

**UNITED REPUBLIC OF TANZANIA
JUDICIARY
HIGH COURT OF TANZANIA
BUKOBA SUB REGISTRY
ORIGINAL JURISDICTION
AT BUKOBA**

MISC. CRIMINAL APPLICATION NO. 16675 OF 2024

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| <ul style="list-style-type: none">1. JASSON MUSOLIN2. JOHANES JOHANEN3. CHARLES DEDAN4. MATHAYO JOSEPH | } | | APPLICANTS |
|---|---|-------|-------------------|

VERSUS

- | | | |
|--|---|--------------------|
| <ul style="list-style-type: none">1. OFFICER COMMANDING THE DISTRICT
OF KARAGWE (OCD)2. REGIONAL CRIMES OFFICER KAGERA (RCO)3. REGIONAL POLICE COMMANDER KAGERA (RPC)4. INSPECTOR GENERAL OF POLICE (IGP)5. ATTORNEY GENERAL6. DIRECTOR OF PUBLIC PROSECUTIONS(DPP) | } | RESPONDENTS |
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RULING OF THE COURT

Date of last order: 25/06/2024

Date of Ruling: 26/6/2024

BEFORE.G.P. MALATA, J

In nutshell, in April 2023 the applicants were arrested and jointly charged for unlawful possession of fire arm, unlawful possession of ammunitions and dealing

in ammunitions. The charges resulted to Economic case No. 3 of 2023 before the Karagwe District Court.

On 11/06/2024, the Director of Public prosecutions (DPP) entered a **Nolle Prosequi** under section 91(1) of the Criminal Procedure Ac, Cap.20 R.E.2022 informing the trial court that, he is no longer wishes to further prosecute the Applicants. A copy of Nolle Prosequi was availed to this court by the applicants for easy of reference.

Upon being released by the Karagwa District Court unconditionally following the **Nolle Prosequi**, on 11/06/2024 the applicants were immediately re-arrested by Police Officers and taken to Kayanga Police Station.

The applicants were kept at Kayanga Police Station from 11/06/2024 to 17/06/2024 without being charged or taken to any court to face a charge.

In view thereof, the applicants found their constitutional rights are being violated by the Republic. They thus engaged Mr. Jackson Mchunguzi Mustafa learned counsel to file an application for Habeas Corpus. On 17/06/2024 the Applicants filed an application seeking for the orders that:

- a) *This honourable Court do issue directions in the nature of Habeas Corpus directed to the Respondent, either by themselves or their agents or their representatives to have the bodies of **JASSON MUSOLIN, JOHANES JOHANSEN, CHARLES DEDAN and MATHAYO JOSEPH.***

- b) **THAT**, this Honourable Court be pleased to order that the Applicants be released from the unlawful custody of the Respondents forthwith.
- c) **THAT**, this Honourable Court be pleased to order the appearance of the Respondents before this Court to show cause why the Applicants who are unlawfully detained should not be set at liberty forthwith.
- d) **THAT**, this Honourable Court be pleased to issue an order prohibiting the Respondents from unlawful detaining the Applicants longer period than permitted by law.
- e) **THAT**, this Honourable Court be pleased to issue an order compelling the respondents to discharge their duties in line with the applicable laws.
- f) Any other order(s) which this Honourable Court deems just and reasonable for the Applicant”

In the affidavit in support of the application, the applicants stated that, they have been in unlawfully detention at Kayanga Police station since 11/06/2024 for more than seven days without being charged or brought to court to face any charge. Neither have they been granted Police bail. Further, that the applicants were told by Police Officers that, they will to be transferred to Kasulu District within Kigoma region to face economic case however, they were not but just kept at Kayanga Police Station.

This is assembled in paragraphs 5,6 and 7 of the applicants’ affidavit.

As stated herein above, the applicants prayed that, the respondents be ordered to

execute the afore stated applicant's prayers and release them from unlawful detention and set them at liberty. Further, that the respondents or any person acting on their behalf should be prohibited from detaining the applicants any longer than the law permits.

Through the counter affidavit sworn by Ms. Alice Mutungi learned State Attorney for the respondents, essentially, they respondents are not refuting the facts that, the applicants are within their hands and that up to the date of hearing the application on 25/06/2024 the applicants were not brought to any court for any criminal charges being fifteen (15) days from the date of arrest. However, they stated that, the applicants have already been transferred to Kasulu District for further legal measure. This fact was with no tangible evidence. This is gathered in paragraphs 5 and 6 of the counter affidavit.

Be it as it may, the applicants are in the hands of the respondents for more than fifteen (15) days without being arraigned with any criminal charge. Additionally, they have not been afforded police bail if the offence which are about to face is bailed.

On 25/06/2024 when the application came for hearing Both counsels were given right to address on the application for or against. Mr. Jackson Mchunguzi Mustafa the learned counsel appeared for the applicants whereas the respondents appeared through Ms. Alice Mutungi learned State Attorney.

Mr. Jackson Mchunguzi Mustafa Advocate submitted that, the application has been brought under section 390 (1) (a) and (b) and 391 of the Criminal Procedure Act, Cap. 20 R.E 2022 and Criminal Procedure Harbus Corpus Rules, G.N. No. 150 of 1930.

He submitted that, the applicants were arrested on 11/6/2024 while at Karagwe District Court. They were rearrested after being discharged by Nolle Prosequi under section 91 (1) of the Criminal Procedure Act, for the offences of unlawful possession of fire arms and ammunition in Economic Case No. 3 of 2023 at Karagwe District Court. It is fifteen (15) days from the date of arrest, the applicants' rights have been in violation by the respondent for failure to charge them for any offence. As such, they have been unable to get court bail. They have also been denied police bail for no apparent reasons. That the respondents' act is clear violation of Article 13 (6) (b) and (e) of Constitution of United Republic of Tanzania, 1977 which prohibits for torture and inhuman person who is not yet found guilty. The respondents' act of arresting the applicants without charging them in any court of law is inhuman, torture and deliberate violations of the afore stated Articles of the Constitution.

To bolster his submission, Mr. Jackson referred this court to the case of **Martin Jacob v. Republic, Criminal Appeal No. 434 of 2021 at page 19 CAT**, where the court of appeal stated that;

“Protection of innocent is more significant for mind kind them punishing the guilty”

Further, the court stated *“It is better one hundred guilty persons should escape than that one innocent person should suffer”*

He finalized his submission by stating that, assuming the applicants are to be charged for economic offences as stated by the respondents, under section 29 (1) of the Economic and Organized Crime Controls Act Cap. 200 R.E 2022 requires such accused to be brought to court within 48 hours from the time of arrest. He also cited the case of **Abdallah Mohamed Malenga v. RCO and Others**, Criminal Appeal No. 143 of 2019 CAT to cement his position.

Finally, he asked the court to grant the sought orders for the interest of justice and maintenance of rule of law.

On the other hand, the respondents, Ms. Alice Mutungi learned State Attorney submitted the respondents were objecting the application by as the same is overtaken by event. She stated that, the applicants have already been transferred to Kasulu waiting to be charged. Thus, the issue of being remanding at Kayanga Police Station is no longer an issue.

She argued that, it is true, the applicants were charged at Karagwe District Court for economic offences and that all of them were discharged by court following the 6th respondent entering Nolle Prosequi under section 91 (1) of the Criminal

Procedure Act, Cap. 20 R.E 2022.

She stated further that, it is also evident that, the 6th respondent has right to rearrested and charge them for the same offence. It is not in dispute that, they were rearrested and informed on the reasons thereof.

Arguing in respect to requirement of section 29 (1) of the EOCCA, She stated that, the 48 hours within which to bring the accused in court commences from the time the accused were arrested. The applicants were arrested on 11/6/2024 to date the applicants have not been brought to court and charged for any offence.

She finally submitted that, the compliance of 48 hours as per section 29 (1) of the EOCCA depends on the circumstances, however there is no such special circumstances described in this case through affidavit.

In rejoinder, Mr. Jackson Mchunguzi Mustafa argued that, there is no attached handing over of accused proving that the applicants have been transferred to Kasulu in Kigoma region. That, the application is not overtaken by event as the applicants have not been brought to court to date in any court whether at Kasulu District Court or Karagwe District.

Having carefully gone through the chamber summons and affidavits for and against the application, submissions by the counsels inclusive, the question to be answered is whether the applicant has established sufficient proof justifying this court to issue the relief sought.

To start with section 390 (1) of the Criminal Procedure Act, Cap. 20 R.E 2022 provides that;

"(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"*

Through the evidence presented by the parties through affidavits, it is clear that; **one**, the applicants were arrested and charged for Economic offence No.3 of 2023 before the Karagwe District Court, **two**, on 11/06/2024 the 6th respondent entered Nolle Prosequi withdrawing the charges against the applicants before the Karagwe District Court, **three**, the Karagwe District court released the applicants unconditionally, **four**, that immediately after such release, on 11/06/2024 the 1st to 4th respondents arrested the applicants and detained them at Kayanga Police Station, **five**, that from 11/06/2024 to 25/06/2024 the applicants have not been charged with any offence before the court of law be it in Kigoma or Kagera region, **six**, the respondents are still detaining the applicants without charging them, **seven**, the applicants have been denied police bail and on the other hand denied court bail as there no charges before the court, **eight**, that, the applicants are alleged to have committed economic offence at Kasulu, this entitle the respondents to bring the applicants to court for the charges within forty Eight (48) hours from the time of arrest, **nine**, it is fifteen (15) days from the date of arrest, the applicants have not been brought to court facing any charge and **ten**, the respondents are still detaining the applicants without charging them or granting police bail indefinite.

In the event, the applicants filed the present application seeking for the afore stated reliefs.

In the determination of this kind application of writs of Habeas Corpus, the court

is guided by various established principles of I shall adopt to.

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 that;

"... 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.

It is evident that, the respondents are mandated to effect arrest to any suspect which act is not condemned here. However, the respondents are required to discharge other legal obligation immediately after such arrest. These includes, **one**, releasing a suspect on police bail, **two**, charging the accused in the court of

law within the time limit prescribed by the law from the time of arrest, in this case within forty-eight (48) hours and **three**, accused to have access to court bail pending trial for bailable offences.

In this case, it has been proven beyond reasonable doubt that, the applicants were arrested on 11/06/2024 to date being fifteen (15) days from the date of arrest, they have not been; **one**, granted police bail, two, not charged in any court of law, **three**, no reasons adduced by the respondent for their non-charging of the accused for more than fifteen (15) days, **four**, no reasons for failure to transport the accused from Karagwe to Kasulu for more than fifteen (15) days from the date of arrest and **five**, the applicants are not aware of the reasons of their detention for the entire period.

The applicants as well have rights to know their charges laid against them but for more than Fifteen days they haven't.

This settles the minds of this court that, the applicants are in unlawful custody due to respondents' failure to discharge any of their legal obligations stated herein above, save for arresting only.

The respondents' act is clear violation of the mandatory provision of section 29(1) of the Economic and Organised Crime Control Act which provides that;

"After a person is arrested, or upon the completion of investigations and the arrest of any person or persons, in respect of the commission of an economic

offence, the person arrested shall as soon as practicable, and in any case within not more than forty-eight hours after his arrest, be taken before the District Court and the Resident Magistrate Court within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.

”

Based on the proven factors and circumstances pointed herein above, it is with no iota of doubt that, a prima facie case warranting grant of the sought orders has been established. Habeas Corpus application is right under our law to avail an accused or detainee with the right to be heard. This court has with precision satisfied that, the respondents are in clear violation of the applicants' rights for failure to grant them with police bail, charge them within forty-eight (48) hours as mandatory directed by section 29 (1) of the EOCCA, Cap.200 and or bring to court for affording them right to be heard.

Given the improvement in criminal justice in our jurisdiction, it is not expected to happen as our infrastructure are very friendly to facilitate and enable that, timely justice to all is seen to be done and that the law takes its supremacies. The violation of peoples' rights will be pulling back the already achieved National standards on justice delivery and adherence to peoples' rights and rule of law.

As the applicants have made out their case, this court rule that, the respondents are in violation of the law and applicants' rights to the extend, I have attempted to explain herein above.

In the result, the respondents, in particular, the 4th and 6th respondents are ordered to;

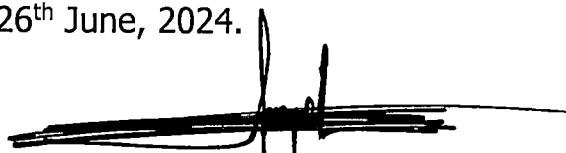
1. release the applicants from unlawful custody, or
2. bring the applicants to court with their charges as required by law, or
3. release the applicants on Police bail, and
4. comply with all legal requirement of ensuring that, the applicants' rights are not infringed any more.

FURTHER, it is ordered that, the above orders should be executed not later than **28TH JUNE, 2024.**

Consequently, the application is granted in the manner stated herein above.

ORDER ACCORDINGLY.

DATE at **BUKOB**A this 26th June, 2024.


G. P. MALATA
JUDGE
26/06/2024

DELIVERED at **BUKOB**A this 26th June, 2024 in the presence both counsels for the parties herein.



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G. P. MALATA
JUDGE
26/06/2024