IN THE HIGH COURT FOR ZAMBIA **2018/HP/1203**

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(3) 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: **SECTION 33 OF THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLE 18 FOR PROVISIONS TO SECURE PROTECTION OF THE LAW CHAPTER 1 OF THE LAWS OF ZAMBIA**

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

BETWEEN:

SEHJAD KAMTHI	**APPLICANT**
AND	
THE ATTORNEY GENERAL	**1ST RESPONDENT**

THE IMMIGRATION DEPARTMENT **2ND RESPONDENT**

BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO

ON 1ST DAY OF AUGUST, 2018.

For the Applicant: *Mr. O. Hatimbula - Mesdames. Mushipe & Associates*

For Respondent: *Ms. N. S. Nchito - Attorney General's Chambers*

JUDGMENT

CASES REFERRED TO:

1. *Mario Satumbu Malyo vs. Attorney General (1988 - 1989) Z.R. 36 (SC);*
2. *Grace Stuart Ibingira and Others vs. Uganda (1966) EA 445;*
3. *Masoud Salim Hemed vs. D.P.P. and 2 Others - Petition No.7 of 2014 EA;*
4. *In The Matter of Kapwepwe and in The Matter of Kaenga and an Application For a Writ of Habeas Corpus And Subjiciendum (1972) Z.R. 321 (C.A.);*
5. *The Attorney-General vs. Valentine Shula Musakanya (1981) Z.R. 1 (S.C.);*
6. *Eleftheriadis vs. Attorney-General (1975) Z.R. 89;*
7. *John Chisata and Faustinos Lombe vs. Attorney General (1981) Z.R. 35 (SC); and*
8. *R vs. Bowen (1973) S. T. R 156 at 158.*

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 Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
4. *The Penal Code, Chapter 87 of the Laws of Zambia;*
5. *The Citizenship Act No. 33 of 2016;*
6. *Introduction to Administrative Law, David Foulkes, Butterworths (1972)*

This is an application for Writ of *Habeas Corpus* by the Applicant Sehjad Kamthi. The application is supported by an Affidavit sworn by Sehjad Kamthi, the Applicant herein. The Applicant was represented at the hearing by his Learned Counsel Mr. Hatimbula.

On 17th July 2018, the Applicant was granted leave to issue a Writ of *Habeas Corpus Ad Subjiciendum* and the matter adjourned to 21st 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 arrested from his residence in Lusaka by Zambia Immigration Officers, who alleged that he was in Zambia illegally and was taken to Ridgeway Police Station where he was detained for a period of two (2) days. That from the time of his arrest and detention, he has not been charged and/or presented before a Court of law to answer to any charge. It is averred that he has been incarcerated for over twenty (20) days and that there is no apparent justification for his detention.

The Application was accompanied by List of Authorities filed herein on 13th July, 2018. Learned Counsel for the Applicant drew the Court's attention to ***Order 54 Rule 1*** of ***The Rules of the Supreme Court***[1], which provides as follows: -

> ***"Application for writ of habeas corpus ad subjiciendum***
>
> ***1. Subject to rule 11, an application for a writ of habeas corpus ad subjiciendum shall be made to a judge in Court, except that -***
>
> ***(a) it shall be made to a Divisional Court of the Queen's Bench Division if the Court so directs;***
>
> ***(b) it may be made to a judge otherwise than in court at any time when no judge is sitting in court; and***
>
> ***(c) any application on behalf of a minor must be made in the first instance to a judge otherwise than in court.***

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."***

My attention was further drawn to ***Order 54 Rule 2*** of ***The Rules of the Supreme Court***[1], which states as follows: -

"(1) The Court or judge to whom an application under rule 1 is made ex parte may make an order forthwith for the writ to issue, or may -

(a) where the application is made to a judge otherwise than in court, direct that an originating summons for the writ be issued, or that an application thereof be made by originating motion to a Divisional Court or to a judge in court;..."

The Court's attention was also drawn to ***Article 13 (3)*** of ***The Constitution***[2], which is couched as follows: -

"(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."

I was also invited to ***Section 33*** of ***The Criminal Procedure Code***[3], which provides that: -

"(1) When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond: but, where any person is retained in custody, he shall be brought before a competent court as soon as practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."

Finally, my attention was drawn to ***Order 54 Rule 4*** of ***The Rules of the Supreme Court***[1], which provides as follows: -

"Power to order release of person restrained

(1) 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 filed herein an Affidavit in Opposition on 24th July, 2018, deposed to by one Oluman Nkuwa, an Assistant 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 Respondent admits to arresting the Applicant on 11th July 2018 and detaining him at Ridgeway Police Station. That the reasons for the Applicant's detention were explained to him. The Applicant was on 14th July 2018, charged with the offence of giving false information to Public Officers contrary to ***Section 317*** of ***The Penal Code***[4], as read together with ***Section 39 (1)*** and ***(2)*** of ***The Citizenship Act***[5]. A copy of the Charge Sheet was exhibited and shown to the Court marked "ON1". That further, the Applicant was charged with the offence of obtaining registration by false pretences contrary to ***Section 316*** of ***The Penal Code***[4] and a copy of the Charge Sheet was exhibited marked "ON2". 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.

At the scheduled hearing on 31st July, 2018, the parties' Advocates were in attendance. Learned Counsel for the Applicant Mr. Hatimbula made the application and relied on the Affidavit in Support filed herein on 13th July 2018 and made *viva voce* submissions. Mr. Hatimbula submitted that the Applicant was arrested on 11th July 2018 and has not been brought before a Court from the time he was apprehended and incarcerated. That the Applicant was on 14th July 2018, charged with bailable offences but due to not being brought before Court, he has been unable to apply for bail and has thus been incarcerated for twenty (20) days in pathetic prison conditions. He sought the indulgency of this Court to compel the State to bring the Applicant before Court so that he could apply for bail.

