

UGANDA / JUDGMENT

In Re Muhindo Herbert & 6 Ors (HCT) [2012] UGHC 96 (29 May 2012)

[2012] UGHC 96

COURT

High Court of Uganda

BEFORE

Bashaija, J

CASE / FILE NUMBER

HCT

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MBARARA****HCT – 05 – CV – MA – 0042 – 2012****IN THE MATTER OF THE SECTION 34 OF THE JUDICATURE ACT CAP. 13, LAWS OF UGANDA****AND****IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM****AND****IN THE MATTER OF MUHINDO HERBERT, MBUSA BITSUMBARO MUHAME, ASHIMWE ISAAC,
HOSEA KAMBOLE, MONDAY NURU *ALIAS* AKYALI AND KWEZI PAUL *ALIAS* ADYERI.****BEFORE HON MR. JUSTICE BASHAIJA K. ANDREW.****RULING**

The six Applicants herein brought this application under ***Section 34 of the Judicature Act (Cap.13) and Rule 3 of the Judicature (Habeas Corpus*) *Rules*** seeking for an order of a ***Writ of Habeas Corpus Ad Subjiciendum*** to issue, and costs of the application on to be provided for.

The application is supported by the affidavits of the respective Applicants but in the main, the grounds which are the same are that:-

1. ***The Applicants were arrested on various dates in the months of January and February 2011 and charged in the General Court Martial at Makindye on various dates on 6th April 2011 and 5th May 2011 with illegal possession of firearms and remanded to Kigo Prison.***

2. ***The General Court Martial also ordered the transfer of the Applicants to the Second Division Court Martial in Mbarara and the Applicants were transferred to Mbarara Central Prison on 3rd day of July 2011, and have since been detained there at.***
3. ***That the Applicants have never been produced in court since they first appeared in the General Court Martial at Makindye and are not serving any lawful sentence.***
4. ***That the continued detention of the Applicants without trial is not only unlawful but also unconstitutional.***
5. ***That civilians can no longer be tried by the Court Martial.***
6. ***That it is only fair and just that the Writ of Habeas Corpus Ad Subjiciendum be issued forthwith.***

The Applicants were represented by Mr. Sibendire of M/s Sibendira Tayebwa & Co. Advocates, while the Respondent was represented by Mr. Ndibarema Mwebaza of the Attorney General's Chambers. Mr. Ndibarema raised objections to the application based on the affidavit in reply of Ms. Asimwe Bamanya Phiona of the Attorney General's Chambers to oppose the application.

Counsel for the Respondent contended that it is not true that the Applicants have not been produced before any court since they were remanded by a competent court - the General Court Martial - and that the application for **habeas corpus** is not a proper application since it is intended to oust the jurisdiction of the Court Martial. Mr. Ndibarema argued that what is being questioned is the legality and constitutionality of the prolonged detention, in that the Applicants state that they have been moved from one prison to another. Counsel advanced the proposition that if the Applicants feel that they cannot be legally tried by the Court Martial, they should raise the issue with the Court Martial, but not in the High Court.

Secondly, Counsel submitted that since the matter has constitutional implications; the Applicants should file an application in the Constitutional Court to interpret the constitutionality, legality or otherwise of the trial of the Applicants in the Court Martial. Mr. Ndibarema went further that it is not within the mandate of this court to inquire into the workings of the other court, where three counts of unlawful possession of firearms and ammunition are recorded as ***Criminal Case No. 047 of 2011.*** To that extent, Counsel was of the view that this application is not properly before this court.

In reply, Mr. Sibendire, learned counsel for the Applicants, submitted that the application is properly before this court; and that the Court Martial which charged the Applicants has no jurisdiction to charge and try them. Further, that the Applicants; all being civilians who are not charged with any member of the Uganda Peoples' Defence Forces (UPDF), cannot be brought under the jurisdiction of the Court Martial. That the affidavit in reply upon which Mr. Ndibarema based his objections did not dispute the fact that the Applicants are civilians and not members of the armed forces or the UPDF. Therefore, their being charged in the Court Martial was unlawful, and it follows that even their detention, wherever they are, is also unlawful.

Counsel further submitted that applications for *habeas corpus* are usually brought in instances of unlawful detention and that the same would apply in the instant case where the Applicants are being unlawfully detained.

In rejoinder; Mr. Ndibarema reiterated his earlier contention that if the Applicants wish to challenge the jurisdiction of Court Martial, they must only do so in the Constitutional Court, because a party can not challenge the constitutionality of the process in the High Court. Further, that ***Section 14 of the Judicature Act (supra)*** does not empower the High Court to delve in the constitutional matters. Counsel maintained the position that the Applicants, if they so wish, should seek a constitutional redress on the matter. He also reiterated the prayer that the application struck off with costs.

Three main issues, in my view, emerge from the pleadings and submissions of the parties. They are:-

1. ***Whether the Applicants are in unlawful detention; and if so,***
2. ***Whether the High court is empowered to intervene in the detention ordered by the General Court Martial.***
3. ***Whether the orders sought can be obtained in this application or not.***

I believe that the other side- issues of whether the Court Martial can lawfully charge and try civilians would be simultaneously resolved within the main issues above. Before embarking on resolution of the main issues, it is called for to restate the position as relates to ***Section 14 (1) of the Judicature Act,*** which was referred to by both Counsel. For ease of reference the relevant portion it is quoted below.

“14 (1). The High Court shall, subject to Constitution, have unlimited jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.”*

This section derives from ***Article 139(1) of the constitution,*** and vests the High Court with both unlimited original and appellate jurisdiction over all matters in Uganda. ***Article 139(1)*** states as follows:-

“The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law”.*

Section 14 (supra) is, however, not a provision to be had resort to each time a matter in dispute, such as the instant one, comes up. There are other specific laws which prescribe the access procedure to the High Court in exercise of its original or appellate jurisdiction. Under ***Section 33 of the Judicature Act (supra)***, the High Court only exercises the jurisdiction vested in it by the Constitution or any other Act to grant remedies sought, if the matter/claim is properly brought before it*.(underlined for emphasis)*

It follows that if a party wishes to take benefit of the exercise of the High Court's jurisdiction – as indeed with all other courts – such a party must bring its claim properly by adhering to the procedure prescribed by the law, and not otherwise. It is settled that where an Act or Constitution prescribes the manner in which to bring an action, a party has no option but to comply, and failure will result in the matter being struck out. See **Muzoora Amon R K v. NRM & 2 O'rs, High Court Misc. Cause No. 0201 of 2010** per Zehurikize . J; and **Ssali Godfery v. the Electoral Commission and Kabaale Sulaiman, Election Petition No.13 of 2011** per Kabito, J.; **Haman Singh Bhogal T/a Hamam Singh & Co. v. Jauda Karsan (1953) 20 EACA 17 at page 18.**

In the instant case, I find that reference to **Section 14 of the Judicature Act (supra)** was redundant and sheer surplusage since the remedy sought is for an order of **habeas corpus ad subjiciendum**; which is specifically provided for under **Section 34(a) (supra)**. Since this is the specific relevant provision under which this application was brought, there was no need to call upon this court by references to its unlimited jurisdiction. The High Court does not intervene in matters before another court merely because of the unlimited jurisdiction, but because, **inter alia,** such matters are properly brought before it.

ISSUE 1.

Whether the Applicants are in unlawful detention.

It is in the affidavit evidence of all the six Applicants that they were arrested on various dates; on 6/4/2011 and 5/5/2011, and charged with illegal possession of firearms before the General Court Martial at Makindye – Kampala and remanded at Kigo Prison. The said General Court Martial also made an order for the transfer of the Applicants to Second Division Court Martial – Mbarara. As a result they were transferred to Mbarara Central Prison on 3/7/2011. It is also the evidence of the Applicant that they have since been detained at the said prison and not produced in any court. That they are not serving any lawful sentence, and that their continued detention without trial is unlawful and unconstitutional.

