IN THE HIGH COURT FOR ZAMBIA **2017/HP/1778**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**ORDER 54 RULES 1, 2 3 AND 4 OF THE RULES OF THE SUPREME COURT**
IN THE MATTER OF:	**ARTICLE 13, 15, 17, 19, 20, 21 AND 23 OF PART III FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**ARTICLE 18 FOR THE PROVISIONS TO SECURE PROTECTION OF THE LAW CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**FRED HAMAAMBA**
IN THE MATTER OF:	**APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJCIENDUM**

B E T W E E N :

FRED HAMAAMBA	**APPLICANT**
AND	
ATTORNEY GENERAL	**RESPONDENT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 29th day of November, 2017

For the Applicant	:	*Mr. Z. Sinkala, Messrs Muleza Mwiimbu & Co.*
For the Respondent	:	*Mr. C. Mulonda, Ag. Senior State Advocate*

R U L I N G

Cases Referred To:

1. *Growley's Case (1818) 2 Sworn 1*
2. *The People v Obvious Summertone Mwaliteta and 4 Others HP/231/2016*
3. *John Chisata and Another v Attorney General S.C.Z. Judgment No. 6 of 1981*

Legislation Referred To:

1. *Rules of the Supreme Court 1999*
2. *Constitution of Zambia, Chapter 1 as amended by Act No. 2 of 2016*

Other Works Referred To:

1. *Halsbury's Laws of England, 4th Edition Volume 2*

This is an application for a Writ of Habeas Corpus *Ad Subjiciendum*. It is filed pursuant to Order 54 Rules 2 and 3 of the Rules of the Supreme Court.

It is supported by an Affidavit sworn by **Zevyanji Sinkala**, who states that on 8th October, 2017, his client, Fred Hamaamba was apprehended by Police and detained at Woodlands Police Station without being charged or notified of the offence he was alleged to have committed. That all attempts to have the Applicant charged or released proved futile. He prayed to the Court to issue a Writ of Habeas Corpus directing the Officer-In-Charge at Lusaka Central Police Station and to bring the body of the Applicant before Court.

Counsel for the Applicant filed skeleton arguments, where he submitted that on 28th April, 2017, the Applicant was apprehended by the Police at the Government Complex and accused of masterminding the graffiti works entitled "Free HH". He was taken to Lusaka Central Police and denied bond because the police could not locate his docket. Counsel submitted that the Applicant was detained for a week and was not taken to Court so that he could apply for bail. That the offence he was charged with namely, idling and disorderly conduct under section 179 of the Penal Code, is bailable.

Counsel cited Order 54 Rule 2 and 3 of the Rules of the Supreme Court, which reads:

> **"(2) An application for such writ may be made ex-parte and, subject to paragraph (3) must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.**
>
> **(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2) the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason."**

Counsel submitted that the Applicant was unable to make the application because of the nature of his circumstances and Counsel

proceeded on his behalf. Counsel referred to the importance and supremacy of the Writ of Habeas Corpus as elucidated by Lord Eldon, L.C. in **Growley's Case**[1], quoting from Hale's History of the Common Law that:

> **"The Writ of Habeas Corpus is a very high prerogative writ, by which the king has a right to enquire the cause for which any of his subjects are deprived of their liberty."**

He also cited Cornes Crown Practice mentioned in **Halsbury's Laws of England, 4th Edition Volume 2** at page 24, footnote (e), where it is declared that:

> **"If any man be imprisoned by another a corpus causa, i.e. habeas corpus can be granted by the Court to those who imprison him for the king ought to have an account rendered to him concerning the liberty of his subjects and the restraint thereof."**

He further cited the Earl of Birkenhead in **O'brien's Case**, at page 609, which refers to the writ of habeas corpus as:

> **"...perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity..."**

Counsel urged the Court to issue the Writ of Habeas Corpus forthwith as the Applicant was held without charge or explanation

of reasons for his detention for over twenty-one days. According to Counsel, the requirements of a writ of habeas corpus had been met.

