IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 28 OF 2023

JAMES WILLIAM SIJE.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE OF TZ (IGP).....1st RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATION (DCI).....2nd RESPONDENT
REGIONAL POLICE COMMANDER (RPC).....3rd RESPONDENT
REGIONAL CRIMES OFFICER (RCO).....4th RESPONDENT
OFFICER COMMANDING DISTRICT(OCD).....5th RESPONDENT
OFFICER COMMANDING CR. INV. OC-CID ILEMELA.....6th RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....7th RESPONDENT

RULING

2nd & 20th October, 2023.

ITEMBA, J.

This is an application for a writ of Habeas Corpus, filed under section 390(1)(a) and (b) of the Criminal Procedure Code R.E 2022 (herein referred to as the CPA). The applicant's affidavit seeks the following inter-parte orders:

(a) That, this Honourable Court be pleased to order that the applicant be released from the unlawful custody of the 1st, 2nd, 3rd, 4th and 6th Respondents forthwith.

(b) That, in the alternative and without prejudice to paragraph (a) above, this Honourable Court be pleased to order the appearance of the 1st, 2nd, 3rd, 4th,5th, 6th and 7th Respondents before this court to show cause why the Applicant who is unlawfully detained should not be set at liberty forthwith.

(c) That, this Honourable Court be pleased to issue an order prohibiting the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents from unlawful holding and detaining the Applicant for longer period than permitted by law.

(d) That, this Honourable Court be pleased to issue an order compelling the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th, Respondents to discharge their duties in line with the applicable laws.

(e) Any other order(s) which this Honourable Court deems just and reasonable for the Applicant.

The application is founded on the affidavit of WILLIAM SIJE RUBUNDA, who is the father of the Applicant. The respondents, through Mr. Evance Kaiza Mazubasi, learned state attorney, filed a counter affidavit and a supplementary counter affidavit to contest the application. During the hearing, the applicant was represented by Mr. Peter Madeleka, learned counsel, while all seven respondents were represented by Ms. Magreth Mwaseba and Mr. Evance Kaiza, both state attorneys.

Mr. Madeleka, initiated the proceedings by raising concerns on the propriety of the counter-affidavit and supplementary counter-affidavit which had two attachments. He argued that the counter affidavit and supplementary counter affidavit did not effectively respond to the applicant's affidavit. He contended that the deponent of the counter affidavit, Mr. Evans Kaiza Mazubasi, lacked the authority to swear an affidavit concerning the facts presented. Mr. Madeleka emphasized that the deponent was objecting to the contents of the affidavit, which mainly spoke of the unlawful arrest and detention of the applicant, even though he was not present at the scene, nor was he a police officer or a witness. He argued that the facts in the affidavit were untrue under the circumstances.

He contended further that the filing of a supplementary counter affidavit, consisting of only three paragraphs, sworn by the same individual, Evans Kaiza Mazubasi is rather an irregular practice and to compound the matter, there is an affidavit by SSP Yesaya Edward Sudi attached to it. The learned counsel, in perplexity, raised concerns about the purpose of the supplementary affidavit, asserting that affidavits are meant to be contested by counter affidavits. Furthermore, the counsel commented

on the annexed affidavit of SSP Yesaya, emphasizing its lack of title of the case and relevance to the case in question.

He stressed that should the court ascribe significance to this annexure, it would effectively deny the applicant the right to be heard, as they were not afforded an opportunity to respond. The counsel questioned the rationale behind the inclusion of the statement made by William Sije Rubanda, the applicant's father, to the police, as it lacks a discernible connection to the supplementary counter affidavit. Consequently, he argued that this statement lacks a foundation and should be expunged from the records.

The counsel further contended that the affidavit in question is legally inadequate, citing the case of **Finn von Wurden Petersen & Another v Arusha District Council,** Civil App. No. 562/17 of 2017 in the Court of Appeal in Arusha. This case holds that, based on a defective affidavit, the court should infer that the respondents do not oppose the application. As such, he prayed for the court to restrict the respondents to addressing only the legal issues, due to their failure to file a proper counter affidavit.

