

Lujila v O/C Kigo Prison & Ors
(Misc Cause No. 86 of 2013) [2013]
UGHCCD 134 (7 October 2013)
[2013] UGHCCD 134

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RULING

The applicant Lijila Mathius (Rugira Mathias as per the Charge Sheet) represented by M/s Rwakafuzi & Co. Advocates filed this application by Notice of Motion for an order of Habeas Corpus Ad subjiciendum under rr 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. It was proposed that the order doth issue to:-

1. The Officer in Charge Kigo Government Prison
2. The Director of Public Prosecutions.
3. Commander of the Uganda Peoples Defence Forces, and
4. The Attorney General of Uganda.

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

1. He was remanded by the General Court Martial in UPDF/GEN/075/10 Uganda V Lujila Mathias to date.
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 hearing Mr. Rwakafuzi learned counsel for the applicant *ex parte* an order for the issue of a writ of Habeas Corpus Ad subjiciendum nisi was issued.

Only one respondent i.e O/C Kigo Government Prison made a return of the writ stating that the applicant Lijila Mathias is detained in his custody by virtue of a remand 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 is attached to the return. The prisoner was in court.

At the hearing of this application *inter partes*, the O/C Kigo Prison Mr. Moses Ssentalo (ASP) was represented by Sandra Mwesigye a State Attorney.

In his submission Mr. Rwakafuzi stated that his client is a civilian who had a pistol without a licence who was charged in the court martial on 13.07.2010 and has been held without trial for 4 years. That the applicant has continued to languish on remand without trial which amounts to an illegal detention and this court should find so. That this court should order his release.

Secondly that the applicant is a civilian not supposed to be tried for an offence which does not relate to national security since being found in possession of a pistol which can be licenced under the Fire Arms Act does not make him triable by the court martial. Learned counsel referred the case of **Namugerwa Hadija Vs Attorney General SCCA 4 of 2012** where the Supreme Court held that a civilian who is found in possession of a firearm the monopoly of the UPDF is triable in the court martial but Mr. Rwakauuzi submitted that a pistol does not fall in the category of such fire arms. He referred to S. 119(h) of the UPDF Act which refers to the weapons of war such as Grenades, Tanks, Bazookas, Jet fighters etc.

Learned counsel further submitted that the Fire Arms Act is administered by the Police and police licences civilians to own certain weapons for hunting and self defence. That the law under which the applicant is charged is a civil law not the UPDF Act which is a Military law.

Mr. Rwakafuuzi further submitted that there is no offence created anywhere for the charges the applicant is facing talking about the monopoly of UPDF. Learned counsel urged court to distinguish the Supreme Court decision on this matter. He also prayed that this court refers this matter to the Constitutional Court for interpretation as to whether a court martial can try civilians or civil offences particularly offences relating to a firearm which is not the monopoly of the UPDF. That this application involves a question for interpretation of the Constitutional Court.

In reply, Ms Sandra Mwesigye opposed the application because it is baseless. She submitted that the return on the file has a charge sheet which shows that the applicant is A4 charged with unlawful possession of a firearm being ordinarily the monopoly of the defence forces. That the applicant was remanded to Kigo Prison by the General Court Martial Makindye on 17.07.2010 which is a competent court with jurisdiction over the applicant's offence because of the circumstances in which the applicant was found in possession of the firearm. That the pistol in question Gericho 941 DSL S/NO36326065 was allegedly robbed from Lt Julius Tumanya a UPDF Officer. That the pistol was registered by the UPDF and therefore a monopoly of UPDF.

Ms Mwesigye further submitted that the case of **Namugerwa Hadija Vs DPP and Attorney General SCCA 4 of 2012** referred to by Mr. Rwakafuuzi raised the same issues as now. That after considering S. 119 of the UPDF Act the Supreme Court held that the offence complained of fell in the jurisdiction of the court martial.

