

IN THE HIGH COURT FOR ZAMBIA

2018/HP/1215

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**IN THE MATTER OF: ORDER 54 RULES 1, 2 AND 4 OF THE
RULES OF THE SUPREME COURT OF
ENGLAND (WHITE BOOK) 1999
EDITION**

**IN THE MATTER OF: ARTICLES 13 AND 15 OF PART III FOR
THE PROTECTION OF THE
FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL THE
CONSTITUTION OF ZAMBIA CHAPTER
1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: AN APPLICATION OF ILYAS YUSUF
USTAD**

**IN THE MATTER OF: AN APPLICATION FOR A WRIT OF
HABEAS CORPUS AD SUBJICIENDUM**

BETWEEN:

ILYAS YUSUF USTAD

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

**BEFORE THE HON. MADAM JUSTICE P. K. YANGAILO ON 27TH
DAY OF JULY, 2018.**

For the Applicant: Mr. B. Mosha - Mosha & Co.

For Respondent: Mr. E. Tembo - Attorney General's Chambers

JUDGMENT

CASES REFERRED TO:

1. *C and S Investments Limited, ACE Car Hire Limited, Sunday Maluba vs. The Attorney General* (2004) ZR 216;
2. *Hakainde Hichilema vs. Attorney General* - 2017/HP/0606 (unreported);
3. *Mario Satumbu Malyo vs. Attorney General* (1988 - 1989) ZR 36 (SC);
4. *Grace Stuart Ibingira and Others vs. Uganda* (1966) EA 445;
5. *Masoud Salim Hemed -Vs- D.P.P. and 2 Others* - Petition No.7 of 2014 EA;

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court (White Book)* 1999 Edition;
2. *The Constitution, Chapter 1 of the Laws of Zambia*;
3. *The Penal Code, Chapter 87 of the Laws of Zambia*;
4. *The Citizenship Act No. 33 of 2016*; and
5. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*;

This is an application for Writ of *Habeas Corpus* by the Applicant Ilyas Yusuf Ustad. The application is supported by an Affidavit sworn by Mulenga Mwamba Chansa, who avers that the Applicant is restrained and unable to swear the Affidavit on grounds that he is given limited access to his legal representatives. The Applicant was represented at the hearing by his Learned Counsel Mr. Mosha. The matter first came up for hearing on 20th July, 2018 where the Applicant was granted leave to issue a Writ of *Habeas Corpus Ad Subjiciendum* and the matter adjourned to 27th July 2018 for the hearing of the substantive application for Writ of *Habeas Corpus*.

The circumstances leading to this application, as set out in the Applicant's Affidavit, are that the Applicant was born in India and

acquired Zambian Nationality. That on or about the 12th day of July 2018, he was apprehended in Lusaka by officers from the Immigration Offices who later detained him at their offices for a period of two (2) days and later sent him to Lusaka Remand Correctional Centre where he has been up to date. It is averred that the Applicant has not been informed of the reason for his detention and has not been charged with any offence. That there is no apparent justification for his detention.

The Application was accompanied by skeleton arguments filed herein on 23rd July, 2018. Learned Counsel for the Applicant drew the Court's attention to **Order 54 Rule 1 (2) and (3) of The Rules of the Supreme Court**¹ as read with **Order 54 Rule 1(10). Order 54 Rule 1 (2) and (3) of The Rules of the Supreme Court**¹ provides as follows: -

- "(2) An application for such writ may be made ex parte and, subject to paragraph (3) must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.*
- (3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2) the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason."*

The Court's attention was also drawn to **Article 18 of The Constitution**², which governs the freedom of liberty of an

individual. Counsel submits that the Applicant has duly satisfied the requirements of *Writ of Habeas Corpus Ad Subjiciendum* as prescribed by **Order 54** of **The Rules of the Supreme Court**¹ and it ought to issue forthwith to enable him to be brought before this Court for it to interrogate the reasons for his illegal, unlawful and unconstitutional incarceration.