There was no rebuttal by Respondent specific to the depositions of the Applicants that they have since the said date been in detention at the behest of the General Court Martial. They have not been produced before any court to know their fate ever since their detention. Since there is no rebuttal of these facts, the Applicants' depositions are presumed to be admitted by the Respondent. See **Masa v. Achen [1978] HCB 297.**

The next point to consider is whether, indeed, the detention is unlawful, which would call for the intervention of this court under provision of **Section 34(a)(supra)**. For ease of reference the section is quoted fully below.

“The High Court—

**(a) may, at any time, where a person is deprived of his or her personal liberty otherwise than in execution of a lawful sentence (or order) imposed on that person by a competent court, upon complaint being made to the High Court by or on behalf of that person and if it appears by affidavit made in support of the complaint that there is a reasonable ground for the complaint,*

award under the seal of the court a writ of habeas corpus ad subjiciendum directed to the person in whose custody the person deprived of liberty is; and when the return is made, the judge before whom the writ is returnable shall inquire into the truth of the facts set out in the affidavit and may make any order as the justice of the case requires;*

(b) may award a writ of habeas corpus ad testificandum or habeas corpus ad respondendum for bringing up any prisoner detained in any prison before any court, a court-martial, an official or special referee, an arbitrator or any commissioners acting under the authority of any commission from the President for trial or, as the case may be, to be examined touching any matter to be inquired into by or pending before a court, a court martial, an official or special referee, an arbitrator or the commissioners.”

It is the evidence of the Applicants that they were arrested from Kasese Municipal Council, in the Kasese District on 14/2/2011 by the former Rapid Response Unit (RRU) of the Uganda Police. They were then detained at various places, at Kasese Central Police and Fort Portal, before they could be transferred to Makindye General Court Martial on 6/4/2011 where they were charged and then remanded to Kigo prison. The GCM further ordered that they be transferred to Mbarara Division Court Martial as stated above. Clearly, the Applicants spent a period of one month and three weeks after they were arrested before they could be charged in the GCM; which was way beyond the time prescribed under ***Article 23(4) of the Constitution***. For ease of reference it is quoted below.

“*A person arrested or detained –*

1. ***for the purpose of bringing him or her before a court in execution of an order of a Court ; or***
2. ***upon reasonable suspicion of his or having committed or being about to commit a criminal offence under the laws of Uganda; shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty eight hours from the time of his or her arrest.”***

To my understanding, there could be no clearer unlawful detention as was in this case; given the time beyond which the Applicants were detained before they could be produced before the General Court Martial. In any event, their detention at the various holding centres in Kasese and Fort Portal was nothing short of false imprisonment. This is the position in as far as the detention of the Applicants before being brought to Makindye General Court Martial was concerned.

Secondly, it was Mr. Sibendire’s submission that even after being charged in GCM, the Applicants have continued to be in unlawful detention. Since their transfer from Kigo Prison to Mbarara Central Prison, they have not been produced in court, yet they are not serving any lawful sentence. I would agree with this argument in so far as the detention of the Applicants amounted to gross violation of their rights to a fair hearing as ensured under ***Article 28(1) (supra)***. I quote it fully below for ease of reference.

“28(1) In determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent, impartial court or tribunal established by law.”*

It should also be added that a right to a fair hearing is a non-derogable right under ***Article 44*** of the ***Constitution***, which provides as follows:-

“Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—*

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

***(d) the right to an order of habeas corpus*.”**

The detention of the Applicants without being produced in any court of law since 6/4/2011 up to date is, in my view, a profound violation of the Applicants’ human rights to a speedy hearing envisaged under ***Article 28(1)(supra)***. As it were, the Applicants are, invariably, in detention - not serving any lawful sentence - but at the whims of the General Court Martial, which ordered their detention.

