

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISCELLANEUS CAUSE NO. 09 OF 2021
IN THE MATTER OF ARTICLES 23 (1), (9), 44 (D) AND 50 OF THE CONSTITUTION OF
THE REPUBLIC OF UGANDA 1995

AND

IN THE MATTER OF SECTION 34 OF THE JUDICATURE ACT CAP 13 OF THE LAWS
OF UGANDA (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION FOR WRIT OF HABEAS CORPUS AD
SUBJICIENDUM BY KIWANUKA JOHN AND OTHERS

1. KIWANUKA JOHN
2. MUWONGE VINCENT LUBEGA
3. LUYOBYA GYAVIRA
4. NYOMBI SHAFIC
5. KAKINDA ANDREW
6. NGOBYA EMMANUEL
7. MUWONGE RONALD
8. MPAKA FAROUK
9. MUKASA MAHAD
10. KYAZE BARACK
11. KAWUKI RONALD
12. KASINGA FAHAD
13. KYAMBADE SULAIT
14. KASUMBA GEORGE
15. KYAKUWA MAHAD A.K.A BOY
16. SSEGIRINYA EMMANUEL
17. LUSEMBO FRANK
18. SSEBUGENYI DERRICK APPLICANTS

VERSUS

1. THE DIRECTOR GENERAL OF INTERNAL SECURITY ORGANISATION
2. THE ATTORNEY GENERAL

3. THE INSPECTOR GENERAL OF POLICE (UGANDA POLICE)
4. THE CHIEFTAINCY OF MILITARY INTELLIGENCE (CMI)
5. THE CHIEF OF DEFENCE FORCES (UPDF) :::::::::::::::::::::::::::::::::::::::
RESPONDENTS

BEFORE; HON JUSTICE VICTORIA NAKINTU NKWANGA KATAMBA

RULING

This is an application seeking an order for a writ of habeas corpus under Articles 23 (1), (9), 44 (d) and 50 of the Constitution of the Republic of Uganda 1995 and the Judicature (Habeas Corpus) Rules. The Application seeks for orders that this Court directs a writ of Habeas Corpus Ad Subjiciendum in respect of the Applicants as against the Respondents. Although this application was filed for all the eighteen Applicants, it is Counsel for the Applicants' submission that on the 22nd day of March 2021, seventeen of them were dropped off by unknown people in Kyotera. From the foregoing, this application partly stands in as far as the 14th Applicant a one Kasumba Geroje is still missing and I will proceed to consider the same in that regard.

In support of the Application, Kyomugisha Jane, the sister to the 14th Applicant swore an affidavit in which she stated that the 14th Applicant was a business person before arrest in Kyotera Town. He was kidnapped and arrested between the 8th day and 14th day of January 2021 in Kisamula Village, Kyakkonda Parish, Kyotera Town Council in Kyotera District, by unknown men dressed in military faigue using vehicles known as drone, double cabin at around 01pm. The 14th Applicant's family has tried to establish his whereabouts in vain and he is still in illegal detention. The 14th Applicant has not been charged in any competent court of law since the illegal arrest and on that basis, the relatives have decided to pursue this application for purposes of the Applicant's application for Habeas Corpus and Subjiciendum.

Under Rule 3 of the Judicature (Habeas Corpus) Rules, this application is meant to be ex parte. However, this Court exercised its discretion under Rules 4 of the same Rules and directed service of the application to be effected on the Respondents. The Respondents were duly served as per the affidavit of Alex Sempijja a court process server, which was filed on the 19th March 2021. It therefore goes to show that the Respondents are well aware of the instant application but chose not to file any affidavits in reply.

Both Counsel for the Applicants and Respondents made oral submissions in court on the 1st day of April 2021. Counsel for the Applicants prayed for the writ to issue in regard of the 14th Applicant who is still missing.

Counsel for the Respondents submitted that the 4th Respondent responded contending that they did not have the Applicants in their custody and that since the rest of the Applicants were returned, it is contended that they were taken by unknown people which cannot be imputed on the Respondents and a writ of Habeas Corpus cannot issue in rem.

Counsel for the Applicants cited Rule 3(4)(c) of the Judicature (Habeas Corpus) Rules which provided that the Application shall mention the place where the Applicant is restrained, if known. It is not strict that the place where the Applicant is restrained should be known.

Counsel for the Applicants further made written submissions and raised one ground of illegal detention of the applicant by the agents of the Respondents.

