, when the 2nd Applicant reported to the hospital on the 9th November 2015 that she was raped, she was given all the basic medical attention. The Applicants therefore failed to prove that the 2nd Applicant’s right to equality and freedom from discrimination was violated by the Respondents.

Issue 3: Whether the 2nd Applicant’s right to dignity was violated by the Respondents.

[23] Article 24 of the Constitution guarantees the right not to be subjected to any form of torture or cruel, inhumane or degrading treatment. Article 44(a) of the Constitution prohibits the derogation from the enjoyment of the freedom from torture.

[23] The Prevention and Prohibition of Torture Act, 2012 which was enacted by Parliament to, among others, give effect to Articles 24 and 44(a) of the Constitution, in Section 2(1) it defines torture as follows:

“(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation

of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—

- (a) obtaining information or a confession from the person or any other person;*
- (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or*
- (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.”*

[24] In this case, no evidence was adduced to prove that the Respondents did any act or omission, by which severe pain or suffering whether physical or mental, was intentionally inflicted on the 2nd Applicant to achieve any of purposes mention in Section 2(1) of the Prevention and Prohibition of Torture Act, 2012 or any related purposes. I therefore find that the Applicants failed to prove that the 2nd Applicant’s right to dignity was violated by the Respondents.

Issue 4: What remedies are available to the parties.

[25] In the end, the Applicants having failed to prove their case, it is accordingly dismissed. As regards the cost of this application, the general rule is that costs follow the events and a successful party should not be deprived of costs except for good cause. I note that although the 1st Applicant filed this application in public interest, they clearly did not bother to interrogate it to find out whether it was worthy filing it in court. I will therefore find no reason why I should deny the Respondents the costs of this application. The Applicants are accordingly ordered to jointly and severally pay the Respondents the costs of this application.

I so order.

I so order.

Dated and delivered by email this 19th day of January, 2024.



Phillip Odoki

JUDGE

