CHISALA MUKUNTO v THE ATTORNEY-GENERAL (1988) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., BWEUPE AND CHAILA, A.JJ.S.
8TH MARCH AND 13TH JUNE, 1988.
(S.C.Z. JUDGMENT NO. 7 of 1988)

Flynote
Preservation of Public Security - Detention for sheltering alleged escapee - Challenge to the detention powers under the Preservation of Public Security Act.

Headnote
The appellant was detained under the Preservation of Public Security Act on charges of having sheltered a person who was alleged to have escaped from lawful custody. There was evidence that the escapee was a member of a violent political party that intended to overthrow the legitimate government of the Republic of Zambia. The appellant challenged his detention and sought to obtain his liberty and damages.

Held:
(i) Detention cannot be an excessive measure where there is a basis for the authority to believe that it would be dangerous not to detain the appellant
(ii) There is no occasion in this case to go behind the grounds served nor would it be justifiable to drew any parallel between the detaining authority personally stating that he has an additional ground and an investigating officer stating that his report had contained more and further allegations but which have not formed the basis for the actual detention.
(iii) It would not make the slightest difference to the substance of the allegations if the precise date of the assistance to Kalenga within the period mentioned or the name of the hostile country had been spelt out.
(iv) The fact that the appellant suffered inconvenience in common with other prisoners in the police cells and in the prison clearly rules out any question that the appellant should receive the additional damages sought.

Cases referred to:
(1) Kaira v The Attorney-General (1980) Z.R. 65
(2) Karesh Chandra v State of W.B., A. (1959) India S.C. 1335
(3) Re:Kapwepwe And Kaenga (1972) Z.R. 248
(4) The Attorney-General v Mwaba (1975) Z.R 218
(5) The Attorney-General v Musonda & Others (1974) Z.R. 220
(6) Arbon v Anderson (1943) 1 ALL E.R. 154

For the Appellant: G.. Kunda, George Kunda and Company.
For the Respondent: R.O. Okafor, Senior State Advocate.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court

This appeal arises out of the lack of success on certain prayers contained in a Constitutional Petition to the High Court whereby the appellant sought to obtain his liberty and damages. He was detained under a detention order dated 24th February, 1987, made pursuant to the provisions of Regulation 33(1) of the Preservation of Public Security Regulations. The grounds

upon which he is detained read:

"(1) That you CHISALA MUKUNTO on a date unknown but between 15th September, 1996, and 30th September, 1986, - received and kept at your farm house at Plot No. M. 157, Washama Farm, Kabwe Road , Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, one HENRY KALENGA an escape from lawful custody.

(2) That you kept the said HENRY KALENGA for more than two weeks knowing that the said HENRY KALENGA was a wanted person

(3) That you knew that HENRY KALENGA was detained for offences under the Preservation of Public Security Act.

(4) That you further actively assisted the said HENRY KALENGA in his attempt to flee the country to a country hostile to Zambia

(5) That on a date unknown but during the month of October, 1986, you brought the said HENRY KALENGA to Lusaka on his way to a Foreign Country.

(6) That you never reported the presence of HENRY KALENGA to the Security Forces.

Your aforesaid activities are Prejudicial to Public Security and there is apprehension that if left at large, you will continue to persist in these unlawful activities and therefore, for the purpose of Preserving Public Security it has been found necessary to detain you."

The evidence was by affidavits as well as viva voce. It transpired, among other things, that Henry Kalenga was alleged to be a member of a shadowy underground political ground called "Peoples Redemption Organisation" whose objectives were said to include the violet overthrow by illegal means of the lawful government using persons to be given military training in a hostile country. Kalenga escaped from custody on 15th September r, 1986 but was recaptured on a date unspecified in October, 1986, that is to say, several months before the appellant's own detention. The evidence led on behalf of the respondent also showed that the investigating officer had included in his report to the authorities an allegation that the appellant was himself a member of the "Peoples Redemption Organisation" and that the purpose of assisting Kalenga was to facilitate his flight to South Africa through Malawi. There is a ground of appeal based on this evidence and with which we shall deal later in this Judgment.