The Respondent filed herein an Affidavit in Opposition on 24th July, 2018, deposed to by one Frank Michelo, an immigration officer in the employ of Ministry of Home Affairs under the Immigration Department. It is averred in the said Affidavit, *inter alia*, that the Applicant availed himself to Immigration Headquarters on 11th July 2018, upon hearing that his purported adopted son Moyyuddin Mahmed Hasan Dema had been arrested by Immigration Officers and that the reasons for the Applicant's detention were explained. The Applicant was later charged and that his continued detention is within the confines of the law, thereby constitutional. It is further averred that on 14th July 2018, the Applicant was charged with the offence of giving false information to Public Officers contrary to **Section 317** of **The Penal Code**³, as read together with **Section 39 (1)** and **(2)** of **The Citizenship Act**⁴. A copy of the Charge Sheet was exhibited and shown to the Court marked "FM1". It is also averred that the Applicant is at liberty to apply for bail when he appears in the Subordinate Court as the docket has already been forwarded to the National Prosecution Authority for prosecution.

The Respondent filed herein skeleton arguments on 24th July, 2018. In its submissions, the Respondent drew the Court's attention to **Article 13 (1) of The Constitution**², which states that: -

"A person shall not be deprived of his personal liberty except as may be authorised by law in any of the following cases:

(a) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;..."

Learned Counsel Mr. Tembo submits that the right to personal liberty is not an absolute one, but one which can be lawfully infringed upon if a person is reasonably suspected of having committed an offence. My attention was also drawn to **Section 26 (a) of The Criminal Procedure Code**⁵, which provides as follows: -

"Any Police Officer may, without an order from a magistrate and without a warrant, arrest -

(a) any person whom he suspects, upon reasonable grounds, of having committed a cognizable offence;..."

Mr. Tembo submits that the arrest and subsequent detention of the Applicant is justifiable as there was reasonable suspicion of an offence having been committed by him. He also submits that the purpose of *habeas corpus* is to require a person under arrest to be brought before a Judge or Court so as to secure a person's release unless lawful grounds are shown for their continued detention and that they are ready to present the body.

It has been submitted on behalf of the Respondent that the law that civil proceedings should not be used to arrest criminal proceedings is well settled. My attention was drawn to the case of **C and S Investments Limited, ACE Car Hire Limited, Sunday Maluba vs. The Attorney General**¹, where it was held that: -

"Civil proceedings cannot be used to arrest criminal investigations."

On the basis of the above, Mr. Tembo submits that the Applicant was arrested and later charged for the offence of *giving false information to public officers* contrary to **Section 39 (1) of The Citizenship Act**⁴; *Uttering false documents to public officers* contrary to **Section 344 of The Penal Code**³, and that due criminal procedure was followed. It has also been submitted that the Applicant is yet to appear in Court. He contends that the effect of this application by the Applicant is to arrest ongoing criminal proceedings and urged the Court to dismiss it.

To fortify of his contention, Mr. Tembo referred this Court to the case of **Hakainde Hichilema vs. Attorney General**², where it was held that: -

"Habeas Corpus proceedings are not designed to forestall criminal proceedings. Habeas Corpus proceedings cannot be used as a remedy against an internment that is allowed by law."

The Court's attention was drawn to **Article 13 (3) of The Constitution**², which provides that: -

"Protection of right to personal liberty

(3) *Any person who is arrested or detained-*

- (a) *for the purpose of bringing him before a court in execution of an order of a court; or*
- (b) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;*

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Mr. Tembo submits that it is not by *habeas Corpus* application that the Applicant will be tried quickly after having been charged, but the onus is upon the trial Courts to ensure that the Applicant is tried within reasonable time. He further submits that the application for *habeas corpus ad subjiciendum* and bail pending the hearing of the said application is not properly before this Court as it is a well settled point in law that bail applications lie in the trial Court. My attention was drawn to the case of ***Hakainde Hichilema vs. Attorney General***², where Justice G. Chawatama stated that: -

"I agree with the Learned Attorney General that it is the role of the trial court to establish the validity or otherwise of the charges and

the trial court will inquire into the same, at this stage the Court cannot pronounce itself on the validity of the case."