In response, Ms. Mwaseba, learned state attorney, opposed the application, stating that Mr. Evans Kaiza, State Attorney, had the capacity to swear an affidavit, and the argument against his competence was misplaced. She pointed out that Mr. Evans Kaiza's counter affidavit explained his assignment to handle the matter on behalf of all the respondents.

Regarding the alleged impropriety of the 4th respondent's affidavit, she argued that Mr. Madeleka's assertion was unfounded. She cited the case of **Francis Eugene Polycarp v. Ms. Panone & Co. Ltd** (supra), stating that the contents of an affidavit are equivalent to oral evidence and that the 4th respondent's affidavit contained information about the arrest, serving as evidence. She further explained that the annexed affidavit of the 4th respondent was part of the supplementary counter affidavit and did not require a title of its own. She contended that since the respondents had filed both a counter affidavit and a supplementary counter affidavit opposing the application, they had the right to reply submissions, rendering the case of **Finn Von Wurden Petersen and Another v. Arusha District Council** (supra) inapplicable. She added that the applicant's affidavit is also incompetent because it contains lies.

Mr. Madeleka was given an opportunity to rejoin on the propriety of the respondent's pleadings as argued by the counsel for the respondents, and he reiterated the necessity for a proper affidavit in both counter affidavits.

Having heard submissions from both parties on the propriety of counter-affidavit and supplementary counter-affidavit I will proceed to determine whether the parties have filed proper pleadings before considering the merit of this application. It is valuable noting here that, Order XIX, Rule 3 (1) of the Civil Procedure Code provides that:

> *'Affidavits 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.'*

It means, from the position of the law above that, an affidavit being sworn written evidence in substitute of oral evidence, must be confined to such statements as the deponent is able of his own knowledge to prove and not otherwise. See also the cases of **Philip Bernard Mlay v. Idd**

Gahu, Civil Appeal No. 43 of 2009, Court of Appeal of Tanzania, (unreported).

It is worth to note as well that, an advocate can swear and file affidavit in proceedings in which he represents his client, but on matters which are in the advocate's personal knowledge only. This principle was settled in the case of **Lalago Cotton Ginnery and Oil Mills Company Limited v The Loans and Advances Realization Trust (LART),** Civil Application No. 80 of 2002 CAT (unreported) where it was stated:

> "*From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client.*"

As explained hereinabove, both parties have accused each other of having incompetent affidavits and counter affidavits. Starting with the applicant's affidavit, I have gone through it and I think that, by its' form, it has the qualities of an affidavit and I cannot at this stage decide whether it contains lies or not as alleged by the respondent. The weight of the

contents in the affidavit will be assessed when determining the application itself. In respect of the respondent's counter affidavit, indeed, there is a counter affidavit and a supplementary counter affidavit which has two annexures namely the affidavit of SSP Yesaya (PF1) and the statement of Wiliam Sije Rubunda, the deponent herein (NPS1). As per the records, on 25/9/2023 the learned state attorney representing the respondents was granted leave to file supplementary counter affidavit following new facts being revealed by the 4th respondent. Mr. Evance Kaiza Masubasi state attorney, averred in the verification clause that he received some of information from the 4th respondent which he believed to be true. As for the 4th respondent's affidavit, it speaks for itself. Whether it should bear a tittle or not, considering that the counter affidavit itself is well titled, I see no prejudice to the applicant. Largely, so long as the learned state attorney was lawfully representing the respondents and he attached the affidavit of the 4th respondent I do not see any reason to fault his counter affidavit, supplementary counter affidavit and its annexures.

Moving on to the application for Habeas Corpus, Mr. Madeleka started by citing the decision in **Mary Vitalis Temu v. RPC of Njombe & Others,** Civil Appeal No. 339 of 2017, in which the Court of Appeal

emphasized that a writ of Habeas Corpus should be issued when it is proven that the person is in unlawful custody of the respondents. He argued that the applicant was unlawfully arrested on 17th August, 2021, and was not held in an appropriate facility, with his whereabouts unknown. He also cited the case of **Michael Daniel Nyambore and 6 others v Officer Commanding Station Bukoba and 3 others**, Misc. Criminal application no. 38 of 2022, wherein the High Court clarified that a police station is neither a court of law nor a prison facility.