The learned State Attorney also referred to the case of **Uganda Law Society Vs Attorney General Constitutional Petition 18 of 2005** where the petitioner challenged the constitutionalism of trying civilians in the court martial. That the constitutional court held that civilians subject to Military Law under S.2 of the UPDF Act may be charged in the court martial for contravening the Fire Arms Act for being with weapons ordinarily the monopoly of the UPDF.

Ms Mwesigye further submitted that it is not true as deponed by the applicant that his detention is illegal. The detention was sanctioned by a competent court which remanded him following due process. That a writ of Habeas Corpus is supposed to be granted if a detention is unlawful. Further that although the applicant has been on remand for long, he will soon be tried.

Finally, Ms Mwesigye submitted that there is no reason for referring this matter to the Constitutional Court because the trial of the applicant is not in contravention of the constitution and the issues raised by the applicant were addressed in Namubiru's case. She prayed that this application be dismissed with costs.

I have considered this application as a whole and the submissions by respective counsel for and against this application. As I have stated in this ruling this is an application for Habeas Corpus Subjiciendum. Usually writs of habeas corpus are used to review the legality of applicants arrest, imprisonment and detention. However, the most important prerequisite for Habeas Corpus review are two to wit;

1. The petitioner/applicant must be in custody when the application is filed.
2. A prisoner who is held in state government custody must have exhausted all state remedies including state appellate review. It is not a substitute for appeal.

The purpose for filing the 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. It ensures 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. An application of this nature does not necessarily protect other rights such as entitlement to a fair trial.

Having these legal parameters in mind, and considering the submissions by Mr. Rwakafuuzi learned counsel for the applicant and Ms Mwesigye for the respondent I am of the considered view that learned counsel for the applicant has overstretched the purpose for a habeas corpus review. Learned counsel dwelt so much on whether a pistol, the subject of the charge against the applicant is a monopoly of the military. Obviously this is a triable issue determinable on evidence. It cannot be an issue for habeas corpus.

Learned counsel for the applicant attacked the legality of the charge sheet arraigning the applicant but this should not be a concern raised in Habeas Corpus proceedings. It is the trial court which has the mandate to pronounce itself on the issue.

As rightly submitted by Ms Mwesigye for the respondent 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 Ssentalo (ASP) clearly indicates the authority under which he is holding the applicant. This cannot therefore be held to be illegal detention or detention without sufficient cause or detention incommunicado. Neither is this detention prohibited by law. The issue of fair trial or release on bail or others rights should not arise under these proceedings. Such issues should be a concern of other proceedings.

Whether the charge sheet discloses 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. In any case, the Supreme Court in the case of **Namugerwa Hadija Vs DPP & Attorney General SCCA 4 of 2012** relied on by both learned counsel pronounced itself on the extraneous

matters Mr. Rwakafuuzi raised in this application such as whether the charges against the applicant are constitutional or legal. Mr. Rwakafuuzi appeared in that case up to the Supreme Court. That case has similar facts as the one under consideration.

While considering the judgment of the Court of Appeal in Civil Appeal No. 10 of 2012 the Supreme Court held that:-

“from their judgment, it is clear that the learned justices of appeal confined themselves to Section 119(1) (g) and (h) of the UPDF Act in so far as that section brings civilians under the military court’s jurisdiction.

..... they held that the General Court Martial had jurisdiction to try Sali Mohammed for possession of a firearm and ammunition ordinarily being the monopoly of UPDF”

“..... for the offence of being in unlawful possession of fire arms that court held that it had to be show that the accused persons being civilians, were subject to military law by for example showing in the Charge Sheet that the weapons they were alleged to have been found in possession of were ordinarily the monopoly of the Defence Forces.”

The Charge Sheet must disclose the acts which contravened the UPDF Act or any other law. S. 119 of the UPDF Act provides as follows:-

“119 persons subject to military law.

1. ***The following persons shall be subject to military law
.....***

(g) Every person, not otherwise military, who aids and abets a person subject to military law in the commission of a service offence; and

(h) Every person found in unlawful possession of

(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence forces; or

(ii) other classified stores as prescribed.

