**Serugo v Kampala City Council**

**Division:** Court of Appeal of Uganda at Kampala

**Date of judgment:** 30 April 1998

**Case Number:** 14/97

**Before:** Manyindo Dcj, Kato, Berko, Engwau and Twinomujuni JJA

**Sourced by:** P Karugaba

**Summarised by:** H K Mutai

*[1] Constitutional law – Jurisdiction of the Court of Appeal – Interpretation – Limitation period –*

*Whether an issue of constitutional interpretation arose – Whether the petition had been filed in time –*

*Articles 50 and 137 – Constitution – Rule 4(1) – Fundamental Rights and Freedoms (Enforcement*

*Procedure) Rules – Legal Notice 4, 1996.*

*[2] Practice – Constitutional petition – Cause of action – Petitioner convicted of a non-existent offence –*

*Liability of government for acts of judicial officers – Parties – Whether the petitioner’s constitutional*

*rights had been violated – Whether there was a cause of action against Respondents – Article 128(4) –*

*Constitution – Section 4(5) – Government Proceedings Act (Chapter 69) – Section 48(1) – Judicature*

*Statute 1996.*

**Editor’s Summary**

On 5 September 1997, the petitioner was arrested by an official of the Kampala City Council (“KCC”). Later that same day, he was charged before a magistrate’s court with the offence of obstructing a police officer on duty contrary to section 106 of the Penal Code. He pleaded guilty and was sentenced to four months’ imprisonment. On appeal against the conviction and sentence, the appeal was allowed on the ground that he had been convicted of a non-existent offence. On 22 October 1997 he was released from prison and a month later, on 24 November, he filed a petition against the KCC and the Attorney-General seeking a declaration that the acts of the Respondents were unconstitutional and constituted a violation of his human rights, and compensation for the violation. When the petition came up for hearing, the Respondents raised preliminary objections on the grounds (i) that no cause of action against them existed as, in the case of the First Respondent, the wrongs complained of were not committed by a person in its employment, and, in the case of the Second Respondent, section 4(5) of the Government Proceedings Act (Chapter 69) provided that the government was not answerable for the acts of a person carrying out his judicial functions; (ii) that no constitutional issue requiring the Court’s interpretation existed and (iii) that, in any case, the petition was time-barred. Counsel for the petitioner argued that the Second Respondent was properly joined to the suit as the government was responsible for the unconstitutional actions of its agent, the magistrate, and that section 4(5) of the Government Proceedings Act did not apply to constitutional cases.

**Held** – The petitioner had failed to show that the KCC or its agents were responsible for whatever happened to him after his arrest. The only role played by the KCC’s agent was in his arrest, which itself appeared to have been lawful. As for the Second Respondent, the provisions of section 4(5) of the Government Proceedings Act clearly exempted the government from liability for acts or omissions of a judicial officer while acting in his official capacity. The section applied in both ordinary civil suits and in constitutional matters; *Attorney-General v Olwoch* [1972] EA 392 and *Serapio Rukundo v Attorney-General* constitutional case number 3/97 applied. The role of the court with regard to constitutional matters was ordinarily restricted to that of interpretation under article 137 of the Constitution and, in this instance, since no question for interpretation arose, the court had no jurisdiction. Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules provided that a petition alleging a breach of the Constitution had to be filed within 30 days after the date of the alleged breach. The rationale behind this rule was that constitutional cases were important and had to be attended to expeditiously; *Serapio Rukundo v Attorney-General* (*supra*) applied. In this instance, the petitioner having been freed on 22 October he ought to have filed the petition by 22 November and, as he had not done so, the petition was clearly out of time. The objection would therefore be allowed and the petition struck out. **Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Attorney-General v Olwoch* [1972] EA 392 – **AP**