Counsel adverted to Order 54 Rule 1 (2) (3) of the Rules of the Supreme Court, on the purpose of a writ of habeas corpus. Counsel went on to submit that the purpose of a writ of habeas corpus is to produce the body of a detained person before Court so as to test the validity of the detention, and possibly release such person from unlawful restraint. It was his submission that the Applicant having duly satisfied the requirements of Writ of Habeas Corpus as prescribed by Order 54 of the Rules of the Supreme Court ought to have the writ issued so that the Court could interrogate the reasons for his illegal, unlawful and unconstitutional incarceration.

Counsel for the Respondent did not oppose the application.

At the hearing Counsel for the Applicant placed reliance on the Affidavit in Support and Skeleton Arguments. He invited the Court to take judicial notice of Article 2(3) and Article 1(1) of the Constitution (Amendment) Act, which affirm the supremacy of the Constitution. It was his submission that the Constitutional Articles

bound all state organs, institutions and individuals including the police. He added that Article 267(4) of the Constitution permitted a Court to check the actions of the arresting officer or the police in the present case. Further, that Article 267 (1)(a) of the Constitution places a requirement to interpret the Constitution in accordance with the Bill of Rights.

Counsel submitted that the Applicant was arrested on 8th October, 2017 and only charged after seven days. This prompted him to move the Court for a writ of habeas corpus. However, it was only after the application was filed into Court that the State quickly moved to charge the Applicant. Counsel referred me to Article 18 of the Constitution on the presumption of innocence stating that the Applicant was detained for a period of over seven days without a charge, which amounted to a violation of his rights under the Bill of Rights.

Counsel further submitted that the Applicant was facing two counts of aggravated robbery with two other persons unknown. Coincidentally, the particulars stated in the Applicant's information in this case were similar to those that appeared on the certificate of

committal in the case of **The People v Obvious Summertone Mwaliteta and 4 Others[2].** Counsel argued that Honourable M.D. Bowa J, found in that case that the Applicant was not connected to the offence. Taking into account the holding in that case, Counsel stated that the Applicant was now being persecuted on the same facts. He contended that the police had failed to uphold their professional ethics asserting that their actions were immoral and only meant to punish the Applicant granted that there was no evidence connecting him to the present charge.

Counsel further contended that in the event that the Applicant's matter proceeded to trial, the Applicant would unavoidably be found innocent at the no case to answer stage because there is no evidence linking him to the offence. He beseeched the Court to interrogate the actions of the State and to find that the Applicant's fundamental rights had been breached. Further, that the actions against the Applicant amounted to torture and an infringement of his rights.

Counsel stated that since the nature of the application is *sui generis* and meant to protect the Applicant's human rights, the

Court had the right to interfere and declare the actions of the State unconstitutional. Counsel went on to state that in interpreting Article 18 of the Constitution, the Court had to bear in mind that a fair trial begins at the investigation stage. Further, that during their investigations, the police should have deemed the Applicant innocent but considered him guilty thereby violating his presumption of innocence under the Constitution.

Counsel stated that if proper investigations had been launched, the inevitable would have been that the Applicant had not committed the offences he is accused of. He added that assuming that the investigations were thorough, the result would still be the same because the police would have established that the Applicant was not at the crime scene nor identified by any witness.

Counsel prayed to the Court to find that the Applicant's arrest, continued detention and charge were unconstitutional, and to declare them null and void. He also prayed for the Court to set the Applicant at liberty.

Learned Counsel for the Respondent opposed the application stating that Order 54 of the Rules of the Supreme Court provides that applications for habeas corpus are meant to examine the validity of a person's detention. Counsel stated that the Applicant was charged of the offence of aggravated robbery and appeared before the Subordinate Court. It was his contention that the Applicant's detention was lawful and criminal proceedings had been launched against him. Counsel submitted that the Court sitting with civil jurisdiction could not determine the criminal proceedings against the Applicant and therefore the question whether or not the evidence against him was strong enough to secure a conviction was an issue before the trial Court.

Counsel further submitted that if the Court granted the Applicant's prayer to be released, that outcome would prejudice the on-going criminal proceedings. It was his contention that the alleged infringement of the Applicant's rights ought to have been challenged by petition and not by writ of because it had been overtaken by events.

In response, Counsel for the Applicant submitted that the State did not dispute the immorality of the Applicant's incarceration. An application brought by way of habeas corpus was sui generis and the very essence of the application was to examine the validity or legality behind the detention of a person. He further submitted that when a Court is moved by way of habeas corpus, and if it finds that the detention is illegal, then it has the power to set that person at liberty.

Counsel stated that he was aware of the petition process but that this matter could not be subjected to that procedure in view of Article 118(2) (e) of the Constitution (Amendment) Act, which provides that justice should be administered without undue regard to procedural technicalities. He added that the mere fact that the Applicant was charged and taken to Court did not make his incarceration legal or moral. Counsel stated that the Applicant's continued detention, arrest and charge is illegal and that is why he beseeched the Court to interfere.

Counsel contended that if the Court did not interfere, then it would be setting a bad precedent that such actions by the State

were permissible. He prayed to the Court to grant the application and to set the Applicant at liberty.

I am indebted to both Counsels for their submissions.

I have anxiously considered the Affidavit and written submissions filed herein as well as the oral arguments of both Counsels.

Order 54 Rule (2) (3) of the Rules of the Supreme Court states that:

> **"The purpose of the writ is that the body may be produced before the Court, so that release from the restraint may be secured and not that someone who has unlawfully detained or unlawfully parted with the custody may be punished; and therefore the writ is not granted after the release of the person detained...The writ is used to test any alleged invalidity in the commitment of a prisoner, or want of jurisdiction to hold him in custody."**

The purpose of a writ of habeas corpus as stated in Order 54 Rule (2) (3) is to ensure that the body of an Applicant is produced before Court. Habeas Corpus cannot lie after a person has been brought to Court or released.

In casu, Counsel concedes that the Applicant was charged of the offence of aggravated robbery and appeared in Court on 15th October, 2017. However, his contention is that the Respondent acted only after this application was lodged into Court. In the meantime, the Applicant's human rights have been infringed as he is being prosecuted or persecuted on the same facts that he was found with no case to answer in the **Obvious Summertone Mwaliteta**[2] case.

In the case of **John Chisata and Faustinos Lombe v Attorney General**[3], the Supreme Court held that:

> **"(i) The Court is not concerned with the truth or falsity of the grounds of detention but is merely concerned with whether or not there was reasonable cause to suspect the appellants."**

In that case, the Supreme Court cited the case of **R. v Board of Control and Others, Ex parte Rutty (II)** at p 772, where Hilbery J. in the Queen's Bench Division stated thus:

> **"On an application for a writ of habeas corpus this Court does not sit as a Court of Appeal. It will not re-hear the matters which were to be decided by the judicial authority. The Court will, however, admit affidavit evidence in order to decide whether there was any evidence before the judicial authority such as would justify his finding that he had jurisdiction to deal with the Applicant and to make an order."**

Taking into account the guidance given by the Supreme Court, it is trite that I cannot sit as an appeal Court to receive evidence and determine whether or not the criminal charges against the Applicant have merit. Such factual questions can only be decided by a Court sitting with criminal jurisdiction. If I proceeded to do so, then I would be making a finding exercising appellate jurisdiction in a matter where no appeal has been laid before Court.

A habeas corpus application does not call a Court to interrogate the truth of the allegations against the Applicant but only to consider the question whether an Applicant has been charged and presented before a Court of competent jurisdiction. Be that as it may, this application has been overtaken by events and I accordingly dismiss it. I make no order as to costs.

Dated this 29th day of November, 2017.

M. Mapani-Kawimbe
HIGH COURT JUDGE