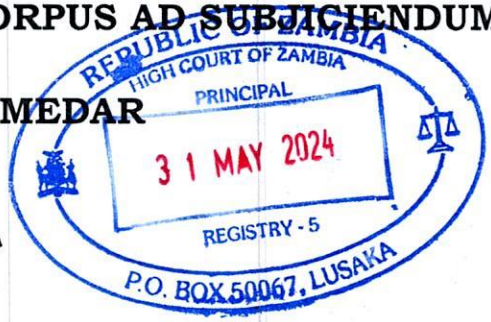
IN THE HIGH COURT FOR ZAMBIA **2024/HP/0576**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:

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



IN THE MATTER: **KAYITARE MEDAR**
BETWEEN:

KAYITARE MEDAR **APPLICANT**
AND
ATTORNEY GENERAL **RESPONDENT**

Before Honourable Mr Justice M.D. Bowa on 31st May, 2024.

For the Applicant: Mr. P. Zulu of Mosha and Company
For the Respondent: Mr. Kambanje Tenford State Advocate.

RULING

Cases referred to:

1. *Eleftherladis vs A.G (1975) Z.R. 69*
2. *Mario Salumbu Malyo vs Attorney General (1988 - 1989) Z.R. 36 (S.C.)*
3. *Kapwepwe and Kalugu vs Attorney General (1975) Z.R 321 (CA)*
4. *Sehjad Kamthi v the Attorney General 2008/HP/1203*
5. *John Chisala and Faustinos Lombe vs the Attorney General SCZ. Judgment No. 6 of 1981*
6. *Fred Hamamba v Attorney General 2017/HP/1778*

Legislation referred to

1. *The White Book 1999 Edition*
2. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
3. *Refuge Act No. 1 of 2017*
4. *Immigration and Deportation Act No. 18 of 2010*

Other works referred to:

1. *Halsbury's Laws of England 4th edition reissue*

1. The Application:

1.1 The Applicant moved the court by summons for leave to issue a Writ of Habeas Corpus ad subjiciendum dated 23rd April 2024 pursuant to Order 54 rule 1 (2) (3) of the RSC of England 1999 edition. In the affidavit in support dated 30th April 2024, the Applicant avers that he is a Congolese National and came into Zambia as a refugee on 23rd June 2019. He exhibits a refugee certificate **"KM1"** as confirmation of his status. Other valid documents such as his refugee identify card and pass were confiscated from him and not given back to him.

1.2 He averred further that on the 13th March 2024 he was placed in custody without being charged by the Immigration officers in Lusaka on account of his being an alleged prohibited immigrant. That he has not been taken to court for a period in excess of 30 days and has been at Kamwala Remand Prison since the day he was apprehended. He verily believed that there is no legal justification for his continued incarceration and further that if the Writ sought is not issued his inalienable Constitutional rights and or freedoms are likely to continue being denied without being heard or caused to appear before a court.

1.3 I considered the application for leave to issue the Writ ex parte and granted the application for the body to be to be brought before me. The Respondent was granted leave to file its opposition. The affidavit in opposition was sworn by Kanenma Chilayi an Assistant Immigration officer. He disputed the Applicant's assertion that he is Congolese and averred that he is in fact Rwandese. The deponent admits that the Applicant came into the country as a Refugee and that he was detained without being charged for being a

prohibited Immigrant. The deponent avers that the Applicant was apprehended on 13th March 2024 and officially charged on 18th March 2024. He added that he is still currently being detained at Kamwala Correctional Facility. Further that a warn and caution statement was recorded from the Applicant for the offence of concealing of true identify contrary to section 52 (2) and 56 (1) of the Immigration and Deportation Act number 18 of 2010. Further that the Applicant has two different nationalities and in possession of different documents marked **"KC2"** and **"KC3"** respectively to this effect.

1.4 It was averred further that the reason the Applicant was not granted police bond was due to the fact that the Immigration department was still verifying his documents through the Commissioner of Refugees in Zambia. It was averred further that the Applicant had been furnished with sufficient information for his detention. Therefore, that the Applicant was being held under lawful authority.

