

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF SHINYANGA)**

**AT SHINYANGA**

**MISC. CRIMINAL APPLICATION No. 17 OF 2022**

**BETWEEN**

**ANDREA EDWIN KOMBA.....APPLICANT**

**VERSUS**

- 1. OFFICER COMMANDING  
STATION (SHINYANGA)**
- 2. INSPECTO GENERAL OF  
POLICE (OF TANZANIA)**
- 3. REGIONAL POLICE COMMISSIONER  
(SHINYANGA REGION)**
- 4. REGIONAL COMMANDER OFFICER  
(SHINYANGA REGION)**
- 5. THE ATTORNEY GENERAL OF  
TANZANIA**

**..... RESPONDENTS**



## **RULING**

Last order date 21/10/2022

Ruling date 24/10/2022

### **MASSAM, J.**

This is ruling in respect of the application brought under section 390[1] [a][b] section 391 of the Criminal Procedure Act [Cap 20 R. E 2022] and Rule 2 and 7 of the Criminal Procedure [harbeus corpus] rules GN No. 150 1930. The applicant filed this application under certificate of urgency for writ of Harbeus Corpus for been unlawfully detained at the Central Police Station in Shinyanga for approximately five days without being released or being taken to the court to be dealt with according to law, and he is detained without any justiable cause or explanatory by the respondent.

In her chamber summons applicant pray to be heard exparte for following reliefs that (i), this honorable court to issue an order for the applicant to be brought before the honourable court and released on bail pending determination of the main application inter-parties (II), That in the alternative and without prejudice to paragraph [1] herein above this court to order the appearance of the respondent before this court to show cause



why the applicant who is unlawfully detained should not be set at liberty forthwith [iii] the honorable court be pleased to issue an order prohibiting the respondents from unlawfully detaining the applicant for longer period than permitted by the law. [iv] That the honourable court be pleased to issue an order compelling the respondents to discharge in line with applicable laws, [v] That this honourable court be pleased to order the respondents to pay compensation to the applicant for illegal and unreasonable detention of the applicant in their custody. and [vi] and other orders which this honorable court deems just and reasonable for the applicant.

Also, applicant pray to be heard inter parties as follows that the honorable court be pleased to order the respondent or any person acting on their behalf to bring the applicant to the High Court and give reasons why the same shall not be set at liberty or released on bail according to the laws of this good country,

*(ii) That in alternative and without prejudice to para 1 hereinabove this honourable court be pleased to order the appearance of the respondent before this honorable court to*





*show cause why the applicant who is an unlawfully detained should not be set at the liberty forthwith.*

*(iii) This honourable court be pleased to issue an order prohibiting the respondent from unlawfully detaining the applicant for longer period than the permitted by the law.*

*(iv) That this honourable court be pleased to issue an order of compelling the respondent to discharge in line with applicable laws.*

*(v) That this honourable court be pleased to order the respondent to pay compensation to the applicant for illegal and unreasonable detention of the applicant in their custody.*

*(vi) And other order[s] which this honourable court deems just and reasonable for the applicant.*

During the hearing of this application the applicant enjoyed the services of Ms. Maria Mwaselela and Shaban Mvungi the learned counsels while the respondents were represented by Mr. Solomon Lwenge SSA , George Kalenda and Musa Mpogole all State attorneys, Solomon Lwende



SSA before hearing the application he informed this court that he has two preliminary objection on point of laws, with the leave of the parties the court agreed to hear both preliminary hearing and main application together, so respondent stated that the first objection is concerning with misjoinder and non-joinder of the parties and second one is of omnibus application.

Submitting to his first issue of misjoinder and non-joinder of the parties the counsel for respondent stated that the prayer before this court was filed without joining Director of Public Prosecution who is necessary party of which failure of that is against Order 1 Rule 9 of Civil Procedure Code Cape 33, to support his argument he cited the case of **Abdullatif Mohamed Hamis verse Mahboob Yusuph Othman**, Civil Revision no 6 /2017 Court of Appeal Dar es salaam page no 27 paragraph 2 the court held that civil procedure code does not define what constitutes misjoinder and non-joinder, but when necessary party failed to be joined to the case that will be mis joinder.

