FAUSTINO LOMBE v ATTORNEY-GENERAL (1986) Z.R. 76 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND MUWO, J.S.
10TH DECEMBER, 1985 AND 16TH SEPTEMBER, 1986
(S.C.Z. JUDGMENT NO. 20 OF 1986)

Flynote

Constitutional Law - Detention - Grounds of detention - Detainee's name incorrect - Effect of Constitutional Law - Detention - Grounds of detention - Failure to publish in Government Gazette within time limit - Effect of Constitutional Law- Detention - Place of detention - Detention in unauthorised place - Effect of Damages-Habeas Corpus - Claim for damages for unlawful detention - Not available on hearing of habeas corpus application.

Headnote

The respondent was detained on the 29th July, 1981, on the ground that he with other (whose names were given) had conspired to rescue persons who were detained on allegations of having attempted to over throw the lawful government of the Republic of Zambia. The detainee contended that the detention order included a name which was not his between his first and last names and that therefore, it was not intended to detain him. He also argued that the notice of his detention was not published in a regular issue of the Government Gazette but in an

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extraordinary issue published mid-week. The other ground of appeal was that other persons detained with the appellant had been released which, it was argued, was an indication that the appellant's detention was punitive. The appellant also asked for damages for unlawful detention on the grounds that for a period he detained in a police station which was an improper place of detention.

Held:

(i) A superfluous name does not nullify a detention order if there is evidence that it was intended to detain the person in fact detained.
(ii) There is no constitutional requirement that the publication of a detention shall be valid only when it is published on a Friday in an ordinary Government Gazette.
(iii) The release of other persons who featured prominently in the grounds for the appellant's detention does not ipso facto render the grounds for his detention inoperative.
(iv) Detention in an unauthorised place does not nullify a Presidential detention order.
(v) Damages for an unlawful period of detention cannot be claimed in a habeas corpus application.

Cases cited:

1. Albert Nana Mhlanga v The Attorney-General [1982/HP/154]
2. Kanoobhai Ashaubhai Patel v Kazimile Kakese Kanongesha [1971/HN/1032]
3. Nkanza v The Attorney-General [1981/HN/633]
4. Munalula and Others v The Attorney-General (1979) Z.R. 154
5. Puta v The Attorney-General (1983) Z.R. 114.

For the Appellant: G. Kunda, Malik & Company.
For the Respondent: F. Mwiinga, Senior State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the Court: The appellant was detained on July 29th, 1981, pursuant to a detention order under the hand of the President in terms of Regulation 33(1) of the Preservation of Public Security Regulations. Notification of his detention was published on August 12, 1981, well within the period specified under Article 27(1)(a) of the Constitution. On the 10th of that month, the appellant was served with grounds for his detention the gist of which was that he had conspired with others (whose names were given) to rescue persons who were in detention on allegations of having attempted to overthrow the lawfully established Government of the Republic of Zambia. In July, 1983, the appellant made an application before the High Court for the issue of a writ of habeas corpus ad subjiciendum. Having considered the application, Lewanika, J., dismissed it. It was against that decision that the appellant appealed to the Supreme Court.

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There were nine grounds of appeal initially filed; of these, five only that is, grounds 1, 2, 3, 6 and 7, will be considered as the rest of them were abandoned prior to the hearing of the appeal. These are the same grounds that had unsuccessfully been argued before the High Court. It was contended on the first ground that the learned trial judge had erred by holding that the Presidential detention order and the statement of grounds for detention referred to the appellant and, in particular, that the inclusion of the name Chinkangalika in the appellant's names was superfluous; and further, it was contended that the trial court had not adequately considered the effect of misdirection of the appellant's names.

It was common ground that both the Presidential detention order and the statement of grounds for detention contained the names Fostinos (Faustino) Chinkangalika Lombe but that the appellant's affidavit filed on June, 15th, 1983 and his National Registration Card exhibited to this affidavit of November 1st, 1983, both gave the appellant's names as Faustino Lombe. Mr Kunda argued that the correct names of a detainee must correctly be reflected in the detention order as well as in the grounds for detention in order to satisfy the provisions of Article 27(1)(a) of the Constitution. He contended that the service of a detention order and of grounds for detention which reflect incorrect names, as in this case, raises the possibility of a wrong person being detained. He further argued that a detainee's name must, as matter of obligation, be hundred per cent correct, and that, anything short of this requirement makes the detention unlawful. In Mr Kunda's submission, the person intended to be detained was someone other than his client, as the detention order and the grounds for detention did not meet the requirement referred to above.