1.5 It was averred further that the Applicant cannot be released because he is not of fixed abode or permanent residency. A

warrant for his detention was exhibited **"KC4."** That a bail bond would thus only be issued once the Applicant proves his of fixed abode. The deponent believed him to be a flight risk. The deponent further believed that this application had been overtaken by events as the Applicant was formerly charged and will appear in court soon.

1.6 The Applicant swore on affidavit in reply dated 16th May 2024. He deposed that he is not a Rwandese but a Congolese National and holder of a valid refugee certificate No. 52600045941 in the names of Kayitare Medar. He deposed that he was only made to sign the document marked **"KC1"** which he believed had a lot of discrepancies in it. He further believed based on advice from his lawyers that the document does not bring out the particulars of the offence, that the dealing offer and witness did not sign it and that it is not a formal charge but a warn and caution statement.

1.7 He further averred that whereas paragraph 5 of the affidavit in opposition contends he had been charged on the 18th March 2024 he has not been taken to court and the Respondent has not justified his detention for the months he

has remained in custody. He added that he had never been informed that any documents were being verified with the Commission for Refugees in Zambia. He added that exhibit **"KC1"** does not furnish sufficient information and left out blank spaces. He averred further that exhibit **"KC4"** dated 20th March 2024 in the affidavit in opposition only requires the Immigration Officers to detain him for 14 days and not beyond that. He further stated that the period cannot be renewed.

1.8 That the application before this court is not for bond but to test the legality of his detention. He maintained that he is of fixed abode at Muyukwajukwa sect 4 refugee camp and that he has people available to sign bond for him. He believed that his application had not been overtaken by events because he had not been formerly charged and even though the warn and caution shows that he signed the statement on the 18th of March 2024 he had not been taken to court for the past 2 months.

1.9 That therefore, his detention has not been justified by the Respondent as they have only alleged that he was charged

when he commenced this action. That the detention was not justified and the court should therefore order his discharge from prison.

2. Skeleton Arguments:

2.1 The Applicant filed skeleton arguments in support of the application in which reliance was placed on Order 54 (1) (2) and (3) of the RSC as the basis for moving the court.

2.2 In further arguments filed in reply to the opposition dated 17th May 2024 the Applicant argues that he was granted refugee recognition in terms of section 13 of the Refugees Act. Further reliance was placed on section 46 of the Refugee Act that provides that:

"Despite the provisions of Part V of the Immigration and Deportation Act 2010, proceedings for unlawful entry or presence in Zambia shall not be instituted or continued against a person or on dependents of that person who enters or is present in Zambia without lawful authority if that person (a) without delay, applies to an authorized officer for recognition as a refugee under section 11, or (6) has became a recognized refugee in accordance with this Act."

2.3 The Applicant further cites article 13 (3) of the Constitution of Zambia that makes provision for the protection of right to personal liberty.

2.4 Also relied upon was section 33 of the Criminal Procedure code on detention of persons arrested without warrant. Further recourse was had on section 38 of the Immigration Deportation Act that provides:

If an immigration officer has reasonable grounds to suspect that any person is a prohibited immigrant, the officer may detain the person for a reasonable period, not exceeding fourteen days, as may be required for the purpose of making inquiries relating to that person.

2.5 It was argued that the above section makes it clear that a time limit of 14 days is provided for to detain a person suspected to be a prohibited immigrant. That a proper read of the section and article 13 (3) of the Constitution suggest that a person should be released immediately they are in custody for 14 days. That the Applicant had been in custody from 13th March 2024 for over 60 days at date of submission.

Further relied on was the case of **Eleftherladis vs A.G**[1] wherein Doyle C.J as he was then stated that:

"I wish to make it clear from the outset that I do not question in any way the discretion of the detaining authority if it is exercised within the power conferred. The question here is one of vires."

2.6 It was argued that the present case invokes the question of vires granted the fact that section 38 of the Immigration and Deportation Act does not permit a detention beyond 14 days. Reliance was also placed on the case of **Mario Salumbu Malyo vs Attorney General**[2] in which the court held:

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

2.7 Further relied on was the case of:

2.8 **Kapwepwe and Kalugu vs Attorney General**[3] in which the Court held inter alia that:

"The ground must be given with sufficient particularity in the circumstances of the case to enable an adequate representation to be made. The detained must be furnished with sufficient information to enable him to know what is alleged him and to make a meaningful representation."