He added that in this application Director of Public Prosecution is a necessary party that failure to join him is fatal as reliefs no 1,2 and 3 which prayed by applicant required to be affected by him and no one else that



failure affects him directly. Again he submitted that in the case **Benaries Bank Ltd verse Bhagwandas** Air [1947] laid down tests to determine whether the party is necessary party to the proceedings, first there must be right of reliefs against such party in respect of the matters involved in the suit and second the court must not be in position to pass the effective decree in absence of such party, so he said in this present application Director of Public Prosecution was not joined as necessary party as elaborated in the case of **Mahboob (supra)** that failure is fatal, in that case Court of Appeal remitted that case for retrial in order trial court to join a necessary party who was Registrar of Titles.

Again, he submitted that in article 59[B][2][3] of Constitution of United Republic of Tanzania 1977 gave powers to DPP to govern the criminal matters as directed in Government notice No. 49 published on 13/2/2018 which gave instrument to DPP to take and conduct criminal cases of United Republic of Tanzania, so failure to join DPP in this application infringe him right to be heard,

Also, he added by saying that section 97 of Criminal Procedure Act [Cap 20 R.E 2022] gives power to Director of Public Prosecution to appear





and plead without any authority in order to inquire trial or appeal, so because this application is under trial his presence was important.

Again Mr. Lwenge SSA submitting to second preliminary objection he said that the application before this court is incompetent for being omnibus as applicant mixed prayers, he mixed prayers of criminal concerning bail and civil which is compensation for illegal and unreasonable detention, while her application was brought under section 391 of Criminal procedure Act which deals with jurisdiction of the court to deal with criminal issues, to support his argument he cited the case of **Ally Chamani verse Karagwe District Council and others civil application no 441/4 of 2014**[unreported] at page 8 this case gave the consequence of mixing the two application as it will be omnibus which needs to be struck out. So, he concludes his prayer to this court to struck out this application for being omnibus.

Ms. Maria Mwaselela advocate for applicant replied and submitted that in the issue of mis joinder and non-joinder she wants to remind the respondent the Miscellaneous Amendment No. 3/2018 Act No. 8 of 2018 which dealt with the issue of Overriding Objectives that non joinder and mis



joinder is not a real Preliminary Objection, She added by submitting that applicant is under the custody of OCD, IGP, RCO, RPC of Shinyanga and Director of Public Prosecution has no knowledge of it, as applicant was praying for police bail and not court bail ,so if this court thought that Director of Public Prosecution must be joined can order amendment of the said application and not to struck out as prayed by respondent.

In her reply to the second issue of omnibus application she insisted that there are circumstances that omnibus application can be entertained by the court but her application is not omnibus thus why she brought her application under section 390[1][a] [b] and section 391 Of Criminal Procedure Act which gives jurisdiction this court to exercise powers to give order to applicant to be brought to the court and allow the reliefs prayed.

Mr. shaban Mvungi counsel for applicant in support what his fellow counsel submitted he submitted that though they did not join DPP in their application but according to GN No. 56 of 2022 Cap 250 gave all state Attorneys powers to deal with criminal issues, and because Attorney General has powers to deal with all cases and all respondents are Government Agencies, Attorney General is connected directly.



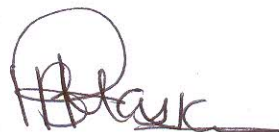


Ms. Maria Mwaselela in rejoining the submission from the respondent she said that she filed this application under certificate of urgency because the applicant is under the custody of the respondents for almost five days without taken to the court, in her application she attaches her affidavit to be part of her submission, in her application she is praying this court to order applicant to be taken to court for bail or to be given police bail. She added by saying that on 15/10/2022 applicant was arrested and taken to the police station for interrogation for the charge of stealing by agent, she tried to bail him but she failed as she was told that the file is at the Office of Regional Crime Officer, she tried to talk to the investigator of that case, the effects of staying with applicant for long time without taken to court, but all her efforts failed. On 19/10/2022 the applicant's wife find the advisement showing that the applicant house is attached by the court for the same issue but she came to realize that there is Misc. Civil case no 10/2022 at Resident Magistrate Court which was heard exparte and order that attachment before judgment, She said that she is aware that Section 4[3] of Criminal Procedure Act R.E 2022 directs that any issue which connected with civil are supposed to be dealt first before taken to the criminal court, so the



complainant was right to file that civil case but he was not right to file again criminal case in the same issue, as he want to get reliefs in two courts in the same issue.

