

TANZANIA / JUDGMENT

MISC

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DECIDED
28 August 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT PAR ES SALAAM IN THE MATTER IN THE NATURE OF HABEAS CORPUS MISCELLANEOUS CRIMINAL APPLICATION NO. 23998 OF 2024 DEUSDEDITH SOKA..... 1st APPLICANT JACOB MLAY..... 2nd APPLICANT FRANK MBISE..... 3rd APPLICANT VERSUS 1stRESPONDENT INSPECTOR GENERAL OF POLICE..... DAR ES SALAAM ZONAL POLICE COMMANDER..... 2ndRESPONDENT DAR ES SALAAM ZONAL CRIMES OFFICER..... 3rdRESPONDENT OFFICER COMMANDING CRIMINAL INVESTIGATION, TEMEKE..... 4TM RESPONDENT CHANG'OMBE OFFICER COMMANDING STATION..... thRESPONDENT 5 DIRECTOR OF PUBLIC PROSECUTIONS..... 6thRESPONDENT ATTORNEY GENERAL..... 7thRESPONDENT

RULING

27th & 28th August, 2024 DYANSOBERA, J.: This is an application brought under a certificate of most extreme urgency. It has been filed under Sections 390 (1) (a) and (b) and 392A (1) of the Criminal 1 I Page Procedure Act [Cap.20 R.E.2022] and rule 2 of the Criminal Procedure {Habeas Corpus) Rules, GN No. 150 of 1930 on the following orders: EX PARTE:

1. That this Honourable court be pleased to order the Applicants be released from the custody of the 1st, 2nd, 3rd, 4th and 5th respondents forthwith;
2. That in the and without prejudice to paragraph 1 above, this Honourable court be pleased to order the appearance of the respondents before this court to show why the Applicants are unlawfully detained.
3. That this Honourable court be pleased to issue an order prohibiting the respondents from continuing detaining the applicants for a longer period than permitted by law.
4. This court be pleased to issue an order compelling the respondents to discharge their duties in accordance of with the applicable law.

5. That this Honourable Court be pleased to issue any other or further reliefs as the court shall be deem fit and just to grant, to grant. INTER PARTES:
1. That this Honourable court be pleased to order the appearance of the Respondents before the Court to show cause why the Applicants who are unlawfully detained should not be set at liberty forthwith.
2. That this Honourable court be pleased to issue an order prohibiting the respondents from unlawfully detaining the Applicants for a longer period than permitted by law.
3. This court be pleased to issue an order compelling the respondents to discharge their duties in accordance with the applicable laws.
4. That this Honourable Court be pleased to order the Respondents to pay the Applicants damages if the applicant's detention is found to be unlawful, illegal and unreasonable
5. That this Honourable Court be pleased to issue any other or further relief(s) as the court shall be deem fit and just to grant, to grant. 2 | Page An affidavit supporting the application has been sworn and filed by Mohamed H. Mzindu, a close friend of the Applicants and conversant with all the material facts and issues relevant to this application. Although the respondents were served and made appearance, they are yet to file their counter affidavit. At the time of hearing of this application, Messrs Peter Michael Madeleka, Deogratias Mahinyila and Paul Kisabo, learned advocates stood for the applicants while the respondents enjoyed legal sen/ices of Ms. Monica Ndakidemi, learned Senior State Attorney and Mr. Cathbert Mbiling'i, learned State Attorney. Arguing in support of the application, Mr. Peter Michael Madeleka was the first to take the floor. He pointed out that this application which has been brought under a certificate of urgency under S. 390 (1) (a) and (b) and 392A (1) of the Criminal Procedure Act and Criminal Procedure {Habeas Corpus} Rules, GN No. 150 of 1930 ("the Rules") is two-pronged, it being both ex parte and inter partes. He informed the court that the nature of this application has its peculiarity as it relates to securing the physical presence of the applicants and ensuring their wellbeing in view of the fact that their whereabouts are unknown. According to Mr. Madeleka, the law requires the applicants to be brought to court first and then other procedures to follow. Mr. Paul Kisabo joined hands with his fellow learned advocate by re-iterating that the matter is under a certificate of urgency. He asserted that although Section 390(1) (a) and (b) of the Criminal Procedure Act gives the court 3 I Pa ge ' discretion, that discretion should be used judicially to make sure that the applicants are first brought to court. According to him, under rule 2 of the Rules, the application for habeas corpus can be made ex-parte taking into account the fact that the applicants were arrested from 18.8.2024 and have not been seen since then. Placing reliance on rule 7 of the Rules, Mr. Kisabo, pressed that the applicants should be admitted to bail pending hearing of the application. In carrying his submission further, Mr. Kisabo, urging the court to invoke rule 12 of the Rules, prayed an order against the respondents to produce the applicants before a Judge for determination of their right as the applicants are in public custody insisting that all can be done before the

