

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

MISC. CRIMINAL APPLICATION NO. 67 OF 2022

NDOLOI ORIAISI NG'IYO.....APPLICANT

VERSUS

OFFICER COMMANDING DISTRICT FOR

NGORONGORO DISTRICT.....1ST RESPONDENT

REGIONAL POLICE COMMANDER FOR ARUSHA REGION...2ND RESPONDENT

REGIONAL COMMISSIONER FOR ARUSHA REGION.....3RD RESPONDENT

DISTRICT COMMISSIONER FOR NGORONGORO DISTRICT.....4TH RESPONDENT

INSPECTOR GENERAL OF POLICE5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

30/03/2023 & 17/05/2023

GWAE, J

This ruling is an outcome of a Miscellaneous Criminal Application brought by one Ndoloi Oriaisi Ng'iyo moving the court under provisions of section 390 (a) and (b) of the Criminal Procedure Act Cap 20 Revised Edition, 2019 (CPA) and rule 2 of the Criminal Procedure (Habeas Corpus) Rules G.N No. 150 of 1930 (The Rules). The applicant is seeking the following;

1. An order compelling the respondents to bring one **ORIAISI PASILANGE NG'IYO** unlawfully detained in an unknown place since 9th June 2022 before this court.
2. An order compelling the respondents to release one **ORIAISI PASILANGE NG'IYO** from unlawful detention and set him free.
3. An order directing appearance of the respondents to show cause why **ORIAISI PASILANGE NG'IYO** who is being unlawfully detained should not be set at liberty and
4. That, the respondents be compelled to bring the body of one **ORIAISI PASILANGE NG'IYO** whether dead or alive.

The application is supported by a sworn affidavit of the applicant who deposed that, sometimes on 9th June 2022 the police officers while conducting an operation of installing beacons at Paloleti Game Reserve and re-allocating Loliondo inhabitants to another place, there arose a resistance from the inhabitants which led to violence between the Police Officers and the Ololosokwani village inhabitants. The applicant went further to depone that on the same date the Police Officers arrested 19 people, **Oriaisii Pasilange Ng'iyio** inclusive. Therefore, the said **Oriaisii** was among the arrested people who left with the Police Officers to an unknown place and to date his whereabouts are unknown despite meticulous and necessary searches for him.

It is further deponed in the supplementary affidavit that, after the arrest of **Oriaisii**, a Misc. Criminal Application No. 47 of 2022 was filed in the court for writ of habeas corpus and the said **Oriaisi Pasilange Ng'iyio** appeared as the 13th applicant. However, the deponent further averred that, the said **Oriaisi Pasilange Ng'iyio** in that Application was branded by the name of **Orias Olen'giyo**. Following the filing of the above application 20 persons out of the arrested people at Ololosokwani Ward and Village were brought before the Resident Magistrate's Court at Arusha charged with an offence of murder vide Preliminary Inquiry No. 11 of 2022. However, Oriaisii Pasilange Ng'iyio was not among the people who were arraigned before Resident Magistrate's Court (RM's Court) vide PI No. 11 of 2022

That, on 30th June and 5th July 2022, the Republic amended the charge sheet to include seven more other accused persons. However, on 22nd November 2022 the Republic entered Nolle Prosequi and all accused persons (27) were set free except **Oriaisii** who was not brought to court and he was nowhere to be found.

On the other hand, the respondents vividly resisted the application through the joint counter affidavit sworn by **ACP Justine Masejo**, the Regional Police Commander (2nd respondent). The respondents strongly

denied to have arrested and detained the said **Oriaisi**. Admittedly, the respondents stated that, the Ministry of Natural Resources carried out the installation exercise of beacons and Tourism and that, the deployment of the law enforcement organs was aimed at maintaining law and order. The deponent further stated that, there has never been any formal complaint of a missing person by the name of Oriaisii Pasilange Ng'iyoyo at any police station.

When the matter came for hearing before me, the applicant was represented by the learned counsel Mr. Simon Mbwambo assisted by Mr. Joseph Shayo whilst Mr. Peter Musetti, learned Senior State Attorney appeared for all respondents.

Arguing in support of the application, Mr. Mbwambo prayed for adoption the contents of both the affidavit and the supplementary affidavit of Ndoloi Oriaisi Ng'iyoyo and in their submission reiterated what is already stated in the affidavit. However, in supporting their arguments Mr. Mbwambo cited the case of **Mary Vitus Temu vs. RPC of Njombe and another**, Criminal Appeal No. 339 of 2017 (Unreported) which was cited with approval by the Court of Appeal of Tanzania in the case of **Abdallah Mohamed Malenga vs. Regional Crime Officer & 4 others**, Criminal Appeal NO. 143 of 2019 (Unreported) where the Court

of Appeal of Tanzania emphasized that, for applications of this nature, writ of habeas Corpus are issuable when it is sufficiently demonstrated that, the person to whom the writ is sought is in the unlawful custody of the respondent.

