

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA (Civil Division)
MISC APPLICATION No 188 of 2020
(Arising From Misc Cause No. 81 of 2020)

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

Versus

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

BEFORE: HON. JUSTICE MICHAEL ELUBU
RULING

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

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

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

1. The Applicant be granted access to MUKIIBI HENRY, TUMUHIMBISE DOUGLAS, KIBALAMA ANDREW, KATEREGGA SADDAM, JUUKO RAJ, KUGONZA KELVIN, SSAMULA DENIS, GWANVU ABBEY, YIGA KAREEM, KIFUBA TEVIN HARRIS, TUSHABOMWE JABEL, KAWOOYA IVAN, WALUGEMBE ASHRAF, JAMES TENDIBWA, MUHEREZA MARK, OKETCH JOEL, SSENYONGA RONALD, SHEEMA RODNEY, AND MAYANJA JACKSON who are currently in the custody of the Respondents in order to enable them to prepare their defences and bail applications in Criminal Case No. 113 of 2020 which has been scheduled for hearing before **HER WORSHIP SARAH BASEMERA** at the Chief Magistrate's Court of Mpigi at Nsangi.
2. Costs of this application be provided for.

The grounds of this application are well enumerated in the Notice of Motion and particularised in the affidavit of one Dr. Adrian Juuko in which he states as follows,

1. That he is the Executive Director of Human Rights Awareness and Promotion Forum (HRAPF), and one of the advocates representing the persons named in the Notice of Motion and who are the accused persons in Criminal Case No. 113 of 2020 before the Chief Magistrates Court of Mpigi at Nsangi. He is therefore well versed with the facts giving rise to this application.
2. That on the 29th of March 2020, the Accused Persons instructed the Legal Aid Clinic of Human Rights Awareness and Promotion Forum (HRAPF) to represent them in their defence against criminal charges which are preferred against them.
3. That the criminal charges arose out of the arrest of the Accused Persons on 29th March 2020, following which event they were detained at Nkokonjeru Police Post until 31st March 2020 when they were arraigned before the Chief Magistrates Court of Mpigi at Nsangi on charges of doing 'a negligent act likely to spread infection of disease' contrary to section 171 of the Penal Code Act and remanded to Kitalya Prison until 28th April 2020.

4. That on 31st March 2020 when the Accused Persons appeared in court, their legal counsel were unable to get to the Court on time because of the restrictions on transport that had been imposed the night before as one of the measures to prevent the spread of COVID-19.

5. That later on the same day, Advocates from the Legal Aid Clinic of Human Rights Awareness and Promotion Forum (HRAPF) made a visit to Kitalya Prisons, where they were informed by the Officer in Charge that the accused persons were not in custody of Kitalya Prisons, and that in any case, lawyers could be only granted access with express permission from Prisons Headquarters.

6. That on 2nd April 2020, the Advocates visited Kabasanda Prison to find out whether the Accused Persons had been taken to that prison instead of Kitalya Prisons. The Officer in Charge of the Prison informed the Advocates that they did not have the said persons in their custody, and then provided the lawyers with the telephone contact of the Officer in Charge of Kitalya Prison. One of the Advocates, Ms. Patricia Kimera then called the Officer in Charge of Kitalya Prison on the number provided, and he confirmed that he had the Accused Persons in detention, but that he could only provide the lawyers access to them with express permission from Prisons Headquarters because of the COVID-19 restrictions.

7. That on 3rd April 2020, a letter was written asking the Commissioner General of Prisons for permission for Ms. Patricia Kimera to access the Accused Persons in order to advise them on the legal options available to them.

8. That the Commissioner General of Prisons responded to that request 19 days later by a letter dated 22nd April 2020, in which it was stated that the HRAPF lawyers could not be allowed to access their clients because 'of the current COVID-19 pandemic lockdown.' The lawyers were advised 'to be patient until the situation improves'.

9. That the Accused Persons' trial was scheduled for 28th April 2020 starting at 9 o'clock before Her Worship SARAH BASEMERA at the Chief Magistrate's Court of Mpigi at Nsangi.

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10. That the Applicant has made all best endeavours and efforts to access their clients but in vain due to the Respondents' refusal to grant access.

11. That the actions of the Respondents in denying the Accused Persons legal representation contravene and are in violation of the Accused Persons fundamental right to a fair hearing guaranteed under article 28(3)(a),(c),(d) and article 44(c) of the Constitution of the Republic of Uganda.

12. That the actions of the Respondents in denying the Accused Persons legal representation contravene and are in violation of the Accused Persons fundamental right to liberty guaranteed under article 23(5)(b) of the Constitution of the Republic of Uganda.