Mr. kalenda state attorney in his reply to the applicants submission, he submitted that he will go direct to the issue of section 3[A]of Civil Procedure Code concerning the overriding objectives he admitting that Civil procedure Code gave room in the case of **Mondorosi Village Council with two others vs. Tanzania Breweries ltd and four others , civil appeal no 66 of 2017** CAT Arusha [unreported ] at page 14 last paragraph and page 15 first paragraph the court held that overriding objectives are allowed but does not used blindly against mandatory provision of procedural law which goes to the foundation of the case, so in this case non joinder and mis joinder was fatal, he pray the matter to be struck out, as elaborated in the case **of Karata Ernest vs. Attorney General Civil Revision no 10/2010** CAT DSM in page 1 and 2 it was held that Preliminary objection is in nature of what used to be a demurrer it raises a pure point of law which is urged on the assumption that all facts pleaded by the other sides are correct so he prayed their Preliminary objection to be taken in a legal sense.





In supporting the issue of omnibus application, he said that it meant a single application which has two distinct prayers as in this application, also in replying the issue of GN no 56 of 2022 which gave state attorneys powers to prosecute he admitted to be true in lower courts only and not High Court.

He added that in article 59 [B][3] of Costitution of United Republic of Tanzania gave Director of Public Prosecution powers to give directives for everyone who exercise his powers but in this case they have no directives, Attorney General in article 59[3] of the Costitution of United Republic of Tanzania mention him as advisor of Government issues and not prosecution ,and if applicant needs to join Attorney General can bring him under section 6 of Government Proceedings and not under Criminal Procedure Act .

Mr. Musa Mpogole State Attorney in adding what his fellow submitted he said that he will concentrate with held of the case of **Abdullatif (supra)** that the non-joinder and mis joinder cannot make a suit defeated in page 27 the Court of Appeal gave exception in general rule in interpreting Order 1 Rule 9 and it quoted Indian Code of Civil Procedure Act V 1908 in this case it was held that it was fatal not to join necessary party and that failure to join necessary party is serious procedural which bleed the justice ,so in





this there was no option of amendment but to struct out the matter for being incompetent.

Lastly in supporting what their fellows submitted Mr. Lwenge SSA submitted that the applicant application which brought are mere speculation in order her prayer to stand two issues must be proved as elaborated in the case of **Abdallah Mohamed Malenga vs. Regional crime officer and four others Criminal Appeal no 143/2019** it was held that the writ of harbeas corpus will be issued where it is demonstrated that the person the writ is sought is in unlawful custody of the respondent, in this case the counsel for the applicant failed to prove that the applicant is under the custody of the respondents, as in her affidavit she said that applicant was arrested but she did not say who arrested him, and she was given the information of his arrest but she did not tell the court who gave her that information, and in the issue of refusal of bail she brought no proof to support the same as the police bail has some condition to fulfil,[1] the applicant was required to write a letter to pray the said bail [II]applicant was supposed to be given a letter of refusal of bail with reasons of that refusal, but in those two issues applicant brought nothing to support the



same. Again, applicant advocate did admit in para 6 of her application that applicant admitted to have criminal case so he is concluding that applicant arrest and detention was not unlawful.

Again, he submitted that in para 7 and 8 applicant said that applicant bail was refused but she brought nothing to the court to proof the same, also in the issue of applicant to spent five days under respondents custody applicant failed to bring any proof that applicant is in respondents custody for more than five days, no RB brought to prove the same.