*Attorney-General v Tinyefuza* Supreme Court constitutional appeal number 1/97

*Serapio Rukundo v Attorney-General* constitutional case number 3/97 – **AP**

***United Kingdom***

*Moharaj v Attorney-General of Trinidad and Tabago No 2* [1978] 2 All ER 670

**JUDGMENT**

**MANYINDO DCJ, KATO, BERKO, ENGWAU AND TWINOMUJUNI JJA:** This ruling is in respect of preliminary objections raised by the two counsel who appeared for the Respondents. After listening to the submissions made by both sides we upheld the objections and struck out the petition while reserving the reasons for the decision. We now proceed to give the reasons. The brief facts leading to this petition are as follows: On 5 September 1997 the petitioner, Ismail Serugo, was arrested by an official of Kampala City Council called Steven Mungoma. On the same day he was taken to the Magistrate Grade II’s Court at Kampala City Hall where he was charged with the offence of obstructing a police officer on duty, contrary to section 106 of the Penal Code Act. The petitioner pleaded guilty to the charge. He was convicted and sentenced to four months’ imprisonment. He appealed to the chief magistrate, Buganda Road Court against conviction and sentence. His appeal was allowed on the ground that he had been convicted on a non-existing offence. He was released from prison on 22 October 1997. He then filed this petition seeking a declaration that the acts of the Respondents were inconsistent with the Constitution and were a violation of his fundamental human rights granted by the provisions of Articles 21(i), 23(i), 28(7) and (12), 25(2) and 31(4) and (5) of the Constitution. The petition further prayed for compensation of UShs 5 000 000 per day for the 50 days he was in detention. When the petition came up for hearing both counsel for the Respondent raised three preliminary objections. These were: 1. that the petition had been brought against the wrong parties 2. that there was no constitutional issue requiring the interpretation by this Court; and 3. that the petition was time barred. Mr *Sendege* who appeared for the First Respondent submitted that the wrongs complained of were not committed by an employee of Kampala City Council since the case was prosecuted by an officer from the office of the Director of Public Prosecutions and the conviction was pronounced by a court established under the Magistrates’ Court Act. He pointed out that all these officers are employed and paid by the central government and not the City Council; therefore he contended, there was no cause of action against Kampala City Council. It is remarkable that Mr *Mbabazi*, learned counsel for the petitioner, did not refer to this point in his long submission. According to the contents of the petitioner’s affidavit sworn of this petition and that of Steven Mungoma sworn in support of the reply to the petition, there is no doubt that the only role played by the First Respondent’s employee (Steven Mungoma) was to arrest the petitioner. The petitioner does not show in his affidavit that both the prosecutor and the Magistrate were employees of the First Respondent. Although in paragraph 2(g) of his petition the petitioner says that it was the First Respondent who set in motion the acts which culminated in violation of his human rights, we are of the view that the First Respondent or its agents were not responsible for whatever happened to the petitioner after his arrest, which arrest was lawful in our view, and in any case, counsel for the petitioner conceded, quite rightly in our view, that any action arising from the arrest was time barred. In the circumstances we agree that the petitioner had no cause of action against the First Respondent. Mr *Tumwesige*, counsel for the Second Respondent, maintained that the Attorney-General had been wrongly made a party to the petition. It was his contention that the government cannot be made answerable for acts of a person carrying out his or her judicial functions. He based his argument on the provisions of section 4(5) of the Government Proceedings Act (Chapter 69) and the case of *Attorney-General v Olwoch* [1972] EA 392. He further contended that as the petitioner was lawfully convicted and sentenced by a competent court of law, his detention in prison for 50 days was lawful under the provisions of article 23(1) of the Constitution. On the other hand Mr *Mbabazi* submitted that the Second Respondent was properly joined to these proceedings as its agent (the Magistrate) acted unconstitutionally. He pointed out that the Second Respondent was liable on “public torts” principle. He based this argument on the case of *Mahoraj v Attorney-General of Trinidad and Tobago (No 2)* [1978] 2 All ER 670. It was Mr *Mbabazi*’s contention that section 4(5) of the Government Proceedings Act is not applicable to constitutional cases and that *Olwoch* (*supra*) upon which the Second Respondent relied was not a constitutional case. He also argued that the case of: *Serapio Rukundo v Attorney-General* constitutional case number 3/97 which decided that section 4(5) of the Government Proceedings Act is applicable to constitutional cases and was consistent with article 128(4) of the Constitution was wrongly decided. Section 4(5) of the Government Proceedings Act upon which Mr *Tumwesige* based his submission on this point reads as follows:

“4(5) No proceedings shall lie against the government by virtue of this section in respect of anything, done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process”.