Mr. Tembo contends that making the application for bail before this Court is irregular as the Applicant should have applied for bail in the trial Court. He urges this Court to dismiss the application.

The Court was invited to **Section 123** of **The Criminal Procedure Code**⁵, which states that: -

"When any person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit:..."

In response to the Applicant's assertion that there is no apparent justification for his detention and that his detention is illegal and unlawful, Mr. Tembo argues that the arrest and detention of the Applicant is lawful and legal as it is supported by the law. I was invited to **Black's Law Dictionary**⁶, who defines unlawful as follows: -

"That which is contrary to law or unauthorised by law."

On the foregoing submissions on behalf of the Respondent, Mr. Tembo states that this is a wrong fora from which the Applicant

seeks his reliefs and humbly prays that the application be dismissed with costs to the Respondent.

At the scheduled hearing on 27th July, 2018, both parties' Advocates were in attendance. The Applicant was also brought before Court. Learned Counsel for the Applicant Mr. Mosha made the application and relied on the Affidavit in Support filed herein on 23rd July 2018 and made *viva voce* submissions. Learned Counsel Mr. Mosha submitted that the Applicant has not been brought before a Court of competent jurisdiction from the time he was apprehended and incarcerated. That the State has not explained why the Applicant has not appeared before Court to take plea and for him to apply for bail. He argues that the fact that the State may have its own internal administrative issues should not be a tool to be used to undermine the Applicant's rights under the Constitution. That the normal and reasonable thing to do is to take the Applicant before a Magistrate within a reasonable time after charging him. Mr. Mosha submits that the offences that the Applicant has been charged with are bailable and urges the Court to evoke its powers under **Order 54 Rule 4** of **The Rules of the Supreme Court**¹ by admitting the Applicant to bail.

For the Respondent, Learned Counsel Mr. Tembo relied entirely on the Affidavit in Opposition and skeleton arguments filed herein on 24th July, 2018.

I have considered the application for Writ of *Habeas Corpus*, the Affidavit evidence of the Applicant and Respondent herein, the

authorities and the submissions by Learned Counsel for both parties, for which I am grateful.

Habeas Corpus generally applies to cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto. In the case of **Mario Satumbu Malyo vs. The Attorney-General**³, the Supreme Court stated as follows: -

"Habeas Corpus proceedings are designed to test the legality or constitutionality of the detention..."

I refer to the case of **Grace Stuart Ibingira and Others vs. Uganda**⁴ as cited in the Mombasa H.C. Petition of **Masoud Salim Hemed vs. D.P.P. and 2 Others**⁵ in which the East African Court of Appeal sitting in Uganda delivered itself as follows: -

"The writ of habeas corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the state. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen in

Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ."

The purpose of the Writ of Habeas Corpus is to relieve a person from unlawful restraint and to determine whether the person under detention is held under lawful authority. Accordingly, the Court has a duty to inquire into the cause of detention of a person and to determine whether that person is being illegally deprived of his liberty. If the Court finds that a person is detained illegally, it orders the release of that person. However, if the detention is proven lawful, then the *habeas corpus* proceedings terminate.