It would also appear clearly that the Court Martial has made no effort to have the Applicants tried given that they have since their detention not been produced before the said court for them to be informed of their fate. As the case stands, the Applicants are in no position to ascertain whether they will, or when they will be brought before or tried by the Court Martial. They are technically in detention without trial.

For a person to be detained for more than one year without ever being tried or being brought before any court to know his or her fate is, in my view, a gross violation of that person’s right to a fair and speedy trial, which renders the otherwise lawful detention ultimately to be unlawful. For all intents and purposes it amounts to unlawful detention, which entitles the affected person to have recourse to the enforcement of his or her non-derogable right under ***Article 44(supra)*** through an order of ***habeas corpus*** under ***Section 34 of the Judicature Act (supra)***. Therefore, this application is properly before this court.

ISSUE 2.

Whether the High court is empowered to intervene in the detention ordered by the General Court Martial.

Mr. Ndibarema submitted that the High Court is not empowered to inquire into the workings of the other court (referring to the Court Martial) where criminal proceedings were instituted; and that to do so would be to oust the jurisdiction of the General Court Martial. With due respect, this is a misreading of ***Section 34 of Judicature Act (supra)*** under which this application was brought, which provides for issuance of orders of the prerogative writ of ***habeas corpus ad**

subjiciendum.* The section specifically empowers the High court to intervene at any time where a person is deprived of his or her personal liberty otherwise than in execution of a lawful sentence (or orders) imposed on that person by a competent court.

In this case, the detention of the Applicants is not in execution of a lawful sentence or order. From the findings of this court above, an illegal detention cannot be a foundation for a lawful sentence or order. That puts the instant case into the scope of cases in which this court may intervene for the obvious reason that persons have been unlawfully deprived of their liberty, and the granting of such a remedy has nothing to do with ousting the jurisdiction of the other court.

The other aspect under ***Section 34 (supra)*** which needs to be considered is the expression “a competent court”; which raises the question of whether the General Court Martial is a competent court or not, with regard to the Applicants in the instant case. Mr. Ndibarema advanced the argument that the General Court Martial is a competent court and that in order to challenge its jurisdiction the Applicants should raise the issue before the same Court Martial, or file a constitutional reference in the Constitutional Court since the matter has constitutional implications. Mr. Sibendire disagreed arguing that the High Court is the proper forum, and that the question of whether civilians can be tried by Court Martial or not has long been settled by the Constitutional Court; and that there is no need to make further reference on the matter.

The first limb of the issue - whether the High Court is empowered to inquire into the legality of the detention of any person by the General Court Martial or other court/tribunal - has been answered in the affirmative based on the clear provisions of ***Section 34(supra)***. As regards the issue of filing of a constitutional reference to determine the legality/constitutionality of the Applicants’ detention, that too I believe, is unnecessary in light of the guidance which was given by the Constitutional Court regarding the trial of civilians by the Court Martial in ***Uganda Law Society v. Attorney General, Constitutional Petition No. 18 of 2005.***

In the above case, their Lordships went at great length to articulate what constitutes service offences for which certain categories of persons could be charged under the ***Uganda Peoples Defence Forces Act,*** and tried by the court martial. Civilians who are not jointly charged with members of the armed forces or who are not charged with possession of equipment which is the exclusive monopoly of the military are excluded from trial by Court Martial.

The evidence in all the affidavits on record converges on the point that the Applicants are civilians who were charged with illegal possession of firearms and ammunition under the ***Firearms Act (Cap.299)***. I do not see how they could then be brought within the ambit of the Court Martial for trial given the Constitutional Court’s decision above. It follows that the GCM is not the competent court in as far as the Applicants are concerned, and the High Court can competently pronounce on the same issue which, even though has constitutional implication, no longer raises issues as to constitutional interpretation. It is a settled matter that only requires enforcement.