Responding to the foregoing Mr. Mussetti also adopted the contents of the joint counter affidavit and went on submitting that, this application is not properly brought before the court. Mr. Musetti referred the case of **Abdallah Malenga** (supra) which emphasized that, it is mandatory requirement of the law to prove that, the person is under restraint of the respondents or unlawful custody of the respondents either in a public or private custody.

Mr. Mussetti went on arguing that at paragraph 5 of the applicant's affidavit, there is nowhere it is stated that, the Police Officers were seen hitting the said Oriaisi by bullet. It was therefore the submission by the respondents' counsel that, the submission by the applicant's counsel for is unfounded. Mr. Mussetti further submitted that, the applicant has the duty to prove that, the said Oriaisi was arrested and put in a police motor vehicle with its registration number and not bare statement that, the said person was put under unlawful custody.

The counsel insisted that, in their counter affidavit, there is a copy of register exhibiting those who were detained from 8th June 2022 to 20th June 2022 including those who were eventually brought to the court and then discharged under section 91 (1) CPA but in that register there is no name of the said Oriaisii.

Mr. Mussetti also submitted on the variance of the name to whom the writ is sought and that appearing in Misc. Criminal Application No. 47 of 2022. It is his argument that, in the applicant's supplementary affidavit, the applicant stated that the said Oriaisi Pasilange Ng'iyu was referred as Orias Oleng'iyu. However, it is his stance that, the said document was not sealed by the court. In the court's records, PI No.11 of 2022, the 1st applicant was known by name of Morongo Daniel Paschal before **Masara, J** and not Shengena Joseph Kilele. He thus urged the court to make its perusal and eventually comes with its own observations. He embraced his arguments by the case of **Damas Aseei and another vs Raymond and others**, Civil Application No. 32 /17/2018 (unreported) where it was stated that, an affidavit tainted with false information or evidence cannot be relied at all.

The counsel for the respondents concluded his submission by stating that, the applicant has failed to prove if the said person allegedly arrested is in the unlawful custody through his affidavit. Furthermore, the

counsel seriously argued that the respondents did not receive any information with effect that there is a missing person as required by the law. He equally, submitted that in this application, the respondents had never arrested the applicant, therefore they are unable to bring him to the court whether alive or dead.

In his rejoinder, Mr. Mbwambo submitted that, on the material date there were fracas. Hence, it was quite impossible for a person to identify registration number of the police motor vehicle or the Force Number and or the name of the police who arrested the said Oriaisi. The learned counsel went on retorting that, the said Oriaisi is not a missing person but a person who was arrested by the police. Therefore, the issue of missing person and reporting to the Police Station does not arise in this case. He added that even in the former application No. 47 of 2022, the said Oriaisi was among those who were under arrest and was one among the applicants; he therefore invited the court to do through scrutiny of the said records.

Having considered the parties' affidavits together with the rival submissions of the parties' counsel the main issue to be determined by this court is; whether the applicant has established sufficient proof justifying this court to issue the reliefs sought in the applicant's chamber summons. In the first place, it is worth noting that, the application at hand

was brought under the provision of section 390 (a) and (b) of the CPA which provides as follows;

"390.-(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."

From the above enabling provision of the law and in line with the above cited case of **Abdallah Mohamed Malenga** (Supra) where the Court of Appeal stressed the conditions for grant of the application for habeas corpus as follows;

*"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 respondents**. 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**" (emphasis supplied)*

The court of Appeal went on holding;

*"Upon consideration of this information, we are of the settled view, 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 who would have been held accountable. Otherwise, the High Court could not have issued direction to unknown people for execution."*
(Bold added)

Just like in the present case, the applicant herein alleges that the said Oriaisi was arrested on 9th June 2022 and until the date of filing of this application he is being detained by the Police Officers. On the other hand, the respondents' serious deny to have arrested and detained the said person. In the premises, it is the firm view of the court, that since the respondents have refused to have arrested and detained the said Oriaisi. Therefore, it is the duty of the applicant to sufficiently provide material facts to establish that, the said Oriaisi was actually arrested and detained by the respondents.

Through the applicant's affidavit and his supplementary affidavit, despite there being established that on 9th June 2022 the Police Officers

arrested the said Oriaisi together with other people, but the applicant has not established that, he was present during the arrest of the said Oriaisi and . As stated in the above-cited case of **Abdallah Mohamed Malenga (supra)** it was important for the applicant to give the identity of the person who arrested the said Oriaisi or even the identity of the police motor vehicle, which he alleged to have taken him. I would add that, it was important for the applicant to allude that, he personally saw police officers arresting his father, Oriaisi and or that after arrest he met the said Oriaisi at a police station while under detention. Going through, the applicant's affidavit, it is not stated to that, effect except the general statement that the said Oriaisi was arrested and detained by police officer on the material date; for easy of reference paragraph 3, 4, and 5 of the applicant's affidavit are reproduced herein under;

3. That, the said ORIASI PASILNGE NG'IYO was arrested by police officers while at his home in Engong'u area, Nairowa Hamlet, Ololosokwani Village and Ward....on the 9th June 2022 around 10:00 hrs

4. That, the police officers were conducting the operation aiming at putting beacons at Pololeti Game Reserve and reallocating Loliondo inhabitants to another place and there were resistance from Loliondo inhabitants which led to the violence between the police officers and Loliondo inhabitants

5. That, during such violence as per paragraph 4 the said ORIASI PASILNGE NG'IYO was injured by police officers who immediately arrested him and went with him using police car."

