

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

**CORAM: HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ
HON. G.M. OKELLO, J.A HON. JUSTICE S.G. ENGWAU,
J.A HON. JUSTICE A. TWINOMUJUNI, J.A HON.
JUSTICE C.K. BYAMUGISHA, J.A**

CONSTITUTIONAL PETITION NO.2 OF 2001

JOYCE NAKACWAPETITIONER

V E R S U S

**1. THE ATTORNEY GENERAL OF UGANDA }
2. KAMPALA CITY COUNCIL }
3. MRS MIWANDA as THE LC1 CHAIRPERSON
NAKAWA TRADING CENTRE }..... RESPONDENTS**

RULING OF THE COURT:

The petitioner filed the following petition under article 137 of the Constitution in which she made the following averments against the three respondents jointly and severally: -

- 1. Your petitioner is a person having an interest in and being affected by the following matters being inconsistent with your petitioner's rights under the Constitution whereby your petitioner is aggrieved.**
- 2. Your petitioner has the right to bring this petition under article 137(2)(b) of the Constitution for the interpretation of the several articles stated herein in relation to the acts and omissions of the respondents, and for consequential orders for redress or a declaration that she is entitled to such redress.**

- 3. Your petitioner is a resident of Nakawa Trading Centre LC1 where the 3rd respondent was the LC1 Chairperson at the time the facts stated herein occurred and at the time of filing this petition.**
- 4. On the 21st day of June 2001 your petitioner was delivered of a baby girl by the roadside near Naguru Kampala City Council (KCC) Clinic in Nakawa Division in the City of Kampala.**
- 5. Your petitioner then proceeded to the 2nd respondent's Maternity Home/Clinic aforementioned with the baby still attached to the after birth to complete the birth process.**
- 6. Your petitioner shall aver that at the said facility she received no medical/maternity care whatsoever but was referred to Mulago Hospital, with no referral letter.**
- 7. The said acts infringe article 33(3) of the Constitution in as far as the 3rd respondent through its employees acting in the course of their employment failed to provide medical and/or maternity care for the petitioner who is a resident in their charge.**
- 8. It shall also be the petitioner's contention that though the Public Health Act (Cap 269 of the Laws of Uganda, 1964) in s.12 provides that the Minister shall make rules for the proper control of clinics or institutions open or kept open by any person for the welfare and care of children or the care of expectant or nursing mothers, the Minister has not made such rules.**
- 9. That the above said omission has led to or contributed to the abuse of your petitioner's rights aforementioned by the 2nd respondent's employees acting in the course of their employment for which the 2nd respondent is vicariously liable.**

- 10. Having been denied maternity care as aforesaid, your petitioner was then forced to walk immediately thereafter, in spite of the fact that she was still bleeding and weak from the delivery and her clothing was all stained with blood.**
- 11. Your Petitioner failed to walk due to dizziness from bleeding and was forced to sit outside in the early morning with a baby only about two hours old.**
- 12. The said omission infringes article 24 of the Constitution in as far as it amounted to cruel, inhuman and degrading treatment meted out to your petitioner by the employees of the 2nd respondent.**
- 13. Your petitioner shall also aver that she was later rescued by a person passing by on her way to work and taken to a clinic in Kireka and finally to the home of Nambi Sophia (who is a sibling to your petitioner) in Kireka in the City of Kampala.**
- 14. Your petitioner shall aver that later that day she returned to her residence in Nakawa Trading Centre and at the instigation of some boda-boda cyclists she was accused by residents and the LC1 Chairperson, the 3rd respondent of having stolen the child.**
- 15. The residents then entered your petitioner's room and in the presence of the 3rd respondent herein pushed her out of the room and led her to the home of the 3rd respondent where they subjected your petitioner to mob justice.**
- 16. Your petitioner was in the process subjected to unlawful vaginal examinations by the 3rd respondent and another, using polythene bags for gloves, in full view of residents of the area, both male and female.**

17. The said infringe your petitioner's rights in as far as they infringe on article 28(3)(b) which ensures that one shall be presumed innocent until proved guilty.
18. The said acts also infringe on article 27(1)(a) in as far as her right to privacy of the person was violated.
19. The said acts also infringe on article 24 as the petitioner was subjected to further cruel and inhuman treatment, and article 27 (1)(a) and (b) in as far as the mob was unlawfully instigated by the 3rd respondent to enter into your petitioner's tenement.
20. The 3rd respondent summoned 999 Police Patrol who came to the 3rd respondent's home where the 3rd respondent and the mob had led your petitioner.
21. Your petitioner was later taken for a medical examination at Naguru Clinic where it was confirmed to the police that the petitioner had gone to the clinic that morning with a baby still attached to the after-birth.
22. The 3rd respondent refused to accept this and convinced the police that she had never seen your petitioner pregnant and that your petitioner was thus a child thief who should be taken into custody.
23. Your petitioner and the baby were arrested and both taken into custody by the police at Jinja Road Police Station where your petitioner was made to sit out in the cold at the Police reception desk, through that night until she was the following day imprisoned on suspicion of "child stealing".
24. Your petitioner's baby was eventually removed from her and the petitioner prevented from breast-feeding. The baby was kept apart in the cold and fed on water and glucose, which were supplied by the 3rd respondent.

