

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.124 OF 2018
IN THE MATTER OF APPLICATION FOR WRIT OF HABEAS CORPUS AD
SUBJICIENDUM
AND
IN THE MATTER OF AN APPLICATION FOR WRIT OF HABEAS CORPUS AD
JUSTIFICANDUM

HON. KIPOI TONNY NSUBUGA----- APPLICANT

VERSUS

THE ATTORNEY GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE CHIEF OF DEFENCE FORCES, UPDF-----RESPONDENTS

THE COMMANDING OFFICER MAKINDYE MILITARY BARRACKS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for *Habeas corpus ad subjiciendum* and an application for a writ of *habeas corpus ad justificandum* requiring the respondents to show cause why they were detaining him illegally, why they instituted illegal criminal proceedings against him, why the illegal criminal proceedings should not be discontinued and why he should not be released forthwith.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly they are stated in the notice of motion as follows;

- a. Around 23rd December 2012, the applicant was arrested on allegations of treason against the Government of the Republic of Uganda.
- b. On 22nd July 2013 the applicant, together with 5 others was arraigned before the High Court and charged with the offence of treason C/c 23 of the Penal Code Act cap 120 and two other offences of concealment of Treason c/s 25 of the Penal Code Act cap 120
- c. Around August 2013, the applicant was granted bail by the High Court of Uganda
- d. On 18th December 2013, the Director of Public Prosecutions entered a *Nolle Prosequi* in relation to offences for which the applicant was indicted.
- e. On 19th September 2014, basing on the *Nolle Prosequi* entered by the DPP, the High Court of Uganda discharged the applicant.
- f. Around 3rd February 2018, the applicant was arrested in Botswana and on 3rd March 2018, the applicant was deported back to Uganda.
- g. On 19th March 2018, the applicant was arraigned before the General Court Martial and Charged with offences based on similar facts for which a *Nolle Prosequi* was entered.
- h. On the same day 19th March 2018, the applicant was remanded to Luzira Upper Prison but the Chairman General Court Martial subsequently, ordered for his transfer to Makindye Military detention facility.
- i. On 7th May 2018, the applicant objected to the jurisdiction of General court Martial to try him, a civilian, in a Military Court, for offences which General Court Martial had no jurisdiction to try, and for which he had been discharged of and also challenged his detention in Military detention facility, which objection was overruled by the Chairman General Court Martial, on advice of the legal advisor the Judge Advocate.
- j. The detention of the applicant, a civilian, in Makindye barracks, is illegal and Unconstitutional.

- k. The trial of the applicant in a Military Court for treason related offences is illegal and unconstitutional.
- l. The institution of proceedings in a Court Martial by the Director of Public Prosecutions is illegal and unconstitutional.
- m. The trial of the applicant in the General Court Martial for offences in which the Director of Public Prosecutions entered a *Nolle Prosequi* is illegal, and unconstitutional

The respondent opposed this application and filed an affidavit in Reply by RO10667, Major Raphael Mugisha who is the lead prosecutor with the Chieftaincy of Legal Services at the General Court Martial and averred that the applicant was arrested and detained in order to answer charges on matters of security that are against him in Uganda. In addition, that the applicant was transferred to the General Court Martial detention facilities for security reasons. The General Court Martial has jurisdiction to try the offences that the applicant was charged with and all rights and a fair hearing have been observed.

The DPP did not institute charges at the General Court Martial against the applicant; instead the charges were instituted by the Director of Prosecutions Uganda Peoples Defence Forces.

That the *Nolle Prosequi* entered by DPP clearly indicated that the offences are not triable at the High Court but the General Court Martial...*"they should be charged in Court Martial"*

At the hearing of this application the counsel were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

I shall resolve this application on the basis of the prayers sought by the Applicant. The applicant was represented by Mr Ronald Iduli whereas the respondent was represented by Ms Cheptoris Slyvia.

