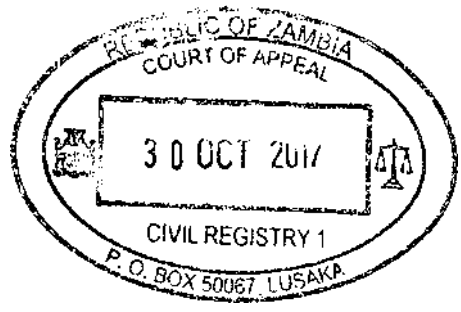
IN THE COURT OF APPEAL **APPEAL/87/2017**
HOLDEN AT NDOLA
(Civil Jurisdiction)



HAKAINDE HICHILEMA **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram: Chisanga JP, Chishimba and Kondolo, JJA

On 04th October, 2017 and 30th October, 2017

For the Appellant: Mr. Sakala, Messrs Malambo & Company
For the Respondent: Mr. L. Kalaluka S.C, Attorney General

RULING

Chisanga, JP, delivered the ruling of the court.

Cases referred to:

1. ***Zambia Democratic Congress vs The Attorney General SCZ No 37 of 1999***
2. ***Attorney General vs The Law Association of Zambia (2008) 1 ZR P 21***
3. ***Bernardo vs Ford (Gossage's case) in (1891-4) ALL ER 522***

Legislation Referred to:

1. ***Halsbury's Law of England 3rd Edition***

The court has before it an appeal against the decision of the Court below, wherein the learned judge refused to issue a Writ of Habeas Corpus for the production of the appellant before the court to be dealt with in accordance with the law and for any relief the court deemed fit.

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The application for the Writ of Habeas Corpus was supported by an affidavit sworn by one Keith Mweemba, counsel for the appellant, wherein he stated that the circumstances of the case required that the Writ of Habeas Corpus issue immediately as the appellant was being held illegally without just, reasonable and probable cause.

In arguing the application, the learned judge was urged to address the question whether the charges preferred against the appellant were reasonable, valid and lawful. It was argued that the intendment of the Habeas Corpus Act of 1679 was to prevent mere accusations, and delays in committing persons to trial in criminal matters. The court was invited to examine the charge, and note that not even one ingredient of the offence of treason had been disclosed on the charge.

In response to the application, learned counsel appearing for the respondent observed that the purpose of Habeas Corpus is to require a person under arrest to be brought before a judge or a court to secure a person's release unless lawful grounds are shown for their detention. He submitted that the constitution imposed an obligation to try arrested persons within a reasonable time. Therefore, the appellant's application was premature and a ruse to arrest criminal proceedings.

In further opposition, the learned Attorney General drew the court's attention to the requirement of Order 54 Rule 2, and submitted that the affidavit sworn by Mr. Keith Mweemba failed to meet the very legal requirement upon which it was based. The affidavit did not state why the applicant was unable to swear his own affidavit and for what reason. He also stated that there was no evidence that the applicant was aggrieved, a substantial requirement to justify the court to exercise its discretion to entertain the application.

According to the learned Attorney General, the court could not pronounce itself on the validity or otherwise of the charges merely on the basis of an affidavit, without hearing evidence. It was his view that the criminal justice system provides for dismissal of frivolous cases at the no case to answer stage.

Upon considering the application, the learned judge saw no reason to trespass into the aspect of the actions of those who detained the applicant, which according to her, are properly the preserve of those who detained him. She thus rejected the argument that the applicant was illegally held without just, reasonable and probable case. She noted that the state moved with speed by ensuring that the applicant was charged. The next step was to take him before the courts of law, which were to ensure that he was tried within a reasonable time.

The learned judge expressed the further view that it was the role of the trial court to establish the validity or otherwise of the charges. She could not pronounce herself on the validity of the charges, as the court was not the proper authority to receive meaningful representations at that stage. She opined that Habeas Corpus proceedings were not designed to forestall criminal proceedings, and could not be used as a remedy against incarceration allowed by law. She dismissed the application on those grounds.

The applicant was aggrieved with that decision, and lodged an appeal on the following grounds:

1. The learned judge in the court below misdirected herself both in law and in fact when she did not issue the Writ of Habeas Corpus presented to her but appointed a return date to hear the parties.

2. The learned court fell into grave error both in law and fact when she held that inquiring into the aspects of the actions of the respondent in

detaining the applicant was the preserve of the respondent's servants who detained the applicant.

3. The court erred both in law and in fact when she held that at the stage of hearing the application for Habeas Corpus it could not inquire into the validity or otherwise of the charges the applicant was facing.

4. The court below erred both in law and fact when it held that the present case was not a fit and proper case for a Writ of Habeas Corpus to issue.

When the appeal was called for hearing, the learned Attorney General addressed the court first, inviting us to take judicial notice that the charges to which the Habeas Corpus application related came up for trial in the High Court. The Director of Public Prosecutions entered a nolle Prosequi, and the matter was discontinued accordingly.