In resolving the issue raised under the first ground of appeal, we wish to draw attention to the appellant's affidavit filed on July 18th, 1983, to which reference has already been made, and in

which the appellant averred that, although his name was Faustino Lombe, people commonly called him Faustino Lombe. In our judgment, the reference to the name Fostinos (Faustino) Chinkangalika Lombe in the detention order and the grounds for detention was a reference to Fostinos alias Faustino Chinkangalika Lombe. It being common cause that the appellant's name is Faustino Lombe, the question arises whether the inclusion of the name Chinkangalika in the detention order and in the grounds for detention meant that the person intended to be detained was not the appellant but someone else. There was evidence in the court below, in the form of an affidavit sworn by Senior Superintendent Yanda, to the effect that the name Chinkangalika had been given to the Police by the appellant himself. However, when the learned trial judge addressed him self to the question under consideration, he came to the conclusion that it was the appellant who had been intended to be detained and that, in any event, the Chinkangalika was superfluous. In doing so, he followed a decision in the unreported case of *Albert Nana Mhlanga v The Attorney-General* (1) in which the High Court had held that the inclusion of the name "Mushanga" was superfluous. We uphold the learned trial judge's

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finding as we are satisfied that the person intended to be detained was the appellant. This case is distinguishable from the unreported cases *Kanoobhai Ashaubhai Patel and Kazimile Kakese Kanongesha* (2), *Nkanza v The Attorney-General* (3) in that the former, the only name appearing in the detention order was Patel, and, as the learned trial judge observed in that case, "the possibility could not be ruled out that a wrong Patel might have been arrested since the detention order carried only the name of Patel and since it is public knowledge that there are countless persons known by that name." and, in *Nkanza*, the detainee filed an affidavit in which he denied that the names given by the detaining authority were his and the State did not file any affidavit in opposition which led the court to accept the evidence contained in the detainee's unchallenged affidavit. But, in the present case, an affidavit in opposition was filed.

In concluding our consideration of this ground, we would like to express the view that, while it is necessary that a detention order as well as grounds for detention should adequately reflect the name of a person intended to be detained, it would be over-zealous to insist that if the name is not one hundred percent accurate the validity of the detention would, for these reason alone, be vitiated in all cases. Each case must be dealt with on its own merits for what is crucial is that the court must be satisfied as to the identity of the person intended to be detained.

On the second ground of appeal, it was submitted that the trial court had erred in holding that the paper on which the appellant's name had been published was a Government Gazette in terms of Article 27(1)(a) of the Constitution. The basis of the submission was that the appellant's detention was unlawful because it had been published on a Wednesday as a "Special Government Gazette" consisting of a single piece of paper, instead of having been published on a Friday as an ordinary Government Gazette in a magazine form as was usually the case. It was further submitted that the Constitution does not authorise the publication of detentions in "Special Government Gazettes" as they are (allegedly) not available to the public but to a limited number of persons within Government circles; but that publication in an ordinary Gazette was in order.

It is common knowledge that the purpose of publishing a person's detention in a Government

Gazette is to inform members of the public of such detention. This is an important safeguard against detainees being held incommunicado. There is, however no Constitutional requirement at the publication of a detention shall be valid only when it is made on a Friday in an ordinary Government Gazette. Article 27 (1)(a) of the Constitution states that:

"27(1) Where a person's freedom of movement is restricted or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:

(a) . . .

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(b)Not more than one month after the commencement of his restriction or detention a notification shall be published in the Gazette stating that he has been restricted or detained and giving particulars of the provision of the law under which his restriction or detention is authorised."

As can clearly be seen, the Constitution makes no discrimination between an ordinary Gazette and a special one. In any event, an affidavit sworn by her Timothy Mwanza, the Government Printer, established that the special Gazette in which the appellant's detention was published was an official Gazette published with the authority of Cabinet Office. It suffices, therefore, that a person's detention is published in a Government Gazette, it being immaterial whether the publication is made in an ordinary or special Gazette or whether this is achieved on a Friday or on any other day of the week.

A Gazette, whether it be ordinary or special, on a single page or in form of a magazine, is a public document; it is not a secret or a private document. As such, it is available to any member of the public who has the ability to pay for it or who receives it as a gift or visits a public library.