Basing on the applicant's affidavit whose parts of its paragraphs are quoted above. I thus buy the stance by the respondents' counsel that, the applicant's evidence does not convince the court to issue the sought orders.

As rightly argued by Mr. Mbwambo that there was fracas between the Loliondo inhabitants and the Police Officers, in my considered view, it was impossible for the applicant who does not even depone if he was present at the scene to have properly identified those who arrested the said Oriaisi. I have also paused another question that, if the applicant's father, Oriaisi was arrested and detained together with 18 other people including Shengena Joseph, the 1st applicant in Misc. Criminal Application No. 47 of 2022 as depicted in the Paragraph 2 of the applicant's supplementary affidavit, why no evidence from such people? It is my thought that, it was prudent in the eyes of the law, if one or more persons have given their pieces of evidence supporting this application in any other recognized form including affidavits.

I have also taken cognisance of the fact that, there were 27 persons who were undisputedly charged and eventually discharged under section 91 (1) of the CPA on 22nd day of November 2022 whilst the applicant filed his supplementary affidavit on 8th March 2023. Thus, if as asserted by the applicant, it was possible for those people who were arrested, charged and discharged to establish the applicant's assertion that on 9th June 2022 his father was arrested and detained by the respondents. An obligation to prove in the required standard was stressed in the case of **Agatha Mshote vs. Emmanuel and 10 others**, Civil Appeal No. 121 of 2019 (unreported), The Court of Appeal at page 19 held;

"We are aware that, it is trite law that the who alleges has a burden of proof in terms of section 110 of the Evidence Act (Cap 6 R.E, 2002) (The Evidence Act) those in civil case, the standard of proof is on balance of probabilities

Guided by the above principle, I am of the increasingly view that, the applicant has not proved if the said Oriaisi was arrested by the respondents and if subsequent to the alleged arrest and detention they made follow ups on the disappearance of the said Oriaisi. Similarly, I have found that, there is no scintilla of evidence justifying this court to hold that the said Oriaisi was arrested and detained by the respondents as

there is also no report made to a Police Station since 9th June 2022 to the date of filing of this application.

It is the further consideration of this court on the facts adduced by the applicant accompanied by annexures that, there was a former application of this nature that was filed as Miscellaneous Application No. 47 of 2022. However, it has been observed by the court that, there is a serious variation of the name of the said Oriaisi Pasilange Ng'iyoo and the one appearing in the said former application where the 13th applicant is **Orias Oleng'iyoo**. The name Oriaisi Pasilange Ng'iyoo and Orias Oleng'iyoo, in my firm opinion, are two different names as correctly argued by Mr. Musetti.

More so, though the applicant duly filed supplementary affidavit yet nothing like reason justifying the difference in names between Oriaisi Pasilange Ng'iyoo and Orias Oleng'iyoo except mere assertion that, in Misc. Criminal Application No. 47 of 2022, the said Oriaisi was 13th applicant identified as Orias Oleng'iyoo. The applicant ought to have stated what made him and his same counsel (Mr. Mbwambo) to have wrongly spelt the name of Oriaisi Pasilange Ng'iyoo.

In my considered view, in the absence of material facts to prove that, the said Oriaisi was arrested, detained and or is still under unlawful


custody of the respondents this court finds that the respondents are not duty bound to either bring the said Oriaisi Pasilange Ng'iyoyo to court while alive or dead or set him free.

It however worthwhile to note that, reporting of a missing person to a police station is necessary since it is the Police Force, which is vested with power to protect the lives of people and their properties. Thus, they applicant and other relatives of Oriaisi Pasilange Ng'iyoyo has/had a duty to report notwithstanding the allegation that, he was arrested by police officers since there are hierarchical Administration levels in the Police Force.

That said and done, this application is devoid of merit and it is dismissed with no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 17th May 2023


MOHAMED. R. GWAE
JUDGE

Court: Ruling delivered this 17th May 2023 in the presence of **Mr. Mkama** accompanied by **Mr. R. Mbise** and **Mr. H. Mbando** (SAs) and Mr. **Deogratias Mgarama** (adv) for the respondents and applicant respectively. Copies of ruling, drawn order and proceedings and drawn order are collectable by today




MOHAMED.R, GWAE,
JUDGE