

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. CRIMINAL APPLICATION NO. 17 OF 2023

(In the matter of an application for direction in the nature of Habeas Corpus)

JUMA APRONAL ADOLICK APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
REGIONAL CRIME OFFICER KATAVI REGION 4TH RESPONDENT
OFFICER COMMANDING STATION (CENTRAL POLICE
STATION MPANDA – KATAVI REGION) 5TH RESPONDENT

RULING

14/9/2023, 5/10/2023

MWENEMPAZI, J:

The applicant filed this application under the Certificate of urgency; he has made the application under *section 390(1)(a) and (b) of the Criminal Procedure Act, [Cap. 20 R.E.2022]* read together with *Rule 2 of the Criminal Procedure (Habeas Corpus) Rules, G. N. No. 150 of 1930* praying for orders that this Honorable Court be pleased to issue direction of the nature of

habeas Corpus directing that the Applicant afore-mentioned currently illegally or improperly held at the Central police station, Mpanda Katavi Region or at such other place under the custody and control of the police, since the 1st September, 2023 immediately after being arrested at Kijichi – Temeke District within Dar es Salaam Region and being transported to Mpanda Katavi Region under police escort on the allegation of stealing by agent, to be taken to Court, so that is dealt with in accordance to the Law. The applicant also prayed for other or further relief (s) as the Court shall deem fit.

The application is supported by an affidavit which has been sworn by Dickson Matata. After serving the same to the respondents, Mr. Gregory Muhangwa, learned state Attorney filed a counter affidavit sworn by Yuda Dominick Masota, the Deputy Regional Crime Officer for Katavi Region, to oppose the application. The respondents have also filed a notice of preliminary that:

1. The affidavit in support of the application is incurably defective for containing legal arguments.
2. The affidavit in Support of the application is incurably defective for containing hearsay evidence.

They are praying that the application be struck out.

The hearing of the preliminary objection was scheduled to be on the 14th September, 2023. On the date, parties informed this Court that they have agreed to pray for leave to proceed with hearing by way of written submission. Their prayer was granted and a scheduling order was issued. The record shows that, only the Counsel for respondents filed written submission and the Counsel for applicant did not. It may be a sign of conceding to the objection or an abandonment of the application.

The applicant was enjoying services of Mr. Dickson Matata learned advocate and the Respondents were being represented by Mr. Gregory Muhangwa and Mr. Fortunatus Mwandu, both learned State Attorneys.

In their written submission, Counsels prayed to submit on both points together. The counsel for Respondents submitted that generally affidavits are governed by Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 R.E. 2019 which provides that: -

"Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications on which statements of his belief may be admitted:

Provided that, the grounds thereof are stated”.

The Counsel submitted that from that principle the deponent is not allowed to say anything in an affidavit except for those facts which he can himself prove. He pointed at paragraph 6 that it contains legal argument that a person is allowed to be detained in police custody for not more than 24 hours; otherwise, he should be either released on police bail or being arraigned before the Court of law to be dealt with in accordance to the law. Hence the applicant is illegally or improperly held at the Central Police station, Mpanda Katavi.

At paragraph 7 the deponent has stated that the applicant has been receiving medical care as he is a seasoned diabetes patient. That is hearsay. He did not produce any proof to substantiate what he has alleged. In order to support the position of law, the Counsel cited the case of **Mohamedali Sadaudin Mohamedali Vs. Mohamoud Mwemusi Cholikungu and Ndanda springs limited**, Misc. Civil Application No. 09 of 2021 that quoted with approval the Case of **Mustafa Raphael Vs. East Africa Gold Mines Ltd**, Civil Appeal No. 40 of 1998 by the Court of Appeal of Tanzania sitting at Dar es salaam in the following words.

"An affidavit is not of a kind of superior evidence. It is simply a written statement on Oath. It has to be factual and free from extraneous matter such hearsay evidence, legal arguments, objection, prayers, and Conclusions."

The Counsel argued that a defective affidavit renders the application incompetent. They therefore prayed that it be struck out. In emphasis he cited the case of **Nicodemus G. Mwita Vs. Bulyangulu Gold Mine** (2002) LCCD 97 at page 172 it was held.

