IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 143 OF 2019

ABDALLAH MOHAMED MALENGA .....APPELLANT

VERSUS

1. REGIONAL CRIME OFFICER .....1ST RESPONDENT
2. REGIONAL POLICE COMMANDER (ILALA ZONE.....2ND RESPONDENT
3. REGIONAL POLICE COMMANDER (DSM ZONE).....3RD RESPONDENT
4. INSPECTOR GENERAL OF POLICE .....4TH RESPONDENT
5. ATTORNEY GENERAL.....5TH RESPONDENT

(Appeal from decision of the of High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Matuma,J.)

dated the 21st day of March, 2019
in
Criminal Application No. 165 of 2018

JUDGMENT OF THE COURT

10th & 24th August, 2021

KWARIKO, J.A.:

This appeal emanates from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Matuma, J) dated 21st March, 2019. In that case the appellant had moved the High Court for orders in the nature of *habeas corpus* in terms of section 390 (1) (a) (b) of the Criminal Procedure Act [CAP 20 R. E. 2002; now, R. E. 2019] (henceforth the CPA) and section 2 (3) of the Judicature and Application of Laws Act [CAP 358 R. E. 2002; now R. E. 2019], that;

one, the respondents show cause why they are holding the appellant in their police cell or in detention. Two, the respondents set free and at liberty the appellant who is illegally and improperly detained in the TAZARA Police Station in Dar es Salaam or any other place where he may be transferred or moved.

The application was supported by an affidavit of one Issa Abdallah Malenga, a brother of the appellant. He deponed that the appellant who was an Imam of Masjid Muhajirina at Kibada area Kigamboni District in the Region of Dar es Salaam was arrested on 3rd November, 2017 before Friday prayer by people who introduced themselves as police officers who had motor vehicle make Noah claiming that they were taking him to TAZARA Police Station for interrogation. Since then, the appellant has not been seen.

The respondents opposed the application through a counter affidavit sworn by Debora John Mcharo, State Attorney. In that affidavit the respondents denied that the appellant was at any time arrested by police officers, thus they had no responsibility to take him to court.

At the conclusion of hearing of the application, the High Court found that there were no material facts to prove that the appellant was arrested by the police and was in their custody.

Aggrieved by that decision, the appellant has preferred this appeal upon a total of five grounds four of which were raised in the memorandum of appeal lodged on 19th June, 2020 and one additional ground when the appeal was called on for hearing in terms of Rule 81 of the Tanzania Court of Appeal Rules, 2009. They are as follows:

1. *The Honourable Court erred in law and fact by holding that the appellant had no proper and contingent evidence to prove that [he] is in police custody of the respondents.*
2. *The Honourable Court erred in law and in fact by holding that the appellant failed to disclose the people who arrested [him].*
3. *The Honourable Court erred in fact and in law by holding that the appellant was duty bound to prove the arrest was done by the respondents.*
4. *The Honourable Court erred in fact and in law by holding that the appellant's affidavit did not direct involvement of the respondents in the appellant's arrest.*

5. *The Honourable Court erred in law and fact when it failed to make direction under section 390 (1) (a) of the CPA to the police to bring the appellant before the court.*

When the appeal was called on for hearing, the appellant was represented by Messrs. Juma Nassoro and Daimu Halfani, learned advocates, whilst Ms. Anna Chimpaye, learned Senior State Attorney who was assisted by Ms. Salome Assey, learned State Attorney appeared for the respondents.

In his argument in respect of the first, second, third and fourth grounds which are interlinked, Mr. Daimu argued that, since it was believed that the appellant was arrested by the police and the respondents were privy to the arrest, it was their duty to disprove that belief by tendering remand register book to show that the appellant was not in their hands. Thus, it was not correct for the learned Judge to hold that there was no proof that the police were holding the appellant. He argued further that the appellant could not mention the names of the police officers who arrested him.

As regards the fifth ground, Mr. Daimu submitted that before the High Court the respondents claimed that the appellant was arrested by the police but might have been taken away by "watu wasiojulikana" literally translating "unknown people". In that case, he argued, the learned Judge ought to have issued directions under section 390 (1) (a) of the CPA to the police to bring the appellant to court. He submitted further that, otherwise, the police ought to have investigated the whereabouts of the appellant through their powers under sections 10 of the CPA and section 5 (1) of the Police Force and Axillary Services Act [CAP 322 R. E. 2002] and Article 14 of the Constitution of the United Republic of Tanzania. He added that the state has a corresponding duty to ensure the safety of its citizens as provided under Order 233 of the Police General Orders (PGO) of 2007. Similarly, the learned counsel invoked Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2010 which Tanzania is a signatory to investigate the disappearance of the appellant.