2.9 It was submitted that contrary to the instruction in the above case, exhibit **"KC1"** relied on by the Respondent falls short of that requirement. That the document leaves out blank spaces on the particulars and that neither the recording officernnor did his witnesses. The court was invited to consider as the questions for determination whether the Applicant had been furnished with sufficient reasons for his detention and if he had been lawfully detained.

2.10 The Applicant cited a High Court decision in **Sehjad Kamthi v the Attorney General**[4] in which it was contended the court observed that an attached charge sheet proved that the Applicant had been charged. Conversely in the present matter that no charge sheet had been attached. That a warn and caution statement was the only document filed and hence insufficient to prove that the Applicant had been charged.

2.11 The Respondent arguments in opposition centers on order 54 (2) (3) of the RSC on the essence if Habeas Corpus applications. Also relied on for this purpose were the case of **John Chisala and Faustinos Lombe vs the Attorney**

General[5] and **Fred Hamamba v Attorney General**[6]. Further reliance was placed on section 17 (1) of the Refugee Act No 1 of 2017 wherein the Law provides that:

"The Commissioner may request the committee to conceal or revoke the recognition of a person as a refugee where there are reasonable grounds to believe that the person concerned.

(a) Has committed an offence under this Act or any other Written law.

(b) Obtained the recognition through fraud, false submission of information action or concealment of a material fact."

2.12 It was the Respondents position that the Applicant continued incarceration is justifiable under the provisions of section 124 of the CPC as he is a flight risk of no fixed abode.

3. <u>The hearing;</u>

3.1 The hearing was held on the 17th May 2024. Learned counsel for the Applicant Mr. Zulu relied on the affidavit in support and in reply and skeleton arguments filed in support of the Applicant's position. He augmented the Applicants position with oral submissions more or less restating the arguments in the filed submissions.

3.2 He emphasized that the Applicant had not at any point been taken to court and insisted that what was exhibited in the affidavit in question was a warn and caution statement that cannot be substituted for a charge. Further that the Applicant had not in fact been charged with any offence. He prayed for the immediate release of the Applicant accordingly.

3.3 For the Respondent the learned State advocate Mr. Kambanje relied on the affidavit in opposition and accompanying skeleton arguments. In making his oral submissions, counsel maintained that the Applicant had been charged on 18th March 2024. That a caution was administered upon arrest for one count of concealing true identity of country of origin contrary to section 52 (1) of the Immigration and Deportation Act that exhibit **"KC1"** that in the affidavit in opposition confirms he was cautioned.

3.4 He added that the Applicant has a case of respond to before the courts of law and the reasons for the detention were given to the him which he acknowledged by signing the warn and caution statement. He thus argued that the Applicant has

been lawfully detained. He stressed that paragraph 9 of the affidavit in opposition highlights the Respondent's concern about the Applicant not being of fixed aboard and thus potentially being a flight risk. He further sought to rely on section 38 of the Immigration Act as the basis of the continued detention. Asked by the court if exhibit **"KC1"** was being presented to be confirmation of the arrest learned counsel insisted that it was.

3.5 In reply Mr. Zulu reiterated the Applicant's position that there was no formal charge. Further that the Applicant was not furnished with sufficient particulars explaining his detention. That the failure to exhibit the charge sheet is tantamount to not being charged at all and it was his client instructions that he had not been so charged. That even if it were to be accepted that he was charged, the Applicant has been in custody for 60 days as at date of hearing and has not appeared before a court where the charges would have been explained to him. He reiterated the prayer for the discharge of the Applicant forthwith.

4. Court's consideration:

4.1 I have carefully considered the application before me. The question for my determination is whether this a proper case in which I can consider discharging the Applicant pursuant to the Writ of Habeas Corpus.

4.2 The learned authors of the White book in the explanatory notes of order 54/7/2 Write that:

"the Writ of habeas corpus ad subjiciendum remains of highest constitutional importance for by it the liberty of the subject is vindicated and his release from any manner of unjustifiable detention assured...the purpose of the Writ is that the body may be produced before the court, so that release from restraint may be secured... the Writ is used to test any alleged invalidity in the commitment of a prisoner, or want of jurisdiction to hold him in custody..."

4.3 Under order 54/7/3 the authors state further that:

" 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."