That, in **Michael Daniel Nyambore and 6 others v Officer Commanding Station Bukoba and 3 others** Misc. Criminal application no. 38 of 2022 at page 14 the High Court stated that, a police station is neither a court of law nor a prison facility.

Furthermore, he referred the court to the decision in **Abdallah Mohamed Malenga v. RCO & 4 Others**, Criminal App. No. 143/2019, which established the conditions that must be met before issuing a writ of Habeas Corpus. These conditions include, the need for the deponent to prove their presence at the scene when the arrest was made. He argued that, the applicant's affidavit fulfilled this requirement by detailing the

circumstances of the arrest and mentioning the registration number of the arresting officers' vehicle.

The other condition is that, the one who allege of unlawful arrest had a duty to prove it. He argued that the affidavit itself serves as proof of the unlawful arrest, relying on the precedent of **Francis Eugene Polycarp v. Ms. Panone & Co. Ltd.** H.C Misc. App. 2/2021, which treated an affidavit as evidence. He also pointed out that the name of the arresting officer was mentioned in the affidavit, demonstrating compliance with this condition.

The last condition requires that the relatives of the applicant should not have kept quiet following the disappearance of the applicant. He emphasized that the applicant's relatives had actively sought information about the applicant's whereabouts, citing paragraph 21 of the affidavit. He prayed for an order requiring the respondents to produce the applicant, dead or alive.

Before concluding his submission, Mr. Madeleka urged the court not to differentiate between cases of civil and criminal nature, citing the precedent in **James Rugemalira v. R and another**, Criminal Appeal No.

59/19 of 2017, which established that principles arising from civil matters can be applicable in criminal cases as well.

Responding on the merit of the application, the learned state attorney started by citing the case of **Mary Vitalis Temu** (supra) stating that the writ of Habeas corpus will only be granted when it is demonstrated that the applicant is in the hands of the respondent. She added that the 4th respondent has explained that they have never arrested the applicant or received any complaints against him so as to arrest him. She referred the court to the statement of **William Sije Rubuda** (annexure PF1) who is the same deponent in applicant's application. She submitted that; the said statement reveals that on 21.08.21 William Sije Rubunda went to the office of the 4th respondent to complain that the applicant is missing. That, in his statement, William Sije Rubunda said he was informed of the applicant being missing by one Farida @ Mama Joakim. That, at the police, he did not mention the name of the arresting officer one Majani, neither did he mention to have been at the scene when the alleged arrest was happening. The learned state attorney went on that, even the contents of paragraph 10 the applicant's affidavit are similar to his statement made before the police. She submitted that under the circumstances, the deponent is lying

because he was not present at the alleged arrest. She stressed that because the case of **Mary Vitalis Temu** is in principle that the writ of Habeas Corpus is granted only when there is evidence of the applicant being unlawful detained and because the applicants' affidavit failed to disclose that, then the applicant is placing the burden to the wrong people. She argued that under Order XIX Rule 3 (1) of CPC, an affidavit has to be confined to the knowledge of the deponent and this was not complied with the applicant and therefore even the requirements of section 390 of the CPA are not met. She added that she agrees with the decision in **Michael D. Nyambore v. Mary Vitalis** that the Police Force is not a prison facility however, in the cited case the applicant was under police custody unlike the present case. To finalise her submission, the learned state attorney relied on the cases of **Ignazio Messima v. Willow Investment SPRL** Civil App. No. 21/2001 and **Kidodi Sugar Estate & 5 Others v. Tanga Petrolem Co, Ltd.** Civil App. No. 110/2009 which stated that the court cannot act on an affidavit which is based on falsehood.

When it was time for rejoinder, in a rather uncommon move, the counsel for the applicant stated that when the case was called last time for hearing on 25/9/2023, in his closing prayers, he submitted that he does not

have confidence with the trial Judge, why there is no ruling to that effect, he questioned. He then prayed to proceed for rejoinder. He stressed that the applicant is in police custody and that the affidavit is countered by a counter affidavit. That, the respondent should not have relied on the statement of the applicant's father because that is not the affidavit. That, the court will compare the submissions and decide where the lies are. He added that, the 4th respondent has acknowledged to know a police officer named Mageni Msobi @ Majani therefore the deponent was telling the truth because how could William Sije Rubunda know about Mageni Masobi @ Majani. He lamented that it has been two years since the applicant disappeared and the respondent should be made accountable.

Having appraised the parties' extensive submissions, the main issue is whether the application has merit.

I will start with the issue of recusal which popped up in the middle of parties' submissions. It was submitted by the counsel for the applicant that, the trial judge was moved to recuse herself and a ruling to that effect was expected. Primarily, it is a principle of law that, request for recusal of the judge is a very serious allegations which this court and the Court of Appeal have maintained that, the same should not be entertained unless

the complainant submits strong evidence supporting recusal of the judge or any other judicial officer. See: **Isaac Mwamasika and 2 Other Vs. CRDB Bank Limited,** Civil Revision No.6 of 2016(CAT-unreported) among others. Therefore, before recusal of any judicial officer strong reasons must be advanced supporting the contention that, with his conducts, the judicial officer is not expected to discharge his duties fairly. In the case of **R vs. Australian Stevedoring Industry Board, Ex parte Melbourne Stevedoring Co Pty Ltd** [1953] 88 CLR 100, the case which was quoted with approval by this Court in **Dhirajlal Walji Ladwa & 2 Others v. Jitesh Jayantlal Ladwa & Another**, HC-Comm. Cause No. 2 of 2020 (HC-unreported), the Court held:

> *'...to demonstrate disqualification for bias "it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties.'*

After giving that background, much as the submission by the applicant's counsel was brought during rejoinder, in few words, the records of this application, do not support the appellant's counsel's allegations. It was noted that, on the alleged date, after proceedings for that day were

closed and the case being adjourned, the applicant's counsel kept on randomly talking and complaining to no one in specific, his main issue being why is the case adjourned while it was scheduled for hearing. No hearing was done in respect of his grumbles, no grounds were advanced even the adverse party did not reply because there was nothing to reply. It goes therefore, under those circumstances, no ruling would have been issued. The learned counsel would have properly moved the court by addressing on recusal and advance grounds thereof in a proper court's setting and there was no reason for him not to be heard. Suffice it to say, this court will not put itself in an Alice in wonderland situation by reacting to anything that the parties feel to utter. Court procedures are in place for a reason and they must be adhered to. That, said, this court cannot entertain the applicant's submissions on the judges' recusal as they were not placed before the court.

Finally in respect of the merit of the application, **Section 390 (1)(a) and (b) of the Criminal Procedure Act** provides that:

*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; (emphasis supplied)

In the case of **Mary Vitus Temu v. R.P.C of Njombe and Another (supra)** it was held that:

'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).*

Therefore, upon being properly moved, the court may give directions in terms of section 390 (1) and (2) of the CPA, but it is the duty of the applicant to demonstrate that the person is in unlawful custody of the respondent.

Going by the affidavit of the applicant's father, William Sije Rubunda, on 17/8/2021 between 2030hrs and 2100 hrs at Mnadani Street, Nyakato National area, the applicant was having a drink in the grocery owned by one Farida @ Mama Joakim who is also his neighbour. That, three police

officers under supervision of SGT Mageni Msobi Mageni @ Majani who was identified, arrested the applicant and left with him using a motor vehicle with registration no. **T 849 DQL**. That, the applicant's father who alleged to have been at the scene at the time of the alleged arrest, has written letters, made physical visits to the police force and made countless efforts to trace the applicant, but in vain. The said letters have been annexed with the affidavit. The respondent denies being responsible with the applicant's disappearance and states that the deponent was not even at the scene.