For the Respondent, Learned Counsel Ms. Nchito relied entirely on the Affidavit in Opposition filed herein on 24th July, 2018, save to add *viva voce*, that the Applicant has been charged and is in lawful custody. Further that the docket has been forwarded to National Prosecutions Authority (NPA) and the Applicant is due to appear in the trial Court soon, where he will be at liberty to apply for bail. She prayed that the Applicant's application be dismissed.

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 the 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***[1], the Supreme Court stated as follows: -

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

The learned author of ***Introduction to Administrative Law***[6], at page 125 quoting Halsbury's Law of England 3rd Edition, had this to say: -

> ***"The writ of habeas corpus ad subjiciendum, which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or private custody. It is a prerogative writ by which the Queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it, the High Court and the Judges of that Court, at the instance of a subject aggrieved, command the production of that subject and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released."***
> (Court's emphasis)

I refer to the case of ***Grace Stuart Ibingira and Others vs. Uganda***[2] as cited in the Mombasa H.C. Petition of ***Masoud Salim Hemed vs. D.P.P. and 2 Others***[3] 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."

As can be seen from the authorities cited above, 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. I refer to ***The Matter of Kapwepwe and in The Matter of Kaenga and an Application For a Writ of Habeas Corpus And Subjiciendum***[4] where it was held as follows: -

> ***"(i) It is a matter of fact in the particular circumstances of each case what and how much detail must be given;***
>
> ***(ii) The matter must be looked at from the point of view of the detainee himself ; and***
>
> ***(iii) The ground must be given with sufficient particularity in the circumstances of the case to enable an adequate***

> ***representation to be made. The detainee must be furnished with sufficient information to enable him to know what is alleged against him and to make a meaningful representation."***

From the above, it can be clearly seen that the person detained must be furnished with sufficient information for his detention and that the Court has a duty to inquire into the cause of detention of a person in order 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. Thus, the issues for determination herein are whether the Applicant has been furnished with sufficient information for his detention and if the Applicant is being detained illegally.

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 was apprehended on 11th July 2018 and in paragraph 9 of the said Affidavit, it is averred that the Applicant has been incarcerated for over twenty (20) days without being furnished with reasons for his detention. I find this to be untruthful as the Applicant only filed his application herein on 13th July 2018, which was two (2) days after being apprehended and as such, he cannot claim to have be in custody for over 20 days. In *viva voce* submissions made on behalf of the Applicant, Mr. Hatimbula submitted that the Applicant was charged with offences on 14th July, 2018.

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 counts of offences. According to the exhibit attached to the Respondent's Affidavit in Opposition shown and produced before this Court as "ON1 - 2", 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***[4] *as read together with* ***Section 39 (2)*** *of* ***The Citizenship Act***[5]. It is stated in Count one that the Applicant gave false information to National Registration Officers stating that he was legally adopted, 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***[4]. It is stated that the Applicant did cause details to be registered in the adoption register that resulted into him being issued with National Registration No. 425900/10/1. 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***[4]. It is stated that the Applicant did obtain a green National Registration Card No. 425900/10/1 by declaring that he was legally adopted, when in fact not. In Count four, the Applicant is charged for the offence of uttering an adoption order to the National Registration Office on unknown date but between 20th June 2017 and 11th July 2018.

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...***"

I further draw my attention to the case of ***The Attorney-General vs. Valentine Shula Musakanya***[5], where it was held as follows: -

> ***"(i) The fundamental object intended to be secured by para. (a) of 30 clause (1) of Art. 27 is to provide a machinery for enabling a detained or restricted person to know as soon as possible but not later than fourteen days the reasons for his detention or restriction.***
>
> ***(ii) The expression in any case not more than fourteen days' represents the maximum, mandatory period within which detainee or restricted must be furnished with grounds for his detention or restriction, as the case may be."***

I also draw my attention to the case of ***Eleftheriadis vs. Attorney-General***[6] where Doyle, C.J. (as he then was), had occasion to observe at page 91 as follows: -

> ***"I wish to make it clear from the outset that I do not question in any way the discretion of the detaining authority. The court cannot query the discretion of the detaining authority if it is exercised within the power conferred. The question here is one of vires."*** Court's emphasis.

From the above, it is clear that the grounds may be challenged on the basis that they disclose facts that suggest that the detaining authority acted *ultra vires*. Further, the grounds for detention can be challenged on the basis of their reasonableness as can be seen from the case of ***John Chisata and Faustinos Lombe vs. Attorney General***[7], where it was held as follows: -

> ***'The court is not concerned with the truth or falsity of the grounds of detention but is merely concerned with whether or not there was reasonable cause to suspect the appellants."***

In the case of ***R vs. Bowen***[8], Kenyon C. J. held that: -

> ***"A warrant of commitment must express the cause for which he is committed, namely felony and what kind of felony...it is necessary upon return of the habeas corpus out of the King's Bench because it is in the nature of a writ of right or a writ of error to determine whether the imprisonment be good or erroneous."***

From the above proposition, it can be seen that, if a warrant of commitment is insufficient in terms of its failure to express the cause for which a person is committed to prison, the accused is entitled to *habeas corpus* on the basis of there being a patent error on the document. The rationale behind this rule, is that it is only when the cause is expressed on the document allowing for detention, that a Court would be able to form an opinion whether or not the cause is sufficient to justify a person's detention.

I have carefully analysed the Affidavit evidence on record and I must state that 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. Hatimbula, in his *viva voce* submissions, stated that the Applicant has not been brought before a Court 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***[1], 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 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 has been furnished with sufficient information for his detention and 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 1st day of August, 2018.

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P. K. YANGAILO
HIGH COURT JUDGE