

UGANDA / JUDGMENT

Balidawa v Officer in Charge Kigo Prison & Ors (Misc Cause No. 022 of 2013) [2013] UGHCCD 166 (20 December 2013)

[2013] UGHCCD 166

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Misc Cause No. 022 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC CAUSE NO. 022 OF 2013

(Arising from Criminal Case UPDF/GCM/040/2010 Uganda Vs Balidawa Muhamed)

BALIDAWA MUHAMED ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. THE OFFICER IN CHARGE OF KIGO

GOVERNMENT PRISON

2. THE DIRECTOR OF PUBLIC PROSECUTIONS

3. COMMANDER OF THE UGANDA PEOPLES RESPONDENTS

DEFENCE FORCES

4. ATTORNEY GENERAL OF UGANDA

BEFORE: HON. JUSTICE STEPHEN MUSOTA

Civil procedure- habeas corpus

RULING

This is an application for an order of habeas corpus Ad subjiciendum brought by way of Notice of Motion under Rules 1, 2 and 3 of the Judicature (Habeas Corpus) rules, and Article 23 (a) of the Constitution as well as S. 34 (a) of the Judicature Act. The applicant through his lawyers M/s Rwakafuuzi & Co Advocates seeks for a writ of habeas corpus to be issued to:- The Officer in Charge Kigo Government Prison

1. The Director of Public Prosecutions.
2. Commander of the Uganda Peoples Defence Forces, and
3. The Attorney General of Uganda.

The application is supported by the affidavit of the applicant in which he depones that:-

1. He is on remand at Kigo Government Prison on the orders of the General Court Martial.
2. He cannot be tried by the General Court Martial because it was declared by the Supreme Court as having no jurisdiction to try civilians for non-service offences.
3. He cannot be released on bail because the court martial has no jurisdiction to release him on bail.
4. His continued remand is arbitrary, illegal, unconstitutional, an abuse of court process and amounts to torture or to cruel and degrading treatment.
5. The High Court should make orders that will put him in a position either to be tried by a court of competent jurisdiction or to be released.

After an ex parte hearing of Mr. Rwakafuuzi learned counsel for the applicant a writ of Habeas Corpus Ad subjiciendum nisi was issued.

Only 1st respondent i.e O/C Kigo Government Prison made a return of the writ stating that the applicant is detained in his custody by virtue of a warrant committing him to Kigo Prison on a Charge of unlawful possession of a firearm C/S 3(1)(2)(a)(b) of the firearms Act Cap 229. That the remand was ordered by the Chairman General Court Martial. The remand warrant and charge sheet are attached to the return. In the particulars of offence it is stated that the firearm the applicant was allegedly found with were a monopoly of the Defence forces.

At the hearing of the application interpartes the O/C kigo Government Prison Mr. Moses Sentalo ASP was represented by Ms Ampire a State Attorney from the Attorney General's Chambers.

In his brief submission Mr. Rwakafuuzi said that his client being a civilian cannot be tried and/or found guilty of an offence over which the military has no jurisdiction. That only suspects charged under the UPDF Act can be tried by the Court Martial. That if a weapon is licensable then it ceases to be a monopoly of the Defence Forces. That in view of the definition Section 1 of the Firearms Act, the charge sheet presented does not bring the applicant in the UPDF jurisdiction. Learned counsel asked this court to find that the UPDF has no jurisdiction to try the applicant

and/or remand him. That the order nisi be made absolute and the applicant be released.

In reply Ms Ampire opposed the application by drawing the attention of court to the scope of habeas corpus which is investigation of whether the applicant is in lawful custody. That the issue of the validity of the charge sheet and whether the firearms allegedly found with the applicant are a monopoly of the defence forces should be raised at the trial. That it is not for these proceedings to investigate such. Ms Ampire relied on the Supreme Court case of **Namugerwa Hadija Vs Attorney General SCCA 4 of 2012** where learned counsel for the applicant herein represented the appellant and the facts of that case are on all fours with the current case. She prayed that this application be dismissed with costs paid by counsel himself.

I have considered the application as a whole and the submissions by respective counsel. Usually writs for habeas corpus are used to review the legality of the applicant's arrest, imprisonment and detention. Therefore the purpose for filing an application for habeas corpus is to challenge the authority of the prison or jail warden to continue holding the applicant. The application is used when a person is held without charges or is denied due process.

Habeas corpus proceedings are meant to ensure that a prisoner can be released from unlawful detention i.e detention lacking sufficient cause or evidence or detention incommunicado. The detention must therefore be forbidden by the law. Such an application as the instant one does not necessarily protect other rights such as entitlement to a fair trial.

Having these legal parameters in mind and considering the submissions by respective counsel, I am satisfied, by the submission and return made on behalf of the respondent confirming that the applicant was produced before a recognized court of law. He was arraigned and remanded after due process. The return of the writ by Moses Sentalo ASP clearly indicates the authority under which he is holding the applicant. This cannot therefore be held to be illegal detention without sufficient cause or detention incommunicado. Neither is this detention prohibited by law. The issue of trial, release on bail, validity of the charges sheet or other rights are out of the scope of these proceedings. They should have been a concern of other proceedings. Whether the charge sheet disclosed an offence should be determined by the trial court which has jurisdiction to determine the legality of the charges and whether there is evidence to sustain the charges. See; 1. **LUJILA MATHIUS Vs THE O/C KIGO GOVERNMENT PRISON & 3 OTHERS MISC CAUSE 86 OF 2013** 2. **NAMUGERWA HADJA Vs DPP & ATTORNEY GENERAL SCCA 04 OF 2012**.

Since the applicant is charged with unlawful possession of firearms that are a monopoly of the UPDF there is a link with s. 119(1)(h) of the UPDF Act. Whether the allegation is true is subject to proof in the trial court. In the final result I will decline to grant this application. It is dismissed.

Since Mr. Rwakafuuzi was pursuing a rights issue I will not order for costs to be paid by him.

Each party shall bear its costs.

Stephen Musota

J U D G E

20.12.2013

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Prepared on 13 October 2026 · Esheria