The learned trial judge did not in any way misdirect himself on the issue as the appellant's detention had been published in conformity with the provisions of Article 27 (1)(a) of the Constitution.

The question raised under the third ground of appeal, namely, that the trial court erred in holding that the name published in the Government Gazette did not amount to a misdescription need not be discussed as this has, by implication, already been considered and resolved under the first ground.

The sixth ground attacks the learned trial judge's finding that the appellant's continued detention was not punitive and that the release of Geoffrey Hamaundu, General Kabwe and other detainees, had not made the grounds for his detention cease to operate; and in holding that it was up to the detaining authority to release or continue to detain the appellant.

The contention here is that, under Regulation 32(2) of the Preservation of Public Security Regulations, the President has power to revoke or vary a detention order as he may think fit. But that, in view of the provisions of Article 26 of the Constitution, the President may continue to detain a person only if it can be shown that the continued detention does not exceed anything which, having due regard to the circumstances prevailing at the time, can reasonably be thought to be

required for the purpose of dealing with the situation in question. Mr Kunda went on to say that, although there was a Detainees' Tribunal to review cases of detainees from time to time, its recommendations were not binding on the President, and so, he may continue to detain a person for life by continually rejecting the Tribunals' recommendations. In order to guard against this danger, it was submitted that the court should have power

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to enquire into the reasonableness of the continued detention of a detainee. It was further argued that, in view of the release of the detainees to which reference has already been made, the appellant's continued detention was punitive and, therefore, unlawful.

In our opinion, the release of Geoffrey Hamaundu and other persons who featured prominently in the grounds for the appellant's detention does not ipso facto render the grounds for his detention inoperative as such a situation simply relates to changed circumstances in the appellants detention. We would like to stress that, once a person is lawfully detained, any subsequent change in his circumstances will not render the detention unlawful or give rise to an argument in a court of competent jurisdiction that his continued detention is no longer necessary. The rationale here is that courts of law have no power to enquire into the reasonableness of a detainee's continued detention, for such power is vested in the Detainees' Tribunal whose jurisdiction it is, inter alia, to consider a detainee's subsequent changed circumstances and to make recommendations to the detaining authority.

In *Munalula and Others v The Attorney-General* (4), we said, at page 166, lines 29 to 37 (per Baron, D.C.J.):

> "If the original detention was lawful, as in my view it was since I do not regard the grounds as vague, subsequent changed circumstances will not render it unlawful ab initio. And furthermore it is specifically the function of the tribunal to which I have referred to make recommendations to the detaining authority on the basis of any changed circumstances; it would not be competent for this court to entertain any argument based on changed circumstances, or in other words that it was no longer necessary for the detention to continue."

Mr Kunda was aware of our decision in *Munalula* but argued that this court should reverse itself on the ground that a court order was more helpful than a tribunal's recommendation and that we should look at changed circumstances in relation to the provisions of Article 26 of the Constitution.

As we see it, Article 26 of the Constitution gives no support to Mr Kunda's proposition and there is no basis for overturning *Munalula.* This being the position, we consider that the learned trial judge's finding on the issue canvassed under this ground is impeccable.

Finally, it is canvassed in the seventh ground of appeal that the learned trial judge should have held that the appellant's detention was unlawful for the period that he was detained at Chilanga Police Station cells thereby entitling him to damages.

It is not in dispute that, on August 10th, 1981, between 06.00 and 17.00 hours, the appellant was transferred from Lilayi Prison to a nearby Chilanga Police Station. Here we agree with the submission made on the appellant's behalf that his detention during the prior in question was

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unlawful. However, it is conceded by his learned counsel that such detention did not, on the authority of *Puta v The Attorney-General* (5), nullify the Presidential detention order. The only remedy asked for is damages.

As indicated at the very beginning of this judgment, this was an application for writ of habeas corpus ad subjiciendum. We wish to say that a writ of habeas corpus is not one that attracts, nor is it intended to attract, damages. *Puta's* case is to be distinguished because it was a petition founded on the Constitution in which certain remedies, including damages, were prayed for. In this case however, and for the reasons stated, the appellant is not entitled to claim damages in habeas corpus proceedings.

This appeal is dismissed. We propose, however, to make no order as to costs in this Court.

Appeal dismissed