application is heard. Counsel also made reference to Article 15(1) and (2) of the Constitution of the United Republic on the rights to personal freedom which provides that: '15. -(1) Every person has the right to freedom and to live as a free person.

- (2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only- fa) under circumstances and in accordance with procedures prescribed by law; or
- (b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence'. 4 | Page Translated in Kiswahili, reads, '15. -(1) Kila mtu anayo haki ya kuwa huru na kuishi kama mtu huru.
- (2) Kwa madhumuni ya kuhifadhi haki ya mtu kuwa huru na kuishi kwa uhuru, itakuwa ni marufuku kwa mtu yeyote kukamatwa, kufungwa, kufungiwa, kuwekwa kizuizini, kuhamishwa kwa nguvu au kunyang'anywa uhuru wake vinginevyo, isipokuwa tu- fa) katika hali na kwa kufuata utaratibu uliowekwa na sheria, au
- (b) katika kutekeleza hukumu, amri au adhabu iliyotolewa na mahakama kutokana na shauri au na mtu kutiwa hatiani kwa kosa la jinai'. It was contended on part of the applicants that they have been robbed of their rights to live as free people. Being aware that respondents are yet to file their counter affidavit, Mr. Paul Kisabo argued, however, that the non-filing of the counter affidavit by the respondents could not disable the court to issue the orders being sought by the applicants. Counsel for the applicants maintained their prayer that the applicants be released on bail or brought in court so that they are heard. In response to these submissions, Ms. Monica Ndakidemi asserted that the supporting affidavit has not stated the whereabouts of the applicants; only the argument that the applicants reached the Chang'ombe Police Station and the said deponent admitted that upon communicating with Chang'ombe Police Station, he was assured that the applicants were not there. Learned Senior State 5 | Page Attorney also informed the court that when they communicated with the Chang'ombe Police Station, they were also told that the applicants were not in their custody. She informed the court that they are making a follow up on the validity of the arguments that the applicants are at the Police as, according to the affidavit, there is nothing showing that the applicants were arrested and subsequently detained by the police. It was prayed on part of the respondents to be given time in which to file their counter affidavit and opposed the prayer that the court make any order particularly where there is an undertaking the following up of the information on the whereabouts of the applicants. Supporting the submission by his fellow State Attorney, Cathbert Mbiling'i pointed out that the Court of Appeal had made emphasis that for an order of habeas corpus to be granted, there must be sufficient proof that the respondent has the custody of the applicants. He relied on the case of Mary Vitalis Temu