- 25. Your petitioner's baby was later taken to Sanyu Babies Home in Mengo through the Probation and Social Welfare Officer, Nakawa Division by the name of Magezi without making proper inquiries.**
- 26. The said acts infringed the Petitioner's rights to care for her newly born baby and also contravened article 34(1) in as far as the baby was deprived of the right to be cared for by her parent.**
- 27. Your petitioner was then imprisoned for 5 days without being charged with any offence in a court of law in contravention of her constitutional rights under article 23(4)(c).**
- 28. While in custody your petitioner had neither sanitary nor toilet facilities, she began to smell and the inmates complained of the foul smell that was emanating from her, which constituted a violation of the petitioner's rights under articles 24 and 33(3), by the 1st respondent's employees acting in the course of their employment.**
- 29. Your petitioner shall contend that though S.28 of the Prisons Act provides that there shall be a woman prison officer in every prison who shall have care and the superintendence of female prisoners and be responsible for their control and discipline, the Act fails to provide that charge of female prisoners.**
- 30. Because of the complaints above mentioned your petitioner was eventually taken to the Police surgeon where it was established that she had indeed been delivered of a child a few days before the examination.**
- 31. Your petitioner was then released on police bond after five days in detention without being charged with any offence and she was asked to report back to the police, which she did diligently.**

32. That on her release, the petitioner asked for her child from Jinja Road Police Station but was not given her. She was kept in suspense and kept going to the Police Station for more than a week before she was told that the baby had been taken to Sanyu Babies Home in Mengo.

33. That on or around the 3rd of July 2001 when your petitioner went to Sanyu Babies Home with the Officer in Charge Jinja Road Police Station, she was informed that the child had died on the 2nd of July 2001 and had been buried at Lusaze Cemetery on authority of officers of the 2nd respondent.

34. That your petitioner is not sure that the baby whose burial permit she was shown was in fact her child because the permit also shows that the baby that was buried was only 2 days old, yet the petitioner's baby was to have made 11 days on the 2nd July 2001.

35. That the above notwithstanding, your petitioner shall aver that the loss either by death or otherwise of the child was caused by the negligence of all the respondents, contravenes articles 22(1) and/or article 34(1) and that had not the facts stated above taken place, the petitioner's child would be alive and/or in her custody and care today.

The petitioner then made the following prayers: -

- (a) Grant a declaration that the acts and/or omissions of the respondents stated in this petition are in contravention of and inconsistent with the petitioner's rights that are insured by the constitution in articles 22(1), 24, 33(3), 27(1)(a) and (b), 34(1) and 23(4)(a);**
- (b) Grant a declaration that the respondents also contravened the deceased child's rights under article 34(1);**

- (c) Grant a declaration that your petitioner is entitled to compensation for unlawful imprisonment, pain and suffering, embarrassment and humiliation and loss of her child, from all the respondents jointly and severally; and**
- (d) This court do grant an order for redress that is due to her so as to cut down on her costs of litigation as it is empowered to do under article 137(4)(a);**
- (e) The costs of this petition be borne by the respondents jointly and severally;**
- (f) Such other relief as this Honourable Court may deem fit to grant.**

The petition is supported by an affidavit sworn by the petitioner on 26th July 2001. This petition was filed in this court on 27th July 2001.

The respondents filed answers to the petition and affidavits in support of their respective answers to the petition.

When the petition came before us for hearing on 16 September 2002, Mr. Denis Bireije, the learned Commissioner for Civil Litigation raised two preliminary objections to the petition.

The first objection concerned the jurisdiction of this court to entertain this petition. Mr. Bireije submitted that this petition raised no questions that would require the interpretation of the Constitution. He pointed out the fact that the jurisdiction of this court is limited to matters which fall under article 137 of the Constitution. He argued that the allegations against the Attorney General revolved around the Uganda Police Force for arresting, imprisoning and torturing the petitioner at or around Jinja Road Police Station. In his view, even if these allegations were found to be true, they did not raise any issue that would require constitutional interpretation. He relied on the cases of Ismail Serugo vs. Kampala City Council and Anor, Constitutional Appeal No.2 of 1998, and The Attorney General of Uganda vs. David Tinyefuza, Constitutional Appeal No. 1 of 1998.