For his part, Mr. Nassoro argued that the grounds of appeal raise one issue whether there were material facts for the High Court to grant the application. He contended that the evidence in the affidavit and

conduct of the respondents who generally denied the allegations were sufficient for the Judge to grant the application and that, should this Court uphold the High Court's decision, it will bring people's discontent and distrust to the police hence resisting arrest.

Responding to the foregoing, Ms. Chimpaye argued in respect of the first, second, third and fourth grounds that the High Court was correctly satisfied that there was no sufficient evidence to prove that the appellant was in the custody of the respondents and thus conditions for grant of *habeas corpus* were not met. That, not every person who introduce himself as a police officer is truly police officer because there are pretenders. Further that, the police do not use cars like Noah which was said to have been used by the police officers who allegedly arrested the appellant. The learned counsel added that the deponent of the affidavit did not prove that he was together with the appellant at the time of the alleged arrest. She contended that, it was not enough to say that police officers from TAZARA Police Station arrested the appellant because there was possibility that he was taken away by people other than the police.

In the fifth ground the learned Senior State Attorney contended that the trial Judge could not give direction on something which was not proved. While the learned counsel admitted that the police are duty bound to protect the citizens and investigate criminal incidents as provided in the cited laws, she contended that there is no evidence to prove that the police did not perform their duty in respect of the appellant. She submitted that before the High Court, it was evidenced that a search was conducted in the police stations but the appellant was not found. Basing on the foregoing, Ms. Chimpaye urged the Court to dismiss the appeal for being devoid of merit.

In rejoinder, Mr. Daimu argued that the High Court could have given direction to the police by way of *habeas corpus* and section 390 of the CPA does not require concrete proof to that effect. He contended further that; the respondents' counter affidavit did provide concrete evidence that the police did not arrest the appellant. That, the submission by the State Attorney at page 29 of the record of appeal regarding absence of the appellant in the police stations ought to be stated in the counter affidavit, otherwise it remains to be a statement from the bar which has no any evidential value.

Having considered the grounds of appeal and the contending submissions by the counsel for the parties, the issue to decide is whether the appellant presented enough materials for the High Court to issue directions in the nature of *habeas corpus*. Section 390 (1) of the CPA which is relevant in this case provides thus:

> *"(1) The High Court may, whenever it thinks fit, direct–*
>
> *(a) that any person within the limits of Mainland Tanzania be brought up before the court to be dealt with according to law;*
>
> *(b) that any person illegally or improperly detained in public or private custody within such limits be set at liberty;*
>
> *(c) that any prisoner detained in any prison situate within such limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in such court;*
>
> *(d) that any prisoner detained as aforesaid be brought before a court-martial or any commissioner acting under the authority or any commission from the President for trial or be examined touching any matter*

pending before such court-martial or commissioner respectively;

(e) that any prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on a return of cepi corpus to a writ of attachment."

Before the High Court, the appellant invoked paragraphs (a) and (b) hereinabove to move the court to grant the application. In its decision, the High Court stated that the sought order is usually issued where there is no dispute as to the arrest and detention of the subject and the parties are not at issue to that effect. That the only issue would normally be on the legality of the arrest and detention. The court thus found that there was no sufficient evidence to prove that the appellant was arrested by police officers and in fact no specific police officers were mentioned in this respect and that he was being held under the custody of the respondents.