"On the issue whether an effective affidavit is matter of technicalities, a defective affidavit affects the whole application it supports and therefore, going to the roots of the matter"

The Counsel cited also the Case of **DPP VS. Dodoli Kapufi and Patson tasalile**, Criminal Application No. 4 OF 2008, cat (DSM) where it was held that an affidavit supported by a defective affidavit becomes incompetent. The only fit course of action is to strike out.

I have as well read the affidavit and I have appreciated the contents of paragraph 6 and 7 of applicants' affidavit. Paragraph 6 of the affidavit reads as follows:

"6. That, it is the procedure that, a person is only allowed to be detained in police custody for not more than 24 hours, otherwise he should be either released on police bail or being arraigned before the court to be dealt with in accordance to the law. Henceforth, the Applicant herein is illegally or improperly held at the Central Police Station, Mpanda -Katavi or at such other place under their custody and control since 04th day of September, 2023 when he arrived at Mpanda-Katavi from Dar es Salaam where he was arrested on 01st day of September, 2023 which is more than 144 hours or 6 days since the time he was arrested."

As it may be appreciated it is true that paragraph 6 of the affidavit contain legal arguments which normally will be featured in the submission. The paragraph contains legal arguments such as whether it is illegal for the suspect to be incarcerated for more than 24 hours and whether it is imperative that once the suspect is arrested, he must be released immediately once he stays for 24 hours irrespective of any other condition obtaining in a particular situation. In the case of **Jamal S. Mkumba and**

another vs. Attorney General, Civil Application No. 240/01 of 2019, Court of Appeal of Tanzania at Dar es Salaam (tanzlii) it was held that:

"The legal position is now settled that an affidavit which is used as evidence before the court should not contain extraneous matters but only facts."

That rule was best stated in the case of **Phantom Modern Transport (1985) Ltd vs. DT Dobie (T) Ltd, Civil References Nos. 15 of 2001 and 3 of 2002** (unreported) as follows:

"As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain Statement to which the witness deposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

Paragraph 7 is not supported by any evidence to substantiate the alleged sickness. As that is not enough, I have noted that the deponent did verify generally as follows:

"I, DICKSON MATATA, being the Advocate for the Applicant dully authorized to sign these pleadings DO HEREBY VERIFY that all what has been stated in Paragraphs 1,2,3,4,6,8, and 9 is true to the best of my knowledge and belief as an advocate of the Applicant."

In the referred case, that of **Jamal S. Mkumba and Another vs. Attorney General**(supra) the

" Verification clause is one of the essential ingredients of any valid affidavit which must show the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs."

The affidavit as pointed out has also a defective verification clause which deprives the court of the substantiated evidence by the deponent and leaves this court to guess on which information is of the deponent's knowledge or belief. In the case of **Anatol Peter Rwebangira v. The Principal Secretary, Ministry of Defence and National Service and the Hon. Attorney General**, Civil Application No. 548/04 of 2018 (unreported) it was held that:

"Where an averment is not based on personal

*knowledge, the source of information should be
clearly disclosed'*

That has not been disclosed clearly by the deponent in the application at hand. This court is therefore unable to find out which information should be acted upon; thus, it cannot be admitted as evidence.

In the same case of **Jamal S. Mkumba and Another vs. Attorney General(supra)** it was held that:

"It is now settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraphs is inconsequential."

However, each case has to be decided based on its own facts. In this application, there is no such an option as the applicant seems to be disinterested to continue with the application according to the information I had on the date the matter was scheduled for mention on the 14th September, 2023 as the applicant's counsel did not enter appearance without

any notice. That may be the reasons of failure by the applicant's counsel to enter appearance after realizing that his client has been taken to court.

In the case of **Director of Public of Prosecutions vs. Dodoli Kapufi and Another, Criminal Application No. 11 of 2008, Court of Appeal of Tanzania at Dar es salaam**, it was held that an application supported by a defective affidavit is rendered incompetent. The remedy is to strike out. In the same line of reasoning, this application is therefore struck out.

It is ordered accordingly.




T. M. MWENEMPAZI
JUDGE
5/10/2023