Counsel submitted that in accordance with affidavits, the Applicants were arrested in an operation involving unknown people clad in military fatigue/camouflaged uniform who can be identified as agents of the Respondents since wearing military fatigue is preserved for the armed forces. The Applicants were arrested during a political season and the President admitted in February 2020 that some people had been arrested by security personnel. Relying on Section 34 and 35 of the Judicature Act, Counsel submitted that the remedy of Habeas Corpus is available where there is deprivation of personal liberty without legal justification. Counsel cited the case of *Jovia Karuhanga vs Inspector General of Police MA No. 86 of 2013* where the purpose for a writ of habeas corpus was stated to be; to review the legality of the applicant's arrest, imprisonment and detention and challenge the authority of the prison or jail warden to continue holding the applicant. The Applicants have never been arraigned before a competent court to be charged and this court has jurisdiction under Section 34 of the Judicature Act to review or inquire into the legality of the confinement of the applicants by the Respondents. Counsel submitted that the conduct of the Respondents of detaining the Applicants incommunicado is illegal and prayed for this court to solve the illegality and allow this application.

Determination of the application;

The purpose of a writ for habeas corpus is to review the legality of the Applicant's arrest, imprisonment and detention. The application is used when a person is held without charges or is denied due process. (*See Jovia Karuhanga v Inspector General of Police MA No. 86 of 2013*).

In the instant application, the Applicant (14th Applicant – Kasumba George) was allegedly arrested by unknown persons dressed in military attire along with the other Applicants who have since been returned. No return as to the whereabouts of the Applicant or evidence to show that he has been charged with any offence has been brought to this court by any of the Respondents. For that reason, the whereabouts of the Applicant remain unknown hence this application intended to protect and secure his liberty.

The right to personal liberty is guaranteed by the Constitution of the Republic of Uganda, 1995 under Article 23 which grants the right for suspects under detention to be brought before a competent court within 48 hours of detention. Article 23(9) provides that the right to an order for habeas corpus is inviolable and shall not be suspended.

The writ of Habeas Corpus when granted requires the production of the Applicant before a competent court in order to test the validity of the Applicant's detention and thereafter ensure their release if indeed the person is being held unlawfully, or have the person charged to constitute a legal detention.

Sir Udo Udoma CJ, Sheridan J (as he then was) and Jeffrey Jones, J) in *Uganda v Commissioner of Prison (ex parte Matovu)*, (1966) EA 514 at page 545 observed that:

“To constitute a detention under Reg 1 of the Emergency Powers (Detention) Regulations 1966 an order signed by the Minister authorizing such a detention must be served on the detainees and it is after such service that it could be said that the person was detained by the Minister in the exercise of his powers under the Regulations; and it is only then that the time prescribed under the constitution would begin to run.”

As earlier noted, in the instant case no return acknowledging the detention of the Applicant has been produced in court nor any evidence to show that the Applicant was arraigned before a

competent court and charged with any offence. It is alleged that the Applicant was arrested by military persons as deduced from the military wear and indeed as stated by Counsel for the Applicant an acknowledgement was made that a number of persons were being detained for security purposes. One of the Applicants who was returned (the 13th Applicant) stated that upon being arrested, they made statements and were charged with participating in demonstrations.

No evidence of such charges has been produced in Court despite the Respondents being served effectively with the application and the 14th Applicant is still missing. It has also been submitted that all efforts to establish his whereabouts have been in vain.

Section 34 of the Judicature Act Cap 13 gives this Court the mandate and jurisdiction upon receipt of a complaint where a person is deprived of their personal liberty, if it appears that there is reasonable ground for the complaint, award under the seal of the court a writ of habeas corpus ad subjiciendum...

In the case of *Grace Struat Ibringira & others v Uganda* [1966] EA 445, the Court of Appeal for Eastern Africa had the following to say regarding this writ at page 454:-

“The writ of Habeas Corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. ... The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen ... may test the action of the executive government no matter how high the position of the person who ordered the detention.”

A writ of Habeas Corpus applies cases of illegal detention and it is meant to secure the personal liberty of a person under such illegal detention upon determination of the validity of such detention by the court granting the writ.

I agree with Counsel for the Applicant that preservation of personal liberty is crucial and should only be derogated from in exceptional circumstances. I find that the application and affidavit of the Applicant's sister Kyomugisha Jane, have adduced sufficient grounds to prove that the Applicant was arrested allegedly by military personnel as they were dressed in military attire and

that his whereabouts are still unknown. Considering that no evidence has been produced as to whether the Applicant is legally detained and was arraigned before a competent court, I find it imperative that his personal liberty is preserved and protected by any means possible.

From the foregoing, this application is hereby granted and an order of a writ of habeas corpus ad subjiciendum is hereby issued directing the Respondents to produce the 14th Applicant Kasumba George before a competent court.

Costs of the application are granted to the Applicant.

I so order.

Dated at Masaka this 7th day of April, 2021

Victoria Nakintu Nkwanga Katamba

Judge