Having considered the application holistically, here are the courts observations: I have gone through the applicant' fathers' affidavit and in paragraph 4, the deponent states that '*I was present when the police officers were arresting the applicant.....*' Yet, looking at the annexures to the said affidavit, there are several letters attached, one is a letter addressed to the police as *'Mkuu wa Polisi Jeshi la Polisi Tanzania'* on 9/12/2021 and he does not mention to have been at the scene, neither does he mention any name of the alleged arresting officers. Another letter is addressed to Mwanza Regional Commissioner, on 18/10/2021. If I can quote parts of the letter, it states:

'Mnamo tarehe 17/8/2021 muda wa saa 2:00 au 3:00 usiku eneo la Nyakato kwenye grosary iitwayo Pombe Shop mali ya Farida au mama Joakim ambaye ni mmiliki wa Grosary akiwepo ***mtoto wangu James William akiwa na mwenzake Raimond*** *wakiwa wanakunywa vinywaji walifika watu wakiwa na gari walijitambulisha wao ni mapolisi na kumkamata mtoto wangu....'*

'Tarehe 18/08/2021 majira ya saa 2:00 asubuhi nikiwa nyumbani ***nilipata taarifa kuwa****.....'* (emphasis supplied)

In these letters, the deponent explains about the arrest but he does not indicate to have been at the scene. He further stated that when the applicant was arrested, he was with his friend named *'Raimondi'*. Also, at the end of the said letter, it is disclosed that on 18/8/2021, the deponent was given a certain information, the details of the information was supposed to be revealed in the following page however, we cannot know which information was that because, for unknown reasons, the second page is missing in the annextures.

Furthermore, as mentioned earlier, the respondent annexed in their supplementary counter affidavit, a statement which William Sije Rubunda is alleged to have recorded at the police station on 21/8/2021. Again, if I may quote, part of the statement reveals the following:

'Kwa sasa nipo mkoa wa Mwanza maeneo ya Nyakato national ambapo nafanya biashara ya duka la bidhaa za nyumbani. Nakumbuka mnamo tarehe 18/08/2021 majira ya saa 08:00hrs nikiwa nyumbani kwangu maeneo ya dukani kwangu ***alifika mama mmoja anayeitwa FARIDA @MAMA JOAKIM*** *anayefanya biashara ya pombe shop maeneo ya hapo mtaani kwetu* ***akanieleza kwamba kama nina taarifa za kukamatwa kwa mtoto wangu*** *JAMES s/o SIJE usiku wa tarehe 17/8/2021 majira ya saa mbili 20:00* ***usiku namimi nikamjibu sifahamu chochote yeye ndiye anayenifikishia Habari kwa mara ya kwanza....'*** ***(****emphasis supplied)*

In brief, here the deponent is explaining to have been in his shop on 18th August 2023 and one Farida @ mama Joakim is the one who visited and informed him about his son's disappearance which happened in the previous night. In consideration of the deponent's witness statement and the letters which he wrote himself to different authorities, there is a clear contradiction raised by the respondent as to whether the deponent was at the scene and whether he saw the police officers arresting the applicant. This evidence remains unchallenged. It was important for the person known as Farida @ Mama Joakim or '*Raimondl* to swear affidavits and give their direct evidence on this matter but that was not done.

It is my findings that, it has not been proved that the deponent was at the scene when the alleged unlawful arrest was done and for these reasons, his evidence remains hearsay. Under the circumstances, the applicants' affidavit is contravening Order XIX, Rule 3 (1) of the Civil Procedure Code and the decision of **Philip Bernard Mlay v. Idd Gahu** (supra). In other words, it cannot be said that it has been proved in the affidavit, that the deponent has confined himself to such statements which he is able, of his own knowledge to prove.

Finally, this court finds that, it has not been demonstrated that, the applicant is in the unlawful custody of the defendants. Consequently, the application fails and it is hereby dismissed.

It is so ordered.

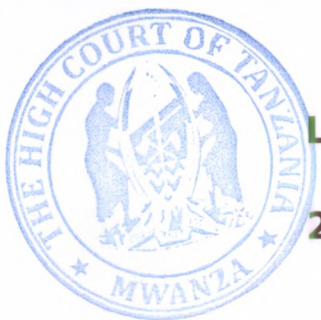
Right of appeal explained.

DATED at **MWANZA** this 20th day of October, 2023.

THE HIGH COURT OF TANZANIA
MWANZA

L. J. ITEMBA
JUDGE
20/10/2023

Ruling delivered this 20th day of October in the presence of Mr. Peter Madeleka counsel for the applicant, Mr. Johnson Simon learned state attorney for the respondent and Ms. Glady Mnjari, RMA.



L. J. ITEMBA
JUDGE
20/10/2023