The appeal was prosecuted on four grounds. Since some of the arguments were similar, if not identical, to those advanced in the case of *Fred Petelo Mulenga* (No.61 of 1987) which was argued on the same occasion, we were invited to apply some of the arguments on both sides in that case to this case. The first question was whether the appellant's detention did not exceed anything which could reasonably be thought to be required for the purpose of dealing with the situation in question, as contemplated by Article 26 of the Constitution, Our answer to the submission that detention was an excessive measure because the activities amounted to a fairly minor offence under Regulation 36 of the Preservation of Public Security Regulations is that there is no obligation on the part of the detaining authority to prosecute. What is more, the allegations in the grounds which disclose an association with Kalenga and his cause, and the assistance the appellant is alleged to have rendered, all indicate that it was not unreasonable for the authority to suspect the appellant's own sympathies and position in relation to Kalenga and his objectives. For the reasons given in *Muleng's* case, which apply equally to this case, detention cannot be an excessive measure where there is a basis for the authority to believe that it would be dangerous not to detain the appellant. The learned trial judge was not in error and the first ground fails.

The second ground of appeal raises the question whether the authority had additional grounds of detention which were not served on the appellant and, if so, whether Article 27 (1) (a) of the Constitution had not been contravened. The respondent called as their witness, one of the investigating officers who deposed,, in this affidavit and viva voce, to the effect that, apart from the allegation contained in the grounds which were served, the appellant was

himself also a member of the “Peoples Redemption Organsation”; that he had given Kalenga K40 transport money to go to Kitwe; and that the appellant’s intentions were to facilitate Kalenga’s flight to South Africa where Kalenga would solicit support for his cause from Dr. James Savimbi’s UNITA. It was argued that these were far more serious reasons for detention than the ones stated in the grounds and that, on the authority of *Kaira v The Attorney-General* (1), the detention should be declared invalid for failure to serve all the grounds of detention. Mr Okafor argued in opposition and submitted that the learned trial judge was not wrong to find that there were no additional grounds as such. He pointed out that in *Kaira* (1) it was the detaining authority in person who disclosed an additional ground whereas here, the officer was not competent to speak on behalf of the authority concerning the grounds or reasons on which the detaining authority formed his own subjective satisfaction.

We have given anxious consideration to this ground of appeal. Grounds of detention are the reasons for the detention or the conclusions of fact arrived at by the authority upon which the decision to detain was reached. These should, therefore, be distinguished from the detailed facts or the evidence available to the authorities. A detainee is entitled to sufficiently detailed grounds; but he is not entitled to have the evidence set out in the written statement of grounds. It is apparent therefore, that the investigating officer was giving evidence and that the learned trial judge’s analysis and conclusion on the matter were not as erroneous as has been submitted. It is, of course, correct to say that all the grounds upon which a person is detained should be furnished. Omitting the irrelevant, Article 27(1) (a) requires that the detainee - “shall ….. be furnished with a statement in writing ……. Specifying in detail the grounds upon which he is…..detained .” (Underlining supplied).

In *Naresh Chandra v State of W.B.,* (2) referred to at page 125 of Volume 2 of Basu’s Community on the Constitution of India, 5th Edition, it was stated, inter alia, that:

> “No part of such”grounds can be held back nor can any more “grounds” be added thereto. What must be supplied are “the grounds on which the order has been made” and nothing less.''

In our case, what must be furnished are “the grounds upon which he is … detained”. These have been stated in the statement signed by the Secretary to the Cabinet on behalf of the detaining authority. We agree with Mr. Okafor, therefore, that, even if the evidence could be construed as advancing any new grounds, the detaining authority has manifestly accepted and acted upon only such of the reasons as have been furnished. In our opinion there is no occasion in this case to go behind the grounds served nor would it be justifiable to drew any parallel between the detaining authority personally stating that he has an additional ground, as in *Kaira* (1), and an investigating officer stating that his report had contained more and further allegations but which have not formed the basis for the actual detention. This ground also fails.

The third ground of appeal was that the fourth and fifth grounds of detention were vague and not in the detail required by the Constitution to permit the making of meaningful representations. It was argued that the failure to specify the type of assistance given to Kalenga and the precise date when such assistance was given rendered the fourth ground of detention to be vague. It was also argued that the failure to name the hostile country to which Kalenga was to flee rendered in the first ground of detention to the effect that the appellant received Kalenga on a date unknown but between 15th and 30th September 1986 and in the fifth ground that he brought Kalenga to Lusaka on a date unknown but in October 1986 made the fifth ground of detention even more vague. We have considered these arguments. The question of vagueness or inadequacy of details to satisfy the Constitution invites an examination at the factual level. The teas has been adequately discussed in various decisions including that in *Re: Kapwepwe and Kalenga* (3). Ultimately, therefore, where the grounds