These provisions clearly do exempt the government from liability for acts or omissions of a judicial officer while acting in his or her official capacity. Section 48(1) of the Judicature Statute 1996 and article 128(4) of the Constitution also do provide protection to judicial officers while carrying out their judicial function. In *Olwoch* (*supra*) where the facts were almost the same as in the present case, the Court of Appeal for East Africa held that no suit lies against the government for acts done in discharge of judicial functions. In the present case the Magistrate who tried, convicted and sentenced the petitioner was obviously carrying out his judicial function for which the government cannot be held liable. We do not agree with Mr *Mbabazi*’s contention that section 4(5) of Government Proceedings Act does not apply to constitutional cases. In our view the section applies to both ordinary civil suits and constitutional matters. This Court was of the same view in *Rukundo* (*supra*). We do not agree with the) counsel for the petitioner that that case was wrongly decided. Accordingly the petitioner has no cause of action against the Second Respondent. The second objection is that this Court has no jurisdiction in the matter. Mr *Tumwesige* argued at length that this petition was improperly instituted in this Court under article 137 of the Constitution, as there is no issue involving interpretation of the Constitution. In his view the matter should have been filed in any other competent court for redress under article 50 of the Constitution. He cited the decision of the Supreme Court in the case of *Attorney-General v Tinyefuza* Supreme Court constitutional appeal number 1/97 in support of that argument. Mr *Sendege* agreed with Mr *Tumwesige* on this point. Mr *Mbabazi* had a different view on the matter. He submitted that this Court has jurisdiction to concurrently deal with the articles 50 and 137 of the Constitution. It was his view that this Court does not only handle matters concerning the interpretation of the Constitution but it also handles the enforcement of the Constitution when the violation of its provisions occurs. He also relied on *Tinyefuza* (*supra*)*.* In our view this Court should normally be involved in matters requiring interpretation of the Constitution under article 137. In the instant case the question of interpretation of the Constitution does not arise therefore this Court has no jurisdiction in the matter. On the question of the petition being time-barred, which was the last ground of the preliminary objection, Mr Sendege, the learned counsel for the First Respondent, submitted that the petition was time barred because it had been filed 30 days after the occurrence of the acts complained of by the petitioner which was contrary to rule 4 of Legal Notice Number 4 of 1996. On the other hand Mr Mbabazi, the learned counsel for the petitioner argued that Legal Notice Number 4 of 1996 is unconstitutional as it forecloses the rights of an individual to seek redress. Rule 4(1) of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996, upon which this objection was based reads as follows:

“4(1) The petition shall be presented by the petitioner by lodging it in person, or, by 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”. We considered this matter in *Rukundo* (*supra*) and stated thus: “The above rule provides that a petition shall be lodged within thirty days after breach of the Constitution complained of. The purpose of this rule is not hard to find. It takes into account among others the importance of constitutional cases, which must be attended to expeditiously and seeks to cut out stale cases. We do not therefore agree with Mr *Kayondo* SC that in constitutional matters there is no time limit. He did not give us any authority for that proposition. We think that this petition offended against the said Rule 4(1). We therefore, uphold the first objection”.

We still hold the same view. We agree with Mr *Mbabazi* that detention is a continuing wrong. In this case the cause of action in respect of unlawful detention would have arisen on or by 22 October 1997 when the petitioner was released from prison. It follows that this petition should have been filed on 22 November 1997. However it was filed on 24 Noveber 1997 which was clearly out of time. It was for those reasons that we allowed the objections and struck out this petition with costs to the Respondents.

For the Applicant:

*Mr Kayondo SC*

For the Respondent