13. That there is an imminent threat and danger of continued and further violation and contravention of the Accused Persons' fundamental Constitutional rights to a fair hearing guaranteed under articles 28(3)(a), 28(3)(c), 28(3)(d) and article 44(c) of the Constitution of the Republic of Uganda.

14. That there is an imminent threat and danger of continued and further violation and contravention of the Accused Persons' fundamental Constitutional rights to liberty guaranteed under articles 23(5)(b) of the Constitution of the Republic of Uganda.

15. That there is an imminent threat and danger that the Accused Persons will suffer a miscarriage of justice.

16. That it is urgent, equitable and in the interest of justice that this application is allowed.

17. That there is a main application before this Honourable Court in which the Applicant has a prima facie and good case.

18. That this Honourable Court is vested with inherent jurisdiction to grant the remedies sought herein.

There are two supplementary affidavits deposed by the applicant. In one filed on the 30th of April 2020 the applicant states that when the applicants were not produced in Court on the 28th of April 2020, an oral application for bail could not be made. A formal application for bail before the Chief Magistrates Court in Mpigi was accordingly lodged. That the applicant now intends to also file another application for bail before the High Court. It is also averred that

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10. That the Applicant has made all best endeavours and efforts to access their clients but in vain due to the Respondents' refusal to grant access.

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Counsel and the applicant had still not been granted access to the accused persons by the 29th of April 2020.

The second supplementary affidavit is deposed on the 8th of May 2020 and in it Dr Adrian Juuko affirmed that an application for bail before the Chief Magistrates Court in Mpigi had not been fixed because the Prison authority had not been honouring production warrants.

When this instant matter came up for hearing before this Court, the applicants produced an affidavit of service indicating that the respondents had been properly served. The 1st respondent's acknowledgement of service is clearly indicated on the return. This Court was therefore satisfied that there was proper service and for that reason went ahead to hear the matter ex parte.

I shall now turn to the merits of this application.

The question for the Court is whether the applicant is entitled to the prayers sought?

It is the import of the applicants pleadings and the submissions of his Counsel that the accused persons named in the Notice of Motion have been denied access to their legal counsel. This application is therefore for prayers that the Court makes an order for access to the accused persons to enable them prepare their defences and make bail applications.

It was the contention of Counsel that the continued denial of the accused persons access to counsel infringes on the right to liberty that is enshrined in Art 23 (5) (b) of **the Constitution of the Republic of Uganda**. But more importantly is an infringement of Article 44 (c) from which there can be no derogation.

This Court is in full agreement with the position of the law as stated by the applicant. The continued detention without right to Counsel is an infringement of the fair trial rights every person enjoys under Article 28 of **the Constitution**. The right to fair hearing is non derogable. That right is preserved under Article 44 of the Constitution.

Articles 28 provides for the right to a fair trial. In particular Article 28 a, b, c and d state,

Every person who is charged with a criminal offence shall be

- a. be presumed to be innocent until proved guilty or until that person has pleaded guilty;
- b. be informed immediately, in a language that the person understands, of the nature of the offence;
- c. be given adequate time and facilities for the preparation of his or her defence;
- d. be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice

The Court is fully cognisant that there is a threat of a viral pandemic across the Country and as stated by the Commissioner General of Prisons in his letter to the applicant which is attached to the affidavit in support of the application, his action to deny access to the accused persons is done because of that threat.

The law however hold the right to fair trial sacrosanct. Article 44 of the Constitution provides that

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

a. --

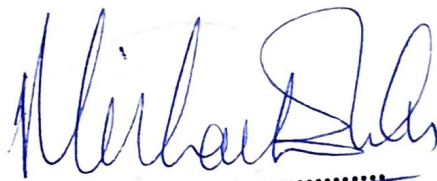
b. --

c. the right to fair hearing;

It was for this reason that this court held in **Turyamusiima vs. AG and Anor HCMA (Civil Division) No 64 of 2020** that during the subsistence of the pandemic and restricted movement orders, the Attorney General should provide detailed modalities stating what mechanisms, in deserving cases, Advocates may utilise for access to clients, to guarantee that the right to a fair hearing; ... (as stated under Article 44 of the Constitution) is preserved.

While it is true that the order in the Turyamusiima case (supra) may appear to render this application moot, it was observed in the Constitutional Case of **Dr. Kiiza Besigye & Others vs. The A G, Constitutional petition No. 07 of 2007** that at the end of the day it is the Courts to enforce the provisions of the Constitution otherwise there would be no reason for having those provisions in the first place...

In this instant case there is un-rebutted evidence of the continued denial of access to counsel for the accused persons, despite the orders earlier made by this court. It is therefore directed that, with all the necessary precautionary measures taken, the accused persons who are the subjection of this application, should be granted access to Counsel to prepare for their trial and for their bail applications.



Michael Elubu

Judge

12.05.2020