Mr. Bireije's second preliminary objection was that the petition was time barred. He pointed out the provisions of *Rules of the Constitutional Court (Petitions for*

Declarations under article 137 of the Constitution) Directions, 1996. Rule 4 thereof states: -

"The petition shall be presented by lodging it in person, or, through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the constitution complained of in the petition" [Emphasis supplied]

Mr. Bireije submitted that the cause of action against the Attorney General (if any) arose between 21st June 2001 and 25th June 2001 when the petitioner was arrested, detained and released on police bond. This petition should have been filed not later than 25th July 2001, but it was filed on 27th July 2001 two days after the expiry of the stipulated thirty days. In his view, this filing was clearly out of time and the whole petition against the Attorney General was incompetent. He relied on the case of Dr. James Rwanyarare and Anor. vs. The Attorney General Constitutional Petition No.11 of 1997 where this court held that a petition filed outside the thirty days was incompetent unless leave for extension was first obtained. Mr. Bireije then submitted that on these two grounds, the petition should be dismissed with costs to the 1st respondent.

Mr. Mutyaba Sempa and Mr. Nerima Nelson learned counsel for the 2nd respondent associated themselves with Mr. Bereije's preliminary objections. They also relied on Serugo's case (supra) and the case of Sebagala vs. The Attorney General and 2 Others, Constitutional Petition No. 1 of 1999.

Mr. Mbalinda Tom, learned counsel for the 3rd respondent also associated himself with Mr. Bireije's submissions and prayed for the dismissal of the petition against his client.

In reply, and on the issue of jurisdiction, Mr. Philip Karugaba, learned counsel for the petitioner, submitted that this court had jurisdiction to hear this petition. He cited a recent decision of this court in Alenyo vs. Attorney General and 2 others, Constitutional Petition No.5 of 2002 in support of his argument. He submitted that the cases of Serugo (supra) and Tinyefuza

(supra) relied upon by the respondents were both considered by this court in Alenyo's case (supra). He invited this court to follow Alenyo's case and hold that this petition was properly before this court and dismiss the objections.

On the issue of limitation, Ms Irene Mulyagonja Kakooza, learned counsel for the petitioner submitted, first, that rule 4 of Legal Notice No.4 of 1996 went against the spirit of the Constitution. In her view, the rule could not validly limit the exercise of a constitutional right guaranteed by the Constitution. She pointed out that there was an Act of Parliament which deals with matters of limitation and if it was intended to impose a time limit on the exercise of constitutional rights, it should be in an Act of Parliament. She also cited Chapter 4 of a book entitled "Uganda: Constitutionalism at Cross Roads" by Peter Walubiri in which the 30 days rule has been heavily criticised. Ms. Mulyagonja invited us to ignore the thirty days rule. Alternatively she invited us to follow our decision in Zachary Olum and Reiner Kafire vs. Attorney General Constitutional, Petition No.6 of 1999 in which this court appears to have departed from its earlier stand on the 30 days rule in Rwanyarare (supra) and Sarapio Rukundo vs. The Attorney General, Constitutional Petition No.3 of 1997.

Ms. Mulyagonja's second submission on this issue was that the events that gave rise to the cause of action against all the respondent's began on 21/6/2001 when the petitioner gave birth, up to the 3rd of July 2001 when the petitioner finally learnt about the death of her child. According to Ms. Mulyagonja, it would not have been possible for the petitioner to contemplate court action before she even knew about the fate of her child.

In her view, if the 30 days rule is applied, the days did not begin to run until after the 3rd July 2001. In that event, this petition which was filed on 27th July 2001 was well within the 30 days and it should be held to be competent. She invited the court to hold that there was no merit in the preliminary objections to the petition and to dismiss them with costs to the petitioner.

First we deal with the issue of jurisdiction. This court has recently pronounced itself on this matter in the case of Alenyo vs. The Attorney General and 2 others (supra) in which

we followed the Supreme Court decisions in Serugo (supra) and David Tinyegunza (supra). We stated: - "Articles 137(1) provides: -

'Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court'.

The Constitution does not define the word "Interpretation". However article 137(3) gives a clear indication of what the word means. It states: '137(3) a person who alleges that: -

(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) Any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.'

We hold view that the allegations made to the Constitutional Court, if they are in conformity with article 137(3), give rise to the interpretation of the Constitution and the Court has the jurisdiction to entertain them.