Once the Constitutional Court has pronounced itself as to the constitutionality of a matter in relation to Acts of Parliament or their provisions, such pronouncements assume the character of constitutional provisions and the principle of constitutional supremacy under ***Article 2(2)*** of the Constitution takes effect. The result is that there would be no need to make further references to the Constitutional Court each time a similar matter involving the same principle as the one already determined comes up in court. What is required is enforceability of the rights of the party by court following upon the Constitutional Court's pronouncements

Also, it needs to be emphasized that the High Court is not precluded from making decisions with constitutional implications even though it is not a Constitutional Court. In ***Kibaya V. Uganda, Constitutional Reference No.28 of 2008***, the position is that any court in which it is sought to make constitutional reference is empowered to determine the matter and decide whether it merits interpretation by the Constitution Court or not. In that way, the court cannot shy away from taking a decision on the matter just because it might involve constitutional implications. Where the High Court satisfies itself that the matter needs not be referred, it will make necessary decision without assuming the jurisdiction of the Constitutional Court under **Article *137 of the Constitution.***

In the instant application this court is, essentially, not required to interpret the constitutionality or otherwise of the Applicants' detention but to enforce their constitutional rights. As was held in ***Albanus Mwasia Mutua v. Republic (of Kenya) Criminal Appeal No. 120/2004,*** cited with approval by the Constitutional Court in **Dr*. Kiiza Besigye and O'rs v. Attorney General Constitutional Petition No.7 of 2007;*** at the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.

The jurisprudence which emerges from the above cited cases appears to be that an unexplained violation of the constitutional right of the accused persons will normally result in an acquittal irrespective of the nature and strength of evidence which could have been, or may be adduced against them. It was aptly observed in ***Dr. Kiiza Besigye and O'rs V. Attorney General (supra)*** that in the process of producing and presenting suspects in our courts, their numerous constitutional rights are violated by the law enforcement and security personnel, yet when such violations are brought to the notice of courts, the prosecutions are allowed go ahead as if nothing has gone a miss.

Their Lordships emphasized the position that it is high time the Judiciary reclaimed its mantle and apply the law to protect the fundamental rights and freedoms of our people as the Constitution requires. Again citing with approval the extract in by Lord Griffiths in ***R* *v. Horseferry Road Magistrates Exparte Bennet (1994) I A. C. 42*,** their Lordships the Justices of the Constitutional Court in ***Dr. Kiiza Besigye (supra*)** quoted the House of Lords who stated as follows:

“.... the judiciary accept responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law... (Authorities in the field of administrative law contend) that it is the function of the High Court to ensure that the executive action is exercised responsibly and as parliament intended. So also it should be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express disapproval by refusing at act upon it. The courts of course have no power to apply direct discipline to the police or prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behavior as an abuse of process and thus preventing a prosecution.”

I can only add that their Lordships’ apt observations are very instructive in relation to the instant application, and should not be taken in vain. Accordingly, I find that the Applicants were illegally detained before they were charged in the GCM, and their continued detention without trial is unlawful. It follows that no lawful prosecution can flow from such illegalities and violations of basic rights of the Applicants.

ISSUE 3.

Whether the orders sought can be obtained in this application or not.

The effect of the continued holding of the Applicants, which is tainted with violations and illegalities as stated above, would be declared unlawful by the High court; and the persons so detained set free. This finding is fortified by the position taken by Constitution Court in ***Dr. Kiiza Besigye & O’rs v. Attorney General,(supra),*** where the Learned Justices held that court can not sanction prosecution of persons where during the proceedings the persons’ human rights had been violated. Court went on to state that no matter how strong the evidence against the persons may be, no fair trial can be achieved at any subsequent trial as it would be a waste of time and an abuse of court process. To my mind, this holding adequately covers the very situation in the instant case.

Accordingly, this court grants an order for the immediate release of all the Applicants. It is further ordered that the Applicants be paid costs of the application. The Applicants are at liberty to pursue compensation for their unlawful detention in accordance with ***Article 23 of the Constitution*** and/ or any other relevant law. It is so ordered.

BASHAIJA K ANDREW

JUDGE

29/05/2012

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