He went on to inform the court that when he received the notice of hearing of the appeal, he called Mr. Haimbe, and pointed out that proceeding with the appeal would serve no purpose in the circumstances. Mr. Haimbe indicated that he would revert on the issue. When the learned Attorney General called him a few days later on the matter, his response was that he had not yet received instructions.

The Attorney General urged the court not to hear the appeal, as that would be an academic exercise culminating in the making of an academic order. He reminded the court that the making of academic orders is frowned upon by the Supreme Court. He referred to **Zambia Democratic Congress vs The Attorney General**[1] where that court, in dealing with the appeal before it, stated the following:

> ***"It is now a notorious fact from what has been publicly published in the media that the Zambia Democratic Congress is no longer in existence and that Mr Derrick Chitala, one of the originators of the application, has since rejoined the ruling party. We take judicial notice of these notorious facts. This appeal in our view is certainly academic. As a matter of practice, this court disapproves being engaged in academic exercises."***

The learned Attorney General also referred to **Attorney General vs The Law Association of Zambia**[2], where the Supreme Court had this to say:

> ***"It is a notorious fact that the elections are since gone. Even if the petitioner was to be successful on the cross-appeal, it is quite clear that the order would serve no purpose apart from being an unnecessary academic exercise. This court frowns upon making academic orders."***

Drawing from these authorities, the Attorney General urged us to take judicial notice that the nolle prosequi was entered in the public interest, and proceeding with the appeal would not foster dialogue, peace and reconciliation currently being brokered.

Mr Sinkala, learned counsel appearing for the appellant was of a contrary view. He pleaded with the court to hear and determine the appeal, as that would develop the jurisprudence on the power of the High Court to enquire into and quash charges preferred against an accused person.

The Attorney General's response was that development of the law should not be sought for in a vacuum. An issue had to exist, to which the law could be applied, in furtherance of jurisprudence on the subject. The determination of the court had to serve a purpose.

He pointed out that appropriate process could be issued in the Constitutional Court for determination of the question whether the High Court had power to enquire into and quash a charge, if that was the appellant's objective. The appellant was equally at liberty to commence an action for malicious prosecution in the High Court, but ought not to be allowed to make this court waste its time and render a decision that would serve no purpose.

We have considered the arguments of the parties. We indeed take judicial notice that a nolle prosequi was entered in the High Court, when the case concerning the appellant was called for trial.

In determining the issue raised by the learned Attorney General, the nature of the Writ of Habeas Corpus must be borne in mind. The learned authors of **Halsbury's Law of England 3rd Edition** Volume 2, address the purpose for which the Writ is issued, at paragraph 40.

They state that it is a prerogative process for securing the liberty of the subject. It affords an effective means of immediate release from unlawful or unjustifiable detention. By the said writ, the High Court, at the instance of the aggrieved subject, commands the production of the subject, and enquires into the cause of his imprisonment. Where no legal justification for the detention exists, the party will be released by the court.

The learned authors of the said work proceed to state, in paragraph 44, that if the illegal detention has ceased before the application is made, the Writ of Habeas Corpus is inapplicable. It will not issue when it is clear that the person charged with unlawfully detaining another, whether a child or an adult has *de facto* ceased to have custody or control.

The House of Lords had occasion to pronounce on the matter in **Bernardo vs Ford (Gossage's case)**[3] and stated the following:

"Where an application for a Writ of Habeas Corpus comes before the court and the court is satisfied that the illegal detention alleged ceased before the application for the writ was made or the person to whom it was directed had notice of the application, so that at those times the person to whom the writ relates was no longer in the custody, power or control of the respondent to the writ, that is a good return to the writ, which therefore, should not be ordered to issue. The remedy of Habeas Corpus is intended to facilitate the release of persons detained in unlawful custody and not to afford the means of inflicting penalties on those persons by whom they were at some time or other illegality detained. If however, the court entertains a doubt whether it be a fact that at the material time the person alleged to be detained was not in the control of the respondent to the writ, the court may issue the writ, and the matter can be decided on the return to the writ when the respondent can be cross-examined."

In the case with which we are now concerned, the appellant in effect invites us to determine whether or not the court was on firm ground in declining to enquire into the appellant's detention and consigning that determination to those who detained him. Additionally, he requires us to determine whether the trial court could enquire into the validity or otherwise of the charges preferred against him. Other issues for determination in the appeal are whether this was a proper case in which to issue a Writ of Habeas Corpus, and whether the trial judge should have issued the writ.

It is rendered clear by the authorities cited that it would be an academic exercise to hear and determine this appeal. It would serve no purpose at all, as there is no corpus to be brought before the courts, in the event the appeal succeeds. *Gossage's* case, supra, applies to the circumstances of this case in that the detention has ceased, as the appellant is no longer in custody.

Any order we would make, were the appellant to succeed would be but a mere *brutum fulmen*, an academic exercise. We are well guided by the authorities cited by the learned Attorney General, to refrain from engaging in an academic exercise, which the Supreme Court frowns upon. We see no point in maintaining this appeal on the list. We thus dismiss it. Each party will bear its own costs, as the appeal was lodged before termination of the criminal proceedings in the court below.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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F. M CHISHIMBA
COURT OF APPEAL JUDGE

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE