

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT KAMPALA
MISCELLANEOUS CAUSE NO.15 OF 2010
IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD
SUBJICIENDUM
KISHAIJA STEVEN VERSUS ATTORNEY GENERAL

RULING:

A writ of habeas corpus ad subjiciendum was issued by this Court on 10th February, 2010. It required the officer in charge of Kigo Prison to produce the body of Kishaija Steven who was said to be detained in that prison.

The affidavit in support of the ex-parte application for the issuance of the writ of habeas corpus was deponed by one Atukunda Emily, who stated that she was the wife of Kishaija Steven. Her evidence, contained in that affidavit, was that Kishaija Steven was not a soldier or a person subject to military law. That the Military Court Martial had no jurisdiction to try him or to order his remand in Kigo Prison. That remanding him or trying any case against him by the Military Court Martial would be unlawful and unconstitutional.

The witness testified further that the applicant was arrested during the month of June 2000, from Jinja Road in Kampala, by officers of the RRU. He was detained at Kireka Police Barracks until 20th September, 2009, when he was taken to the General Court Martial. He was charged with the offence of aggravated robbery and ordered to be remanded at Kigo Prison.

The writ was returned to this court by the Attorney General on 17th February, 2010, when the applicant was produced before Court. An affidavit in reply accompanying the return was deponed by one Nabasa Charity, a State Attorney in the Attorney General's chambers, who stated that she was well versed with the facts of this application. There were three substantive averments in Ms. Nabasa's affidavit:

- that she had been informed by the officer in charge of Kigo prison that the applicant had been found in possession of weapons that were the preserve of the military, the applicant

had committed a robbery with those weapons and he had been charged before the General Court Martial.

- That the applicant had been appearing before the court martial on several occasions to answer charges of aggravated robbery.
- That this application was improperly before this Court.

Learned Counsel, Mr. Samuel Mugisha Mukeri, for the applicant and Ms Arinaitwe Gorreti, representing the Attorney General, made submissions relating to the contents of the return.

It is trite law that upon presenting the applicant and the return before court what is required of the respondent, in this kind of application, is justification of the legality of the detention of the applicant. The respondent has to satisfy Court that the applicant is legally detained.

In the instant application, however, the averment that was contained in paragraph 3 of Ms Nabasa's affidavit, to the effect that she had been informed by the officer in charge of Kigo Prison that the applicant had been found in possession of weapons that were the preserve of the military, appeared to court to be clearly hearsay and inadmissible. To make it worse, the applicant had been kept in unconstitutional detention at the RRU at Kireka for over three months before being charged with aggravated robbery and not being in possession of fire arms. The mere fact of being charged with aggravated robbery, perse, is not evidence that the person charged had been found in possession of weapons which are the preserve of the military. Neither the fact of having been sent upon remand by the court martial nor the fact of appearing from time to time before that court when on remand, render the detention lawful.

What was in issue in this application, but which the return failed to show, was the claim by the applicant that he was not a soldier or a person subject to military law at the time of his arrest. That the court martial, therefore, did not have jurisdiction to try him or legally send him to remand at Kigo prison. The authority of the Supreme Court of Uganda in ***Attorney General Versus Uganda Law Society, Const. Appeal No.1 of 2006***, appears to be very pertinent on this point. The General Court Martial is not competent to try any person unless it is shown that at the time of arrest that person was subject to military law. That important element has not been shown in the instant case.

Court, accordingly, finds that the return which the respondent has presented before it does not show that the applicant's detention is lawful. It is clearly unlawful. The General Court Martial was not competent to try the applicant who was not a person subject to military law at the time of his arrest. The order sending the applicant to Kigo Prison on remand was unlawful. So is the detention. Court, in those circumstances, has no option but to order, as it does, that she applicant be and is released at once from the illegal detention.

The costs of this application be paid by the Attorney General.

V.F. Musoke-Kibuuka

Judge

22.02.10