- v. RPC of Njombe and Another, Criminal Application No. 339 of 2017 (Tanzlii) whereby the Court observed that: "We need to emphasize that it is now well established that the writ of habeas corpus will only issue where it is demonstrated that the person whom the writ is sought is unlawful custody by the respondent". In Mr. Mbiling'i's view, the applicants had to that the applicants are being held by the police force, the fact the applicants and their advocates failed. S | P a g e It was the respondents' prayer that since they were served with documents the day before, they be given time to file a counter affidavit so that we are also heard. In a brief rejoinder, Mr. Peter Madeleka, ironically, congratulated the learned counsel for the respondents for their failure to respond to their (applicant's counsel's) arguments. According to him, it is a principle of law that affidavit is evidence and can only be contracted by way of a counter affidavit and that refuting of the averments in the applicants' affidavit from the bar is not proper. With respect to the case of Mary Vitalis Temu v. RPC of Njombe and Another (supra), Mr. Madeleka urged the court to find it inapplicable to the facts of the case under consideration. He finally invited the court to give the respondents reasonable time to prepare their counter affidavit so that so that the court resumes at 14:00 hrs to hear the application. Mr. Deogratias Mahinyila, reacting on the respondents' response, argued that there is neither law or case law cited which gives a construction of the law different those offered by them. He was confident that the facts in the affidavit reveal that the applicants were at the Chang'ombe Police Station or elsewhere in Tanzania. He insisted that the averments in the supporting affidavit have not be contradicted through a counter affidavit. Having analysed the supporting affidavit and after taking into account the submissions presented by learned counsel, I am satisfied that the fact that the 7 | P a g e applicants are being held under custody of the respondents has not been established. There is nothing proving that the deponent Mohamed H. Mzindu witnessed the applicants being detained, confined or kept in the custody of the police leave alone, being arrested by the police on the 18th day of August, 2024. The contents under paragraphs 5 to 8 of the supporting affidavit fall short of proving that the applicants are in the custody of any of the respondents. On that account, the invoking of the provisions of Section 390 (1) (a) of the CPA and rule 12 of the Rules by ordering the body of the applicants to be produced in court is not, in the circumstances, proper. With regard to the application of rule 7 of the Rules to admit the applicants to bail, the court refrains to use its discretion to grant that prayer. This is partly because, it is common ground that when a person is released on bail, he continues to remain in custody, albeit constructive custody, theirs surety; his liberty remains subject restraint. Habeas corpus is, in my view, intended to and often refers to outright release. And partly because, it has not been sufficiently proved that applicants are detained in public custody. Nonetheless, there is affidavit evidence under paragraph 3 of the supporting affidavit that some time on 19th June, 2023 the first and second applicants were arrested by the officers of the 1st, 2nd and 3rd respondents. According to the deponent, that said applicants were detained for more than two days at the Central Police Station in Dar es Salaam. On the same date the first applicant's phone with a sim card registration number +255 673 703 986 was 8 | P a g e seized by the officers of the 1st, 2nd and 3rd respondents and the that the deponent is aware that since that time, the phone together with the sim card is

under the seizure of the officers of the 1st, 2nd and 3rd respondents to date, coupled with the allegations under paragraphs 5, 6, 7, 8 and 9 of the supporting affidavit. These allegations are serious and the court cannot lightly ignore them. The disappearance of the citizens like the applicants without any explanation is, nowadays, not uncommon. This is a public concern. The court has to take an appropriate action bearing in mind that one of the purposes of a writ of habeas corpus is to protect the liberty of a citizen. According to the chamber summons, paragraph 4 in particular, the applicants' prayer is that: '4. That this Honourable Court be pleased to issue any other or further reliefs as the court shall be deem fit and just to grant'. On 27th August, 2024, the respondents, through their learned Senior State Attorney prayed for time to make inquiry on the whereabouts of the applicants. In that respect, I invoke rule 12 of the Rules and direct the Police Force, the 1st, 2nd, 3rd, 4th and 5th respondents, in particular, to investigate the whereabouts of the applicants and through their powers under sections 10 of the Criminal Procedure Act [Cap. 20 R.E., 2022] and section 5 (1) of the Police Force and Axillary Services Act [CAP 322 R. E, 2019] and Article 14 of the 1977 Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2019] taking into account the undeniable fact that the state has a corresponding duty to ensure the safety of its citizens as provided under Order 233 of the Police Force and Auxiliary Services (Police General Orders) (PGO), GN No. 315 of 2021 published on 26/01/2021. This direction is in line with Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2010 which Tanzania is a signatory thereto. In view of the aforesaid, the application for habeas corpus succeeds in the —W.P. Dy[^]nsobera JUDGE

28. 8.2024 This ruling is delivered under my hand and the seal of this Court on this 28th day of August, 2024 in the presence of Messrs. Peter Michael Madeleka and Paul Kisabo, learned Advocates for the applicants and Ms. Jenifer Masue, learned 10 | P a g e

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