Counsel for the applicant submitted that the applicant filed this writ of habeas corpus before this honourable court on 25th May 2018 challenging both his detention and trial by the military court as being illegal.

Counsel Iduli has also submitted that the applicant was transferred from Makindye military barracks to Luzira Upper prison.

The two issues the applicant's counsel has raised for determination are;

Whether the applicant is in unlawful detention?

Whether the applicant is entitled to any remedies?

This application seems to be rooted in challenging the lawfulness of the detention and prosecution of the applicant in a Military General Court Martial. It appears the applicant's only grievance was detention in a military facility and now that he has been transferred to a civilian facility, then he has no ground upon which to base his complaint to that extent.

I have considered the application as a whole. The purpose of an application for a *writ of habeas corpus ad subjiciendum* is to review the legality of the applicant's arrest, imprisonment and detention and challenge the person still 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 lacking sufficient cause of evidence or detention incommunicado. The detention must therefore be forbidden by law. An application of this nature does not necessarily protect other legal rights such as entitlement to a fair trial. See ***Jovia Karuhanga vs Inspector General of Police, Director Criminal Investigations & Intelligence, Commandat Special Investigations Unit (SIU) Kireka and Attorney General High Court Miscellaneous Application No. 86 of 2013***

Mr Iduli Ronald seems to be using this application as an appeal against the decision of the General Court Martial which overruled him when he raised the issues of jurisdiction and prosecution of the applicant in the General court martial.

The applicant states in his affidavit;

“ That on the same day when the trial commenced, I Through my lawyers of Ojok &Co Advocates, objected to my trial by the General Court Martial as

being unlawful and unconstitutional which objection was overruled by the Chairman general Court martial

ThatI objected to my detention in a military cell as being illegal and unconstitutional which objection was also overruled by the General court Martial.”

The application for habeas corpus cannot be used to determine the legality of the criminal proceedings in criminal prosecutions whether in a civilian court or Military Court. In the case of ***Dr Tiberius Muhebwa vs Uganda Constitution Reference No. 09 of 2012***. The constitutional Court noted;

This Court should not interfere with criminal prosecutions without just cause. Interfering with criminal prosecutions without reasonable grounds would be placing the bar for judicial discretion too low and would not also be in conformity with the exercise of judicial power under Article 126 of the Constitution”

This position was also reiterated in the case of ***Kaitale Julius & 3 others vs Uganda Constitutional Reference No. 11 of 2014*** (decided on 18-01-2018)

This is an application for habeas corpus and its ambit is confined to persons under arrest requiring that they be brought to court before a judge or into court especially to secure the persons release unless lawful grounds are shown for their detention.

This is s recourse in law through which a person can report an unlawful detention or imprisonment to a court and request that the court orders the custodian of the person in charge of such detention facility to bring the person to court.

In simple terms, habeas corpus procedure is a legal procedure that keeps the government from holding a person indefinitely without showing cause.

In the present case the applicant was deported from Botswana and was arraigned in the General Court Martial and currently he is under detention at Luzira Upper prison, I donot see any justification in issuing any writ of habeas corpus.

The issues raised by Mr Iduli for the applicant regarding the illegal detention of the applicant or other violations of the applicant's other rights cannot be a subject of these proceedings. If the applicant wants to challenge the said charges they cannot do so in these proceedings.

A prisoner may apply for the writ of habeas corpus at the moment of arrest challenging the legality of his/her arrest. However, where there have been valid proceedings subsequent to the arrest, which are offered in justification of the detention, the prisoner will not get redress under habeas corpus. ***In the matter of Sheikh Abdul Karim Sentamu & Another Constitutional Reference No. 7 of 1998***

There is sufficient evidence to show that the applicant was produced in court and therefore his detention cannot be unlawful for purposes of issuing a writ of habeas corpus.

For the reasons herein above given, I am unable to grant the applicant's prayers. The application for habeas corpus is hereby dismissed with no order as to costs.

SSEKAANA MUSA
JUDGE
9th /07/2018