The application before this Court has been brought pursuant to **Order 54 of *The Rules of the Supreme Court***¹. According to the Affidavit evidence on record, it is averred by the Applicant that he has been incarcerated since 12th July 2018 without being informed of the reason for his detention nor charged for any offence. For *writ of habeas corpus* to issue, it was required to be established on behalf of the Applicant, that the Applicant was being unlawfully detained by the police or by a government agency. The Respondent avers that the Applicant was on 14th July 2018, charged with three counts of offences. According to the exhibit attached to the Respondent's Affidavit in Opposition shown and produced before this Court as "FM1", the Applicant was on 14th July 2018, charged in Count one *for giving false information in order to acquire Zambian*

*Citizenship for another person contrary to **Section 317 of The Penal Code**³ as read together with **Section 39 (2) of The Citizenship Act**⁴. It is stated in Count one that the Applicant gave false information to National Registration Officers stating that Mohyuddin Mahmed Hasan Dema was legally adopted by the him, when in fact not. In Count two, the Applicant has been charged for obtaining false registration into the adoption register contrary to **Section 316 of The Penal Code**³. It is stated that the Applicant did cause details of Mohyuddin Mahmed Hasan Dema to be registered in the adoption register that resulted into him being issued with National Registration No. 571676/10/1. In Count three, the Applicant has been charged for false registration for the purposes of obtaining a green national registration card contrary to **Section 316 of The Penal Code**³. It is stated that the Applicant did obtain a green National Registration Card No. 571676/10/1 for Mohyuddin Mahmed Hasan Dema by means of false representation.*

I draw my attention to **Order 54 Rule 7 (4) of The Rules of the Supreme Court**¹, which put the burden of proving the lack of legal basis for the detention on the Applicant. The said order provides that: -

"Onus of proof

If the return to the writ on its face shows a valid authority for the detention, it is for the applicant to show, that the detention is, prima facie, illegal..."

No evidence has been placed before this Court to counter the assertion that the Applicant has not been charged, save that the Applicant's Counsel Mr. Mosha, in his *viva voce* submitted, stated that the Applicant has not been brought before a Court of competent jurisdiction to take plea and for him to apply for bail.

I refer to **Order 54 Rule 7 (3) of The Rules of the Supreme Court**¹, which states as follows: -

"The Court has power to examine by affidavit evidence the truth of the facts alleged in the return, but does not act as a Court of appeal..."

I further refer to the case of **Mario Satumbu Malyo vs. The Attorney-General**³, where the Supreme Court held that: -

"The Court is competent to inquire into the validity of a detention order on a variety of challenges including the question of reasonableness where the reasonableness aspect is raised by uncontroversial evidence showing it was impossible to have done the things alleged. The Court does not inquire into the truth of the grounds nor is it the proper authority to receive meaningful representations." (Court's emphasis)

Counsel for the Applicant submitted that the Respondent has not shown cause why the Applicant has not been taken to Court and that the offences that the Applicant has been charged with are bailable offences. Learned Counsel beseeched the Court to admit the Applicant to bail. In support of this, he invited the Court to **Order 54 Rule 4 of The Rules of the Supreme Court**¹. The said order provides as follows: -

"Without prejudice to rule 2 (1), the Court or judge hearing an application for a writ of habeas corpus ad subjiciendum may in its or his discretion order that the person restrained be released, and such order shall be a sufficient warrant to any governor of a prison, constable or other person for the release of the person under restraint."

The Respondent averred that the Applicant was arrested, charged and the docket sent to the Director of Public Prosecutions for consent to prosecute and produced a charge sheet to that effect. Having carefully evaluated the facts of this case, I have no basis of disregarding the Respondent's averments. My role is to establish whether the Applicant has been detained illegally and I have come to the conclusion that the Applicant is held under lawful authority. The Applicant is due to be brought before the Subordinate Court and it is before this Court that he shall be at liberty to apply for bail.

In the premises therefore, this Court reaches the determination that the application of *habeas corpus* cannot in the circumstances of this application be granted. I, therefore decline to direct that the Applicant be released, pursuant to this application for the *Writ of Habeas Corpus*. I make no order as to costs.

Delivered the 27th day of July, 2018.

.....

P. K. YANGAILO
HIGH COURT JUDGE