given are intelligible and capable of being clearly understood, and the detainee must know what is alleged against him and can make a meaningful representation and raise such objections against the order of detention on the merits as he is able to, the grounds will not be classified as vague. In this case, the substance and burden of the grounds in question is clear and the appellant's contention that the authority should have provided more details is not tenable. Copious facts or detailed evidence have no place in otherwise clear grounds. On the facts of this case, and having regard to the gist of the conclusions and reasons stated in the grounds - which can in fact be read as a single statement stated in numbered paragraphs by way of progression - there was no entitlement to the sort of minutiae indicated in the arguments. As counsel for the State properly argued, adopting his learned colleague's arguments in the *Mulenga*_case (61/87), it would not make the slightest difference to the substance of the allegations if the precise date of the assistance to Kalenga within the period mentioned or the name of the hostile country had been spelt out. This ground also fails.

The final ground of appeal was that, in addition to the K2,000 awarded in respect of false imprisonment for being kept in unauthorised places, the appellant should also have been awarded damages for mental torture, inhuman treatment and breaches of Preservation of Public Security Detailed Persons) Regulations. The contention here was that the appellant had been kept in insanitary cells, without proper bedding or food, at the police stations and that thereafter the prison authorities did not offer the types and scales of diet and other ameneties prescribed in the regulations. There was no suggestion that the appellant was singled out for the alleged treatment or deprivation. All prisoners were affected. Mr. Okafor submitted that no damages can be payable unless it had been shown that there was a deliberate and discriminatory practice against the appellant not suffered in common with all other prisoners. Mr. Kunda relied on the *Attorney-General v Mwaba* (4) as to the rights of a detained person to the effect that he maintains al his rights of a detained person to the effect that he maintains all his rights except these necessarily abrogated by the fact of detention. We are also aware that a person who is lawfully detained but who has other constitutional or other statutory rights denied him would be entitled to damages, apart from any other order which may be appropriate in each case : See *The Attorney-General v Musonda and Others* (3). (Baron D.C.J., P. 233 from line 30)

The question as we see it is whether the respondent should pay damages when the facilities have been denied, not to the appellant alone but all prisoners, presumably because of our current poverty. Admittedly the Preservation of Public Security (Detained Persons) Regulations make detailed provision, inter alia, for the type of normal diet which should be fed to a detainee; the question of exercise; and so on. The same regulations also contemplate, under Regulation 21, the setting up of a Committee of Inspection to whom detainees can complain. That the prison authorities have a Statutory duty to comply with the relevant regulations cannot be disputed. However, we consider it to be trite and an elementary principle that not every breach of a statutory duty will necessarily given a private person a right of action. Whether or not it gives such right is a matter of the construction of the statute concerned. Thus, the provision of an alternative remedy of channel of airing grievances, is a strong argument against the remedy by action being available. (See, for instance Paragraph 1340, Halsbury's Laws, Vol. 30, 3rd Edition). In the instant case, a detained person can, for example, complain to the Committee of Inspection. But what is even more important, we consider, is the fact that, though the regulations are obviously intended for the welfare and benefit of detainees, they are nonetheless also concerned with the internal governance of the places of detention. Where, for instance, due to a lack of resources the prison authorities are unable to comply with each and every regulation requiring the financial means with which to give effect thereto, and where in consequence a certain amount of hardship or inconvenience is visited upon all the inmates, then it seems clear to us-judging from the language of the regulations themselves-that wider considerations of policy and convenience preclude the possibility of a private cause of action. It would disastrous to the very provision of prisons and police cells, and to all discipline in those places, if damages must be paid and officers perform their duty

with the fear of an action ever present if, through no wilful or deliberate fault of their own, they deviate from the regulations by being unable , say, to purchase the right types of food or to provide adequate blankets. (See, for instance, *Arbon v Anderson* (1943) 1 ALL E. R. 154). (6). In our view, the type of private action envisaged in the *Musonda* case relates to unwarranted and deliberate deprivations or other avoidable breaches purposely committed to the disadvantage of a particular prisoner, or particular prisoners, alone. Where no such deliberate and unfair discrimination is established, there can be no question of damages. The fact that the appellant suffered inconvenience in common with other prisoners in the police cells and in the prison clearly rules out any question that the appellant should receive the additional damages sought. This ground also fails.

The result is that the appeal has failed but since it raised issues of general importance, there will be no order for costs.

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