He added by saying that the law is very clear that affidavit must contain facts and not argument or conclusion as stated in the case **of Jamal S Mkumba vs. Attorney General**, Civil Application no 240/01 of 2019 in page 7 the court held that .....affidavit should not contain extraneous matters by way of objection , prayer or legal argument ,in that case in page 9 the court ordered the said affidavit to be expunged, so it his prayer that the paragraph no 12,13, and 15 of applicants affidavit to be expunged. Again, he said that para 14,16,17,18, all paragraphs brought without proof of arrest and detention of applicant. Lastly he submitted that the supplementary affidavit which brought by the applicant he pray to be

A handwritten signature in dark ink, appearing to be 'A. R. Raza' or similar, written in a cursive style.



disregarded as she failed to connect the civil case no 3/2022 and the present application, in the issue of compensation of applicant for unlawful detention he replied that it's true that Criminal Procedure Act allowing the same when there was acquittal, where the accused is convicted or when the charge charged is under sexual offences ,so in this application the situation is different as the claim was of tort in nature which needed to be proved and the application is omnibus which mixed tort and harbeus corpus application.

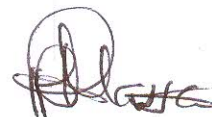
Ms. Maria Mwaselela in her rejoinder submitted that respondent cited the case of **Abdala Mohamed Malenga***[supra]* which refuse to grant harbeas corpus as the applicant failed to prove that he was under respondent custody but in her case she has proof, so that case is distinguishable, the question in their side are two ,if the respondent is denying to have applicant in their custody and two, if respondent did not arrest and detain applicant unlawful, in her side she has a proof that applicant is in their custody that's why they failed to brought counter affidavit. The issue of failure to bring a proof to the court if the bail was refused, she said that it was the duty of the policemen to give them the bail condition and their failure could be the reason of the refusal so the police was to blame on that failure.





She added that it is not true that she did not mention the one who gave her the information of applicant's arrest because the one who gave her that information is applicant's relative known as Hamis Nanai with phone number 0759448909, In the issue that she admitted that applicant had criminal case that has no objection, her concern is refusal of bail to applicant for longer period while the charge against, him was bailable. Also the respondent had duty to bring the proof that, applicant is not in their custody, and the issue of Rb which raised by the respondent she agreed that she did not brought it to court as proof, she insisted that RB always given to complainant and not accused.

She added that the issue of disregard her supplementary affidavit because she failed to proof the relationship between her application and civil case no 3/2022 and Misc. Civil Case No. 10/2022 was not right has respondent failed to bring proof on that argument, In the issue of compensation she submitted that the law is very clear on that but in this application respondent did detain applicant for long period without given bail which cause him to suffer physiologically which need to be compensated.



Lastly, she said that she has no objection that her application is omnibus and thus why he joins Attorney General and not Director of Public Prosecution.

I have considered the arguments for and against application herein by the Learned advocate for applicant and learned State Attorneys for respondent respectively the central issue for determination is whether the application is meritorious, determining the application like this kind the court has to consider whether the applicant has advanced sufficient reasons to convince the court to grant the application sought, by looking to the application brought by the applicant is for habeas corpus praying this court an order to release applicant on bail pending determination of the main application, it is requirement of law that in order this application to be granted the court must consider if this application has merit or not.

Before hearing of this application respondent raised two preliminary objections, so it is the duty of this court to determine that preliminary objection first before proceed with the main application, by starting with the first preliminary objection respondent raised the issue of non-joinder and misjoinder of the party, respondent submitted that this application being criminal in nature and reliefs sought Director of Public Prosecutor is





necessary party who did not joined and that failure was fatal, in cementing his submission he cited the case of **Abdullatif Mohamed Hamis vs. Mehaboob Yusuph Othman civil revision no 6 /2017** CAT DSM held that CPC does not define what constitutes misjoinder and non-joinder but when necessary party to the suit failed to be joined cause the mis joinder of the party, so in his submission he supports by saying that Director of Public Prosecution in this application is necessary part and the failure of joining him as a party is a fatal, this submission was strongly opposed by the counsel for applicant Ms. Maria Mwaselela by submitting that the issue of non-joinder and mis joinder is not a real preliminary objection, as per Misc. Amendment No 3/2018 Act No. 8 of 2018 of Objective principle, so applicant insisted that joining Attorneys General and mis join Director of Public Prosecution was right, this court in answering the same started by looking the nature of the application and the reliefs sought by applicant against the respondents, the relief prayed was criminal in nature and Director of Public Prosecution is in charge of prosecutions, the OCD,RCO,RPC are his agencies in criminal prosecution and investigation, In the Section 3 of the National Prosecution Act mention Director of Public