4.4 The authors of **Halsbury's Laws of England 4th edition reissue** describe the Writ in the following terms:

"The Writ of Habeas Corpus subjiciendum commonly known as the Writ of Habeas Corpus is a prerogative process of securing the liberty of the subject by affording effective means of immediate release from unlawful or unjustifiable detention whether in prison or private body... by it the High 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. Release on habeas corpus is not, however an acquittal nor may the Writ be argued as an appeal..."

4.5 In paragraph 224, the authors go further to Write that:

"in any matter involving the liberty of a subject, the action of the crown or its ministers or officials is subject to the supervision and control of the judges on habeas corpus. The Judges owe a duty to safeguard the liberty of the subject not only to the subject of the crown, but also to all persons within the realm who are under the protection of the court and entitled to resort to the courts to secure any rights which they may have, and this whether they are allies friend or alien enemies... it is this fact which makes the prerogative Writ of the highest constitutional importance, it being a remedy available to the lowest subject against the most powerful. The Writ has frequently been used to test the validity

of actions of the executive and in particular, to test the legality of detention under emerging legislation."

4.6 The above paragraphs are admittedly lengthy but aptly describe what the Writ of habeas corpus is and its importance. Halsbury's laws points out in the latter part of the last passage quoted above, how the Writ is used particularly in Emergency legislation which resonates with our own experience in Zambia. The bulk of jurisprudence on Habeas Corpus in this jurisdiction emanates from challenges of detentions during the State of emergency pursuant to Preservation of Public Security regulations. Suffice to state that the Writ of habeas corpus is available to a detained person to challenge the legality of his/her detention and to secure his release once the Court makes such a determination.

4.7 The Applicant in the present matter contends through his affidavits that he has been so illegally detained by the Immigration Department. His case is basically that he is a Congolese national and was granted refugee status upon his arrival in Zambia. That his documents were confiscated by

the Zambian Immigration Department who proceeded to detain him in excess of 60 days without charge or court appearance on allegations that he is a prohibited immigrant.

4.8 He thus asserts his detention is illegal on 3 fronts. First that he has not been formerly charged and presented before Court; Secondly, that section 38 of the Immigration and Deportation Act only permits a prohibited immigrant to be detained for not more than 14 days and he has remained in custody much longer; Thirdly that he has not been given sufficient ground for his detention.

4.9 The Respondent on the other hand contend that the Applicant has been formerly charged. They rely on what they present to be the charge in the affidavit in support exhibited **"KC1"** and argue that the Department was at liberty to extend the detention beyond 14 days pursuant to a warrant.

4.10 It is not in dispute that the Applicant has been in custody since his detention on 13th March 2024. The Respondent appear to justify the detention based on the fact that the Applicant is not Congolese but in fact Rwandese. They exhibit 2 identities as proof of this and the basis of the subsequent

charges preferred of concealing true identity, citizenship and country of origin contrary to section 52(2) as read with section 56(1) of the Immigration and deportation Act no 18 of 2010 amongst other charges. The Respondent further contends that it formerly arrested the Applicant on the 18th of March 2024 whom they have not granted bond as they were still in the process of verifying documents through the office of the Commissioner of refugees in Zambia. Further That the Applicant was considered a flight risk and will "appear in court soon"

4.11 Exhibit **"KC1"** was a matter of contention centered on whether it amounted to a charge sheet or was just a warn and caution statement. Further the question of whether or not it furnished the Applicant sufficient particulars to know why he was detained was the subject of contrasting positions.

4.12 A close examination reveals the document starts out as a typical warn and caution statement. The bottom part invites the Applicant to indicate whether he admits the charge or not which one would typically expect in a charge statement A

charge statement will ordinarily start with the words " you are charged with..." followed by the statement of the offence as proscribed by a statute. The format of the document appears to suggest there was a charge laid out.

4.13 It is impossible not to see that the presented counts 2 and 3 do not have any particulars of the offence charged which would give credence to the strong views expressed by counsel Zulu that the document is not what the Respondent present it to be- notably, proof that the Applicant was charged. It certainly falls short of the particularity expected.

4.14 The above notwithstanding, there is no rule of law that a charge sheet has to be exhibited to prove an arrest. An averment in an affidavit of such fact would suffice and I have no basis not to accept there was an arrest effected in this case. This was confirmed by the charging officer who was present in court having brought the body in compliance with the court's order.

