

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC CAUSE NO. 86 OF 2013

IN THE MATTER OF AN APPLICATION FOR WRIT OF HABEAS CORPUS

AND

IN THE MATTER OF JOVIA KARUHANGA ::::::::::::::: APPLICANT

VERSUS

1. THE INSPECTOR GENERAL OF POLICE

**2. THE DIRECTOR OF CRIMINAL
INVESTIGATIONS & INTELLIGENCE**

**3. THE COMMANDANT OF SPECIAL
INVESTIGATIONS UNIT (SIU) KIREKA**

4. THE ATTORNEY GENERAL OF UGANDA

} :::::::::::::::RESPONDENTS

BEFORE: HON. JUSTICE STEPHEN MUSOTA

Constitutional law-writ of habeas corpus

RULING

This is an application for Habeas Corpus Ad Subjiciendum brought under Article 23(4) & 9 of the Constitution S. 34 Of the Judicature Act and rules 3 & 4 of the Judicature (Habeas Corpus) Rules SI 13-6 for orders that:-

- (i) Summons be issued and directed against the respondents to wit the Inspector General of Police, the Director of Criminal Investigations & Intelligence, the Commandant and Special Investigations Unit Kireka and the Attorney General to appear in Court and show why the applicant should not be released forthwith.
- (ii) The Respondents do produce the applicant before this court.

The grounds upon which this application is based are that:-

- (a) The applicant was arrested on 17th August 2013 at Rushere Kiruhura District and detained under CRB Rushere 2017/2013.
- (b) Her arrest and detention was in connection with the death of Daniel Karuhanga and 5 others which occurred on 17th August 2013.
- (c) The applicant was transferred to Mbarara Police station on 18th August 2013 where she was detained until 23rd of August 2013 when she was transferred to the Special Investigations Unit Kireka.
- (d) Since her arrest on the 17th August 2013 to date she has never been charged with any offence nor released on police bond to her grave detriment.
- (e) The applicant has been in police custody for forty seven days without any charge in violation of Article 23(4) of the Constitution. This application is supported by the affidavit of the applicant Jovia Karuhanga which reiterates the grounds of application but goes further to explain that the applicant was arrested together with her son John Musiime and all adult members of her household including two house maids, a driver and herdsman. That her children including Monica Kankunda, Alice Ayebare, Jolly Akandwanaho were also arrested.

After court considering the *ex parte* application for a writ of habeas corpus as argued by Mr. Ahimbisibwe an order for the issue of a writ of habeas corpus *ad subjiciendum nisi* was granted.

A return of the said writ was made by Nabunya Stella SP O/C of Uganda Prison Luzira, Women in which she certified that the applicant Jovia Karuhanga is detained in her custody by virtue of a remand warrant issued against her by Buganda Road Court dated 18th October 2013 for the offence of Murder C/S 188 and 189 of the Penal Code Act *vide* Criminal Case file A29/2013. A Charge Sheet to that effect is annexed to the return. It comprises six murder counts, one count of Aggravated Robbery and one count of Simple defilement. A remand warrant signed by the Buganda Road Court is also attached.

In support of return of the writ, Mr. Madete a State Attorney with Attorney General's Chambers submitted that the applicant is in lawful custody/detention.

In reply Mr. Ahimbisibwe for the applicant submitted that the lawful detention started on 18.10.2013. That between 17th August 2013 and 18th October 2013 the applicant was illegally detained. That the continued prosecution of the applicant is a nullity because it is mounted in breach of the law and no lawful prosecution can flow from such illegality. Therefore the applicant should be set free and costs be provided for.

In rejoinder, Mr. Madete for the Attorney General submitted that the purpose for habeas corpus is to establish the reasons for the detention of the person and his/her whereabouts. That the laws provide for other remedies under which the legality or not a detention can be challenged. That the duty upon the respondent was and has been discharged. That it has been shown that the applicant is in lawful custody.

Mr. Madete further submitted that the prayers of the applicant are misplaced and should not be granted. Finally that no costs should be granted.

I have considered the application as a whole and the return made by the respondents. The purpose for a writ of habeas corpus ad subjiciendum is 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 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.

It was held in **Constitutional Reference 7 of 1998; In the matter of Sheik Abdul Karim Sentamu & another Constitutional Reference 7 of 1998** that:-

“The writ is considered to provide an assurance that personal freedom will always be protected”.

As rightly submitted by Mr. Madete for the respondent, the return indicates that the applicant herein was arraigned before Buganda Road court jointly charged with others with Murder and other offences and that court remanded the applicant with her co-accused to Luzira Prison. These documents have been presented to court and their authenticity has not been challenged by the applicant.

Nabunya Stella S.P the Officer in Charge Uganda Prison Luzira women has confirmed holding the applicant on the authority of court. Therefore this cannot be held to be an illegal detention or detention without sufficient cause or detention incommunicado in these proceedings. Neither is this detention prohibited by law.

The issue raised by Mr. Ahimbisibwe for the applicant regarding the preceding illegal detention of the applicant or the violations of the applicant’s other rights cannot be a subject of these proceedings.

A prisoner may apply for the writ the moment of arrest challenging the legality of his/her arrest. However, where there has 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 Sheik Abdul Karim Sentamu & another Constitutional Reference 7 of 1998.**

The illegality in the original arrest or proceeding is immaterial when the subsequent proceedings have been right **Queen Vs Well (1982)9 QBD 70.**

In proceedings for habeas corpus, the relevant time at which the detention of the prisoner must be justified is the time at which court considers the return of the writ. I do not agree with Mr. Ahimbisibwe that because the earlier detention of the applicant was illegal therefore she should be released when court has been told that she faces grave charges of Murder and aggravated robbery. A writ of habeas corpus cannot properly issue because since 18th October, 2013 there has been in force a perfectly valid order detaining the applicant in prison. Any grievances the applicant has about her prolonged detention without trial or arraignment which, if true, this court does not condone, should be a subject of other proceedings which learned counsel for the applicant ought to know.

I am mindful of the Constitutional Court decision in **Constitutional Petition No. 7 of 2002 Dr. Kizza Besigye & others Vs Attorney General.**

It is the duty of courts to enforce the provisions of the constitution and scrupulously apply the law that seeks to secure, enhance and protect fundamental rights and freedoms of an accused person. A prosecution mounted in breach of the law is a violation of the right of the accused and is a nullity.

In my considered view however, this decision is instructive if the proceedings before the court applying it concern a case challenging the legality of charges brought against the complainant. This is not the case in the instant case. The application under consideration complained of detention of the applicant without charges. Now there are charges against the applicant regardless of the mode in which they were preferred. If the applicants want to challenge the said charges they cannot do so under these proceedings. They can do so under other proceedings. Infact the proper forum to challenge the validity of the charges against the applicant ought to be in the court in which she will be arraigned where both **Constitutional Reference 7 of 2010** (supra) and **HCT-05-CV-MA-0042 2012 In re Muhindo Hebert & others** would be very instructive.

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

Stephen Musota

J U D G E

28.10.2013