Prosecution to be the head of operation in the service in relation to prosecution and coordination of investigation duties conducted by the investigative organs. Again, in section 9[1] of the said law mention the DPP duties among others is to control of criminal proceedings, to decide to prosecute or not to prosecute in relation to criminal offence, to institute, conduct and control prosecution for any offence other than court martial, to direct the police and other investigative organs to investigate any information for criminal nature and to report expeditiously.

Again section 10[1] of the same law said that notwithstanding the provision of any law relating to appeals revision or application it shall be the function of Director of Public Prosecution to institute, conduct, and defend criminal proceedings in court of law and to take over an appeal, revision, or application from private prosecution whether as appellant, applicant or respondent and were the Director takes over the appeal as appellant or applicant ....."

So according the above sections of the law this court has no doubt that Director of Public Prosecution is the head of criminal cases who needed to be joined in this application in order for the prayer sought to be affected

A handwritten signature in dark ink, appearing to be a stylized name or set of initials, located at the bottom right of the page.

with him. This court also found out that the powers of Attorney General in Discharge of his duties are found under sub article 3 of the article 59 of the Costitution of United Republic of Tanzania as follows to require any officer in the Public service to furnish any information in relation to any matter which is the subject of legal advice, to issue direction to any officer performing legal function in any ministry of the Government, Government Department or any Agency other than those working in the National Prosecution Service or the office of Solicitor General ,so by this sections this court has no doubt that Attorney General is a government adviser especially in civil issues and he is not a prosecutor, and he has powers to give direction to any office but not of Director of Public Prosecution nor of Solicitor General.

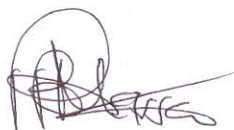
So this court is in support of the applicant's submission that Director of Public prosecution has power to appoint any state attorney to excise his powers as per section 5[3] of the National Prosecution Act which saying that under superintendence ,direction and control of the Director a State Attorney shall be deemed to have been exercised or performed by Director, in this application respondents are in support of applicant's submission on that but they insisted that in this application, have no directives from Director

A handwritten signature in dark ink, appearing to be 'H. R. Kute', is located at the bottom right of the page.



of Public Prosecution thus why they are insisting that to be joined. Also this court is in support of the submissions from the respondent that if applicant finds that Attorney General is still her necessary party is supposed to sue him as per section 6 of the Government Proceedings Act ,this court is aware that section 6[2[ and [3] of Government proceedings Act Cap 5 R.E 2019 which read together with written law amendment Act no 1 of 2020 requires notice of 90 days to be served to the Government, Executive agency, Public Corporation, Parastatal Organization or Public company and failure to comply with that mandatory provision of the law renders the suit incompetent worth of being struck out as elaborated in the case **of Natural wood [t] Ltd vs. The Attorney General civil case no 139 of 2019** High court of Dsm So according to the foregone reasons this court found out that the application before this court is incompetent by failure to join necessary party to this application who is Director of Public Prosecution.

Coming to the second preliminary objection that the filed application is omnibus, the applicant in the submission conceded that its true her application is omnibus thus why she joined Attorney General rather than Director of Public prosecution.

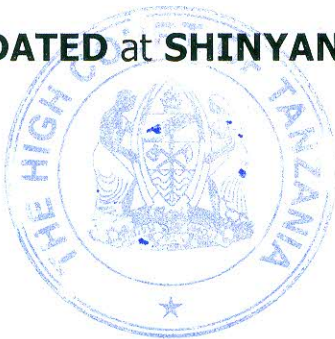




In the upshot since the first preliminary objection is of merit and applicant conceded to the second preliminary objection then the respondent preliminary objection is hereby upheld and this application is hereby strikeout. No order for costs regarding the nature of the case.

It is so ordered.

**DATED** at **SHINYANGA** this 24<sup>th</sup> day of October, 2022.



  
**R.B. Massam**  
**JUDGE**  
**24/10/2022**