The foregoing pronouncement is the crux of the first, second, third and fourth grounds of appeal. The question which follows here is whether the High Court erred in its decision. Before we determine this

question, we would like to restate the principle regarding the writ of *habeas corpus*. In the case of **Mary Vitus Temu v. R.P.C of Njombe and Another,** Criminal Appeal No. 339 of 2017 (unreported), the Court stated thus:

> *"... we need to emphasize that it is now well established that the writ of habeas corpus will only issue where it is demonstrated that the person to whom the writ is sought is in the unlawful custody of the respondent."*

In that case, the Court also took inspiration from a Kenyan case of **Mwangolo Kiguzo v. R,** Misc. Criminal Application No. 164 "A" of 2017 (unreported) referring to **Abdinasir Ahmed Mohamed v. R** [2015] eKLR, which stated thus:

> *"A writ of habeas corpus shall be enforced when* ***the Applicant demonstrates that the subject is in the unlawful custody of the respondent."*** *[Emphasis supplied].*

From the cited authorities, it is therefore clear that in order for a writ of *habeas corpus* to issue it must be proved that the applicant is in the unlawful custody of the respondents. In the instant case there ought to be enough proof that the appellant is in the unlawful custody of the

respondent. While the appellant's side maintains that the appellant was arrested by police officers who are subordinates of the first to fourth respondents, it is different with the respondents who categorically deny that allegation.

We have gone through the affidavit in support of the application for *habeas corpus* and what we have gleaned therefrom is that the appellant was arrested by people who introduced themselves as police officers and that they were taking him to TAZARA Police Station for interrogation. Upon consideration of this information, we are of the settled view that, though the deponent verified it to be among the information that is true to the best of his knowledge, he did not prove that he was present when the alleged arrest was done.

Further, it was the duty of the one who alleged that the appellant was arrested by police officers to prove that assertion. Had there been names of police officers mentioned and identity of police car used, the respondents would have been held accountable. Otherwise, the High Court could not have issued direction to unknown people for execution.

We are also wondering as to how the relatives of the appellant, including the deponent of the affidavit Issa Abdallah Malenga, would

have kept quite from the alleged date of arrest on 3rd November, 2017 until 29th August, 2018 when the application for *habeas corpus* was filed. There is no evidence to show that they followed up at the said TAZARA Police Station to know what was the matter with the appellant and even to get him police bail, if at all he was in custody. Thus, since there was no proof to show that the appellant was arrested by police officers and kept in the unlawful custody of the first, second, third and fourth respondents, the first to fourth grounds have no merit.

As regards the fifth ground, we agree with both parties that it is the duty of the police to protect the citizens and investigate crimes including investigation on missing persons upon receiving report to that effect. In the present case it was not shown that the disappearance of the appellant was reported to the police. However, before the High Court, the issue for determination was not failure by the respondents to investigate the whereabouts of the appellant. That application was in the nature of *habeas corpus* for the respondents to show cause why they were illegally and unlawfully holding the appellant in police custody or in detention and for the High Court to issue directions to the respondents to set him at liberty.

The appellant's counsel forcefully argued that the respondents' counsel as well as the learned Judge commented that probably the appellant was taken away by 'unknown people' hence the police was duty bound to investigate his disappearance. Firstly, we have found that the respondents' counsel stated those words in the course of the submission while disputing the allegations that the appellant was arrested by police officers. Secondly, the issue of 'unknown people' referred to by the learned Judge did not form part of his decision of the application. It was just an *orbiter dictum*. Therefore, there was no materials in which to decide the issue of failure by the police to investigate the whereabouts of the appellant and that was not a decisive point by the learned Judge.

Another complaint in this ground is that the learned Judge erred for failure to issue directions in terms of section 390 (1) (a) of the CPA. We are of the considered view that because there was no proof that the appellant was arrested by the police and was in their custody, the High Court could not have issued direction for them to take him to court. The direction of this nature as we have shown earlier can only be issued if there is no dispute as to the arrest and detention of the applicant by the respondents. This ground too fails.

Consequently, we are of the settled mind that there was no evidence to prove that the appellant was arrested by the police and is in the unlawful custody of the respondents for the High Court to have issued direction in the nature of *habeas corpus*. In the event, we find the appeal devoid of merit and hereby dismiss it.

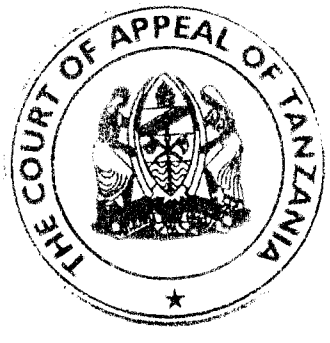
DATED at **DAR ES SALAAM** this 20th day of August, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgement delivered this 24th day of August, 2021 in the presence of Ms. Lovoness Denis, learned counsel for appellant and Mr. Adolf Kissima, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL