IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2017/HP/1212

17 AUG 2017

IN THE MATTER:	ORDER 54 RULES 1, 2 AND 4 OF THE RULES OF THE SUPREME COURT OF ENGLAND (WHITEBOOK) 1999 EDITION
IN THE MATTER OF:	PART III OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
IN THE MATTER OF:	ARTICLE 13, 15, 17 AND 18 OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	SECTION 33 OF THE CRIMINAL PROCEDURE CODE ACT CHAPTER 1 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN:

CHILESHE MULENGA	1ST APPLICANT
MAINZA CHOONGO	2ND APPLICANT
LEYS CHITOMA	3RD APPLICANT
JAMES HAMBULO	4TH APPLICANT
WONDER NAKAZUKA	5TH APPLICANT
KAHYATA ZHYINGA	6TH APPLICANT
BIGGIE MUBAMBE	7TH APPLICANT
JUSTIN MUTONGA	8TH APPLICANT
DAVID NDUMBA	9TH APPLICANT
AMON MWEEMBA	10TH APPLICANT

AND

THE ATTORNEY GENERAL — RESPONDENT

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicants: *Ms. M. Mushipe of Mesdames Mushipe & Associates*

For the Respondent: *Mr. C. Mulonda – State Advocate*

R U L I N G

Cases referred to:

1. *Kalenga M'poyou and Kane Mounourou (1979) ZR 28 (Reprint) (HC)*
2. *Patrick Mainza George Mudenda and Lameck Kamanga v. The People (1981) ZR 146 (HC)*
3. *Zambia National Holdings Limited v. United Nations Independence Party, (1993/1994) ZR 1115*
4. *Access Bank (Zambia) Limited v. Group V Zcon Business Joint Venture SCZ/8/52/2014*
5. *Khalid Mohamed v. The Attorney General (1982) ZR 49*
6. *Moses Chapakwenda and others v. Attorney General (2011) 2 ZR 431*
7. *Mobil (Z) Limited v. Msiska (1983) ZR 86*
8. *Mohamed Muazu v. The Attorney General (1988/1989) ZR 8 (SC)*

Legislation referred to:

1. *Rules of the Supreme Court of England, 1999 edition White Book*
2. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
3. *The Constitution of Zambia, Act No. 35 of 2016*

4. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
5. *Habeas Corpus Acts of 1672 and 1816 of England*
6. *Interpretations Act, Chapter 2 of the Laws of Zambia*
7. *The Constitution of Zambia No. 20 of 2015*

This is an application for leave to issue writ of ***Habeas Corpus Subdiciendum*** (herein after referred to as the writ of ***Habeas Corpus*** commenced by **Chileshe Mulenga, Mainza Choongo, Leys Chitoma, James Hambulo, Wonder Nakazuka, Kahyata Zhyinga, Biggie Mubambe, Justin Mutonga, David Ndumba** and **Amon Mweemba**(herein after referred to as the "Applicants").

The application was by mode of originating motion anchored under Order 54 (1), (2) and 4 of the *Supreme Court Rules of England*[1] *Articles 13, 15, 17 and 18 of the Constitution of Zambia*[1] *and Section 33 of the Criminal Procedure Code*[3].

The application was supported by a joint affidavit and an affidavit in reply deposed to by the relatives of the applicants.

The essence of which was that the Applicants were arrested and detained and restrained from seeing their relatives and lawyers and the location of their detention was unknown and as such the Applicants were unable to depose to the affidavits themselves.

It was deposed that the Applicants were picked on 12th July, 2017 from their respective places of business without warrant by Zambia Police Officers without warrant nor assigning reasons for the

purported arrests. The Applicants were tied up, beaten and paper sprayed and blind forded and airlifted to Lusaka.

On 13th July, 2017 the Applicants 1 and 2 were traced at Ridgeway Police Station and Woodlands Police Station respectively. The duo were then interrogated and beaten but were not informed of the reasons for their detention and arrest.

The Applicants were later conveyed to Lilayi but their relatives were not allowed access to the Applicants nor were they allowed to give them food; the police explaining that the Applicants were being provided with food.

It was deposed that efforts to secure police bond have proved futile as the Applicants have not been charged of any known offence and access to the Applicants has been made practically impossible. That the dependents have by their Advocates and they verily believe that the continued detention of the Applicants is not only unjustified but is also unlawful as it is unconstitutional in that the fundamental and constitutionally guaranteed right to freedom and liberty are being blatantly violated and unfairly prejudiced by government officials currently in control of their custody.

The dependents were further advised that any person who is arrested or detained and who is not released shall be brought without undue delay before a Court within 48 hours.

Further, the Applicants are presumed innocent until proved guilty. It was further deposed that if arrested persons are not tried within a

reasonable time, they ought to be released wither unconditionally or upon reasonable conditions.

In conclusion it was deposed that in the circumstances of the case, this was a proper case for the Court to grant and issue the writ of habeas corpus and to order the release of the Applicants and free then from their unjustified detention.

The Respondent filed in an opposing affidavit. The gravamen of which is that the Applicants herein have made the application as class applicants and not individual Applicants. That consequently, it is difficult for the Respondent to establish and fully appreciate the basis of each individual's application. The affidavit concluded by stating that the Respondent verily believed the application was irregular.

The Applicants filed in an affidavit in reply deposed to by **Chisengo Ndumba** on behalf of the 9th Applicant. The essence and in so far as it is not repetitive is that notwithstanding the contention that this action has been irregularly brought as a class action and it would be difficult to appreciate the individual Applicants basis of each individual's application, the Respondent has not disputed that the Applicants are in the Respondents custody nor have they advanced reasons to justify the Applicants prolonged detention.

It was deposed that the Court was duty bound to safeguard the constitutionally guaranteed human rights. It was averred that the Applicants are being detained *incommunicado* for long period and treated inhumanly by the Respondents agents in blatant

contravention of the constitution. That the Court should not dismiss the action purely on mere technicality.

The Applicants advocates filed in list of authorities and skeleton arguments that also addressed the Respondents list of authorities and skeleton arguments as follows:-

1. **ARRESTED AND DETAINED PERSON TO BE TAKEN TO COURT AND BE TRIED**

Under this limb, Learned Senior Counsel relied on *Article 13 (3) of the Constitution*[2] for the proposition that

> *"any person who is arrested or detained and who is not released shall be brought without undue delay before a Court and if not tried within a reasonable time, then he shall be released either unconditionally or upon reasonable conditions"*

2. **DUTY TO TAKE DETAINEE TO COURT WITHIN 24 HOURS**

Reference was then made to *Section 33 of the Criminal procedure Code*[3], pointing out that *"any person who has been taken into custody without warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may in any case and shall if it does not appear practicable to bring such person before an appropriate Court within 24 hours after he has been taken into custody"*.

It was submitted that notwithstanding the provisions of the above pieces of legislation in (1) and (2) the Applicants have been held *incommunicado*.

3. WRIT OF HABEAS CORPUS

Arising from the submissions under paragraph (1) and (2) above, the Applicants were obliged to launch process for issue of leave for issue of a *writ of habeas corpus*.

Counsel then made reference to *Order 54 Rule (1), (2), (3) and (4) of the Supreme Court Rules of England*[1]. The provisions relate to the jurisdiction of the Court to hear an application for such writ which must be supported by an affidavit deposed to by the Applicant or another person where the restrained person is not able to make the affidavit.

4. SIGNING OF AFFIDAVIT BY A PERSON OTHER THAN APPLICANT

It was submitted that the dependents have explained how they came to sign the affidavits since it was difficult for the Applicants to do so.

5. JOINT OR CLASS APPLICATION

It was argued that the case of ***Kalenga M'poyou and Kane Mounourou***[1] which struck off the file a notice of motion for writs of **habeas corpus** on account that an application for such a writ may not be joint. It was argued out that there was no application before the Court to have proceeded to hear the application and pronounce

itself on it since there was an irregularity that went to the root of the application. Counsel attacked the challenge on the Applicants application on ground of defect of form.

6. **DOCUMENT OR INSTRUMENT NOT TO BE VOID BY REASON OF DEVIATION FROM FORM**

To this extent she called in aid the provisions of *Sections 47 of the Interpretation and General Provisions Act*[5], which stipulates that an instrument or document shall not be void on account of defect in form or irregularity.

7. (i) **RAISING OF A LEGAL CHALLENGE WHETHER FLOUTS APPLICANTS APPLICATION**

It was submitted by Learned Counsel that by raising a legal challenge the Respondent was flouting the Applicants application. In her view *Order 54 (1) (2) and (3)* provide for joint applications.

7(ii) **SUBSEQUENT CASE OF PATRICK MAINZA, GEORGE MUDENDA AND LAMECK KAMANGA V. THE PEOPLE2, ENTERTAINING JOINT APPLICATION**

It was argued that in the above case the High Court entertained a joint habeas corpus application. She therefore urged the Court not to follow the ***Kalenga M'poyou and Kane Mounourou*** case (supra) decided by Moodley J, (as he then was).

8. **APPLICABILITY FO THE 1672 HABEAS CORPUS ACT OF ENGLAND TO ZAMBIA**

It was submitted that the above Act applies to Zambia as pronounced by Sakala, J (as he then was) in the case of ***Patrick Mainza, George Mudenda and Lameck Kamanga v. The People***[3].

9. **PURPOSE OF WRIT OF HABEAS CORPUS**

It was Learned Counsel's submission that is premised on the principle that persons will not be held in detention for unlimited period of time without being brought before a Court to trial.

10. **GUIDELINES IN ADJUDICATION**

It was Counsel' s submission that in adjudicating the Court should take cognisance of *Article 118 (2) (e) and (f) of the Constitution*[6] which provides that in exercising judicial authority shall do so without undue regard to procedural technicalities and values and principles of the Constitution.

Learned Counsel for the Respondent filed brief list of authorities and skeleton arguments in opposition. The grudenom is that:-

(1) (a) **A writ of habeas corpus is a personal action**

In support of this proposition counsel referred to *Order 54/0/2* where it states:-

> *"The writ of habeas corpus ad subjudiciendum which is used to test the validity in the commitment of a prisoner, or want of jurisdiction to hold him, is the most important of all of the writs of this denomination.* ***(underlining mine)***

(b)**Order 54 Rule 1 (1) (2) and (3)**

Learned Counsel cited the above order which provides for an

> *"application to be made ought to be supported by an affidavit by the person restrained..... and where the person restrained is unable for any reason to make 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"*

(c) Order 54/1/5

It was submitted that under this order, it is provided that:-

> *"A writ of habeas corpus will issue where someone is detained without authority or the purported authority is beyond the powers of the person authorizing the detention and so is unlawful"*

Learned Counsel concluded by stating that an application for a writ of habeas corpus is persona in nature as such it should be made by an individual.

At the hearing both Counsel made submissions more or less, they adopted their respective affidavits and articulated their respective positions. I will not therefore replicate the same save for those submissions which were not captured in the head of arguments.

It was Learned Senior Counsels submission Ms. Mushipe that the Applicants are being held without being provided with water, food

and beddings. That they are being held incommunicado and are on hunger strike. She feared that they may perish.

Learned Counsel Mr. Mulonda submitted that the 1st, 2nd, 3rd, 5th and 6th Applicants have been officially charged of Arson and being found in possession of dangerous weapons and dockets.

In respect of the holding in the ***Patrick Mainza, George Mudenda and Lameck Kamanga v. the People*** case, it was his submission that in the case, the state had been desirous of entering a nolle prosequi save that the Courts filed could not be located and as such did not support the detention of the trio on charges of Aggravated Robbery and it was on that basis that the writ of habeas corpus was granted.

In respect of the Courts duty under *Article 118 (2) (e) and (f)* Learned Counsel called in aid the case of ***Access bank (Zambia) Limited v. Group V / Zcon Business joint venture***,[4] where the Court of last resort observed that:-

> *"The Constitution never means to oust the obligations to comply with procedural imperatives as they seek from the Court"*

In respect of the original and unlimited jurisdiction, it was Counsels submission that the case of ***Zambia National Holdings Limited v. United Nations Independence Party***, whereas the Court has that jurisdiction the Court is bound to adjudicate in accordance with law including compliance with procedural requisites as well as substantive limitations.

Learned Counsel Mr. Mulonda to buttress this legal proposition placed before the Court the case of ***Access Bank (Zambia) Limited v. Group V/Zcon Business Joint Ventures***[5], for the proposition that

> *"The Constitution never means to oust the obligation of the parties to comply with procedural imperatives to seek justice from Courts"*

He therefore submitted that I should not be persuaded to allow the Applicants to use *Article 118 (2) (e) of the Constitution* to flout laid down imperatives.

He concluded by submitting that the Applicants application be dismissed for being misconceived at law and irregular and that costs be for the Respondents.

In reply Learned Senior Counsel Ms Mushipe invited the Court to follow the **Mainza case** (supra) where the Court according to her entertained a joint habeas corpus application and not to follow the case of **Kalenga** wherein the **habeas corpus** application was terminated on account of application the Applicants.

She submitted by pointing out that the absence of an opposing affidavit is ground enough to show that the Respondent has failed to justify why its agents are holding in custody the Applicants.

She concluded by saying, the Applicants rights under the constitution are being violated by being detained without reason nor

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She concluded by saying, the Applicants rights under the constitution are being violated by being detained without reason nor

unless there are other constitutional constraints to hear and determine the Petition.

Unlike in an application for leave to issue a writ of habeas corpus the Court has discretion to grant or deny the leave to issue the high writ. Once a party has elected to anchor his application under the high writ then he or she is expected to strictly comply with mandatory legal requirements catalogued in Order 54 of the Supreme Court Rules and the judicial interpretations placed on the said Order as will be illustrated in due course.

The submission under this limb is destitute of merit.

2. **Duty to take detainee to Court within 48 hours under Section 33 of the Criminal Procedure Code**

The application before this Court is clearly is for leave for issue o f a writ of habeas corpus which has been captioned as "*Originating motion for writ of habeas corpus pursuant to Direction of the Court*"

This is the application before me and not an application for Constitutional bail pursuant to 33 of the Criminal Procedure Code3, though the said section is captioned in the heading, the Applicants application is clearly premised on the high writ anchored on Order 54 as foresaid.

The Applicants Advocates have not provided me with any authority for the proposition that an Applicant is entitled to bring multiple claims under the bill of Rights, Habeas Corpus and Section 33 of the Criminal Procedure Code.

It is the duty of the Advocates after navigating and interrogating the various modes of launching of actions to choose the most convenient, best for the interest of their clients taking into account the peculiar circumstances.

After all, a respected litigant depends on the professional excellence and advise of the Learned Counsel and it is on that basis that a fee is charged for such services.

It is not for the Court to start amending the motions so as to aid a party engulfed in a procedural predicament brought about by the Applicant moving the Court.

In the **Mainza** case the Court granted the high writ to issue in the absence of an opposing affidavit. The case reveals that the State (Respondent) were actually anxious to enter a nolle prosequi but for the missing Court record. In my view the Respondent in that case the application was not opposed. The Applicants had stayed for 3 years in detention.

Quite clearly, the case was not decided on merit and to adopt the pronouncement of Siavwapa J, in the case of ***Moses Chapakwenda and others v. Attorney General***[6] *"a consent Judgment has no evidential value as it is not tried on merit"*.

Further the Mainza case did not discuss or refer to the earlier case of Kalenga (supra) which held that a joint action was inappropriate in a writ of habeas corpus application on the reading of the provisions of Order 54 of the White Book. It is pointed out there

that a writ of habeas corpus is an action in person and that "Corpus, means body and not bodies".

In my view, the Mainza case heavily relied upon by the Applicants was decided per incuriam.

3. **Writ of Habeas Corpus**

It is not in dispute that the high writ of habeas corpus is available to any of the Applicants in so far as he or she complies with the rules prescribed within the four corners of Order 54 and as judicially pronounced upon by precedent. One of the requirements is that the affidavit ought to be signed personally or by another person on behalf of the Applicant where the Applicant cannot practically append his signature to the affidavit.

I have no difficulty in accepting that the affidavits were properly sworn by other persons since the Applicants were not in a position. What is unaccepted is that affidavits were made communally or jointly which was disapproved in the Kalenga case.

I do not accept the argument that the non compliance goes to procedure and form. In my view, the non compliance goes to substance in a writ of habeas corpus which by its nature is very personal.

In any event, even assuming I was said to be wrong in this approach, and it were said that the matter has to be adjudicated upon on merit; reference has already been made to Article 118 (2) (e) in respect of the case of ***Access Bank (Zambia) Limited (supra)***

where the Court of last resort authoritatively pronounced itself that:-

> *"The constitution never means to oust the parties obligations to comply with procedural imperatives as they seek justice from Courts'*

4. **Document or Instrument not to be void by reason of deviation from form**

In support of the above legal proposition, reliance was placed on Section 17 of the Interpretations and General Provisions Act.

I have already alluded to this submission in one or two of the preceding paragraphs where I have observed that the non compliance with Order 54 as regards signing affidavit in persona does not to form but to substantive procedural impositions and such non compliance is fatal.

5. **Failure to file affidavit in opposition**

It was canvassed by the Learned Senior Counsel for the Applicant that there being no opposition then the Applicants ought to succeed.

It is trite law that in the absence of a challenging affidavit, the Respondent is deemed to have admitted the facts averred in the affidavit. This however does not proscribe the Respondent to oppose affidavit evidence on points of law.

In any event, it is settled law in our jurisdiction that the burden lies on he who alleges. Ngulube DCJ (as he then was) rested all debate

on the issue when he authoritatively pronounced himself on the matter in the case of ***Khalid Mohamed v. the Attorney General***[7], he craftily put it this way:-

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to a Judgment. I would not accept a proposition that even if a Plaintiffs case has collapsed of its inanition or for some reason or other, Judgment should nevertheless be given to him on the ground that a defence has failed"*

I am bound by the said pronouncement. In the case in casu, there is a serious legal challenge on the non compliance with Order 54 of the Supreme Court Rules of England. If the challenge is meritorious, it has the effect of torpedoing the Applicants applications. I do not therefore agree that the mere fact that an affidavit in opposition has not been filed ought then as a matter of course, the Court has to religiously grant the sought application.

The submission under this limb is destitute of merit.

6. **Whether Respondents Legal Challenge is an abuse of Court process bent on frustrating the Applicants Application**

It was submitted that the challenge in respect of commencing a joint or a class action in a habeas corpus application as alleged by

the Respondents is an abuse of Court process intended to frustrate the Applicants application.

I do not agree. The Court of final resort had occasion to pronounce itself on a similar subject in the case of ***Mobil (Z) Limited v. Msiska***[7], where Gardner JS, as he then was held as follows:-

> *"Holding number 11, obtaining a tactical advantage by taking steps which are available at law is not an abuse of Court process"*

This edit aptly applies to the case in casu.

7. **Applicants of the 1672 Habeas Corpus Act of England**

It was counsels' submission that on the authority of ***Patrick Mainza (supra)*** the Habeas Corpus Act of England of 1672 applies to Zambia. This is incorrect. The Supreme Court in the case of ***Mohamed Muazu v. the Attorney General***[8], Ngulube DCJ (as he then was) Held:-

> *"It is wrong to regard the habeas corpus Act of 1816 as part of Zambian written law....."*

It is worth noting that in the Muazu case the Court was referring the 1816 Act which follows that the 1672 Act cited by the Court in the Mainza case (supra) had been repealed by the subsequent Act.

This issue need no further investigation.

8. **Article 117 (2) (f)**

It was submitted that in adjudicating the Court should factor in the principles of justice and support of the constitution.

This submission on its own cannot be faulted. However, other factors have to be taken into account that in the administration of Justice there are rules, orders, regulations interalia that must be complied with for a party claiming refuge under that Article. Justice is for all and not only of the Applicant.

I have demonstrated above that there has been substantial non compliance with the provisions of Order 54 of the Rules of the Supreme Court Rules of England.

9. **Adducing evidence by Learned Counsel from the BAR**

It was submitted by the Learned Ms Mushipe that the Applicants were on hunger strike, and it was feared they might die.

This contradicts the affidavit evidence wherein it is alleged that the Applicants are being denied food. In any event a person can only be aid to be on hunger strike if he has food which he voluntarily refuses to take.

On the part of the Respondent, it was submitted by Learned Counsel Mr. Mulonda that Applicants 1, 2, 3, 5 and 6 have been charged for offences of Arson and being in possession of dangerous weapons.

I should on the outset observe that it is highly irregular and undesirable for Counsel to adduce evidence from the Bar. In the circumstances, I will attach no probative or evidential to the both Learned Counsels submissions in respect the inadmissible evidence sought to be sneaked in from the Bar.

Having traversed, navigating, evaluated and analysed the various legal issues ably articulated by both parties and factoring the affidavit evidence; I have come to a conclusion that this is not a fit and proper case to grant leave to the Applicants to issue the high writ of habeas corpus.

The application is struck out.

I will follow the path taken by Moodley, J (as he then was in the **Kalenga M'poyou case** when he pronounced that

> *"the striking out of the application is no bar for the Applicants to relaunch subsequent applications or actions"*

I will make no order as to costs. Put differently, each party has to bear its own costs.

Leave to appeal is granted.

Delivered under my hand and seal this 17th day of August, 2017

Mwila Chitabo, SC
Judge