4.15 Be that as it may, the question is having formerly charged the Applicant on the 18th of March 2024, did the Respondent have any lawful justification to keep the Applicant in

custody? Section 33(1) of the Criminal Procedure Code Cap 88 of the laws of Zambia aptly cited by the Applicant provides the following.

"33. (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."

4.16 Reference to the death penalty is of course no longer applicable following its abolition. However, what is clear from

the above section is that the law places an obligation on the detaining authority to present a person charged before a court within 24 hours after being taken in custody or release him on bond. The law recognizes that an officer may have reservations about releasing a suspect on account of the seriousness of the offence .If he determines a detention is necessary because of such apprehension, the law dictates that such officer "Shall" present the person detained as soon as practical.

4.17 The Respondent expresses reservations about giving the bail bond as the offence is considered a serious one and crucially, that the Applicant is also a flight risk. The question is, can it reasonably be said on the facts that it has not been practical for the Immigration Department to present the Applicant before a competent court once the charge was preferred for a period of close to 2 months prior to the filing of this application? I think not. The Respondent presents no lawful justification for such prolonged detention. It is not up to a detaining authority to present a subject to court at its convenience reminiscent in the averment that the Applicant

"will appear in court soon" in paragraph 10 of the affidavit in opposition. It is the law that dictates when this must be done.

4.18 The Respondent relies on Section 38(1) of the Immigration and Deportation Act which provides the following:

"38.(1) If an immigration officer has reasonable grounds to suspect that any person is a prohibited immigrant, the officer may detain the person for a reasonable period, not exceeding fourteen days, as may be required for the purpose of making inquiries relating to that person."

4.19 The section is clear in limiting the period of detention for a suspected prohibited immigrant to 14 days. It does not give the immigration department the leverage to continue extending the detention of a suspect.

4.20 The Applicant invites the court to consider the provisions for detention of persons under article 13(3) of the Republican Constitution. For ease of reference the article provides 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."

4.21 This Article falls under part 3 of the Constitution and hence within the purview of interpretation by the High Court. A read of the article clearly reveals that primacy is placed on the need to present an accused person who is arrested and detained before a court without undue delay. If trial is not undertaken within a reasonable time such court may then order his release either unconditionally or on such conditions as may be deemed fit to ensure the subject appears at a later date for his trial. No ambiguity arises in discerning the

obligation placed on the detaining authority to present the detained person before a court without undue delay. This is the same urgency expressed in section 33 of the Criminal Procedure Code considered earlier above.

4.22 The Applicant argued that section 13 of the Refugee Act affords a person granted a refugee certificate a shield against prosecution of sorts. That such person cannot be charged with certain offences under the Act. That section 46 specifically states that proceedings for unlawful entry or presence in Zambia shall not be instituted or continued against a person who enters or is present in Zambia without lawful authority if that person applies without undue delay for recognition under section 11; or has become a recognized refugee in accordance with the Act. In other words that the charges against the Applicant cannot stick as he is a registered refugee.

4.23 This submission I find, is neither the question of inquiry nor is it the intention and purpose of a Writ of habeas corpus proceedings. These are arguments to be determined by the

court that will try the criminal charges and properly raised as a preliminary issue if the Applicant is minded to do so.

4.24 For present purposes, I am satisfied that whereas the Applicant has now been formerly charged, the Immigration department has no justification to continue to detain him without presenting him before a court . The material presented in the affidavit in opposition appears to justify their apprehension and reservation against releasing the Applicant whom they consider a flight risk in the circumstances. This however is not a basis for failure to adhere to the legal obligation placed upon the Department by the Constitution and the Criminal Procedure Code to present the Applicant before a court of competent jurisdiction for an explanation of the charge, possible plea and trial without undue delay. Such court can entertain a bail application and consider any objections the Respondent have to offer.

4.25 I therefore order that the Respondent present the Applicant before the Subordinate Court on Monday the 3rd of June 2024 at 0900hours after duly filing the requisite cause list to

facilitate such appearance. Costs for this application are for the Applicant to be taxed in default of agreement.

Dated at Lusaka the 31st **day of** May **2024.**

JUDGE.