In the instant petition, the petitioner alleges that the Law Council is guilty of commissions and omissions, which are inconsistent with or in contravention of the constitution. He has petitioned this court for a declaration to that effect. In our judgment these are the type of actions envisaged by article 137(3)(b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his rights guaranteed by specified provisions of the constitution and this court should so declare. In order to do that the Court must determine the meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the court is and interpretation of the Constitution. It is not an enforcement of rights and freedoms. The court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is

not relevant to the issue of jurisdiction. It is what the court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either, that there is a remedy available to the petition somewhere else. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by article 137."

This petition raises issues which can be put into two categories: - In the first category, the petitioner complains, that she was denied medical treatment, that she was subjected to degrading and inhuman treatment, that she was tortured, that her privacy was violated, that her child was denied care and protection from her mother, and that the child was deprived of a chance to live to mention but a few. She alleges that these acts of the respondents are a contravention of her constitutional rights. This court must consider three matters: -

- (i) Were these acts actually committed against the petitioner and her child?
- (ii) Who is responsible for the acts or omissions?
- (iii) Do these acts and/or omissions contravene constitutionally guaranteed rights and freedoms?

It is our view, that the first two questions do not involve any interpretation of the constitution. But the third question does involve an interpretation of the Constitution. Whereas the first two questions could easily be handled by a competent court, that court may be forced to seek the opinion of the Constitutional Court on the third question before disposing of a case where the three questions arise. In our view, this court is obliged to entertain any petition if it raises questions that include the third question posed above. It falls under article 137 of the Constitution and this court has jurisdiction.

In the second category, the petitioner complains of unlawful arrest and imprisonment or detention. Once it is established that any or all the respondents are responsible for this, it is not necessary to "interpret" whether the acts contravene the Constitution. The Constitution is very clear. It does not require a constitutional interpretation to determine whether a person's constitutional rights have been violated for example, if it is established that the person was arrested without cause and detained for more than 24 hours without being taken to court. It is a matter of drawing an inference which can be done by any

competent court. In that case, an application for redress would be better entertained under article 50 of the Constitution.

["Such] an application for redress can be made to the Constitutional Court, ONLY in the context of a petition under article 137 brought principally for Interpretation of the Constitution."

See Ismail Serugo case per Mulenga J.S.C.

The petition before us contains elements of the two categories we have endeavoured to elucidate above. They are part and parcel of one petition, inseparable and indivisible. This court has jurisdiction to entertain matters that would otherwise fall under article 50 if this is done in the process of a constitutional interpretation under article 137 of the Constitution. In our judgment, this court has jurisdiction to entertain this petition and the first preliminary objection will be dismissed.

On the issue of limitation, we state from the outset that we appreciate that the thirty days rule has become contentious and controversial. Academically it has arguments in its favour and arguments against. However, it was enacted under the authority of an Act of Parliament and until it is successfully challenged in court, it remains good law.

We also acknowledge the fact that this court may appear to have given different interpretations to the meaning and application of the thirty days rule. However, our interpretation of the rule in the case of Zachary Olum and Anor vs. The Attorney General stands. Our decision was arrived at in full knowledge and awareness of our earlier decisions in Rukundo vs. Attorney General (supra), Rwanyarare vs. Attorney General (supra) and Sebagala vs. Attorney General (supra). Each decision should be confined to its peculiar facts.

In the instant case, it appears plain to us that the acts and omissions that give rise to the cause of action against the respondents occurred between 21st June 2001 when the petitioner gave birth near Naguru Clinic and 3rd July 2001 when she was told at Sanyu

Babies Home that her child had died of 2nd June 2001. The petitioner alleges that between those dates, all the respondents took part in arresting and detaining the petitioner and her child and unlawfully separated her from the child which acts and omissions led to the death of the child. The petitioner cannot be expected to have started contemplating legal action when she had no idea what had happened to her child. Moreover, though she was released from police custody on police bond on 25th June 2001, she has not yet been discharged from the bond obligations up to this day. It seems the matter is still under investigation. We think that in those circumstances the time of limitation could not have started running until the 3rd July 2001. Since she filed this petition on 27th July 2001, she acted within time and her petition is not time barred. This objection has no merit and must also be dismissed.

In the result, we find no merit in these preliminary objections which we dismiss accordingly. The costs of this application will abide the result of this petition.

Dated at Kampala this 11th day of October 2002.

Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

Hon. Justice G.M. Okello
JUSTICE OF APPEAL

Hon. Justice S.G. Engwau
JUSTICE OF APPEAL

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL

Hon. Justice C.K. Byamugisha
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