Therefore, according to this provision, civilians who find themselves in the circumstances described in the above Section will be subject to military law. S. 2 of the UPDF Act defines the expression “subject to Military Law” to mean being subject to parts V to XIV of the UPDF Act. This consists of Sections 118 to 257 of the Act.

The Supreme Court goes ahead to quote that S. 179(1) of the UPDF Act provides:-

“(1) A person subject to Military law, who does or omits to do an act-

1. ***In Uganda which constitutes an offence under the Penal Code or any other enactment***

2. ***Outside Uganda, which would constitute an offence under the Penal Code Act or any other enactment if it had taken place in Uganda, Commits a service offence and is, on conviction liable to a punishment as prescribed in subsection (2)****

Section 197 of the UPDF Act established a General Court Martial and confers on it inter alia unlimited jurisdiction to try offences under the Act. These include service offences under S. 179 of the Act committed by persons subject to Military law. These persons will include civilians subject to Military law under S.119 (i) (g) and (h) of the UPDF Act.

Under S.2 of the Act, a service offence is an offence under the UPDF Act or any other Act for the time being in force committed by a person who is subject to Military law. Therefore any civilian who is subject to Military law can commit a service offence whether under the UPDF Act or any other Act and may be tried by the General Court Martial.

In view of the above clear and elaborate decision of the Supreme court on all the issues raised by Mr. Rwakafuuzi, his submission on the legality of trial of the applicant in the General Court Martial do not arise. The applicant is before a duly constituted court and his arraignment is legal. No Constitutional question arises from this case as envisaged under Article 137(5) of the Constitution because, the Constitutional Court pronounced itself on the Constitutionality of S.119 (i) (g) and (h) of the UPDF Act. The Constitutionality of this law was upheld by the Constitutional Court in **Uganda Law Society Vs Attorney General** (supra) and is still the position of the law as of now.

In the instant case, the applicant is charged with an offence of unlawful possession of a firearm c/s 3(1) (20 (a) and (b) of the Fire Arms Act (Cap 299). The particulars of offence are that:-

“Agaba Frank, Byaruhanga Patrick, Zabangi Julius, Rugira Mathias, Kayongo Bashir, Senabulya Wilberforce, Musasizi Musa and others still at large, on the 14th day of May 2010 at Nakawa-Naguru Road junction Kampala District had in their possession a Firearm to wit, a Pistol Gericho 941 DSL S/No 36326065 without holding a valid Firearms certificate, the said firearm being ordinarily the monopoly of the defence forces.”

Therefore the alleged particulars of the offence the applicant the subject of the application for habeas corpus is charged of show that inter alia he is subject to Military law by virtue of S.119(1) (h) of the Act. There is a link between the accused and S.119 (i) (h) of the UPDF Act since it is stated that the weapon he was allegedly found in possession of is ordinarily the monopoly of the defence forces. Whether this allegation is true is subject to proof in the trial court. This court cannot use this application and the scanty information available without further evidence to determine whether the Gericho Pistol S/No. 36326065 is an arm ordinarily the monopoly of the Defence forces or not.

In my considered view therefore I am inclined to agree with the submission by Ms Mwesigye learned State Attorney that (Rugira Mathias) Lujila Mathius A4 is being lawfully held in prison. I decline to grant this application.

Before I take leave of this case I must comment that this application was uncalled for since Mr. Rwakafuuzi learned counsel for the applicant ought to have known the position of the law having prosecuted Namugerwa Hadija's case up to the Supreme Court. That case had similar facts as the instant one. It was misleading to urge this court to depart from that clear statement of the law. Luckily enough, the sharp legal microscope of this court detected the infection in time. The application for habeas corpus is hereby dismissed but given the nature of this case and the fact that the applicant is in custody awaiting trial, each party shall meet its costs.

Stephen Musota

J U D G E

07.10.2013

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