Registrar Court of Appeal

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THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CONSTITUTIONAL REFERENCE NO. 7 OF 1998

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.,
HON. MR. JUSTICE G.M. OKELLO, J.A.,
HON. MR. JUSTICE J.P. BERKO, J.A.,
HON. MR. JUSTICE A. TWINOMUJUNI, J.A. &
HON. LADY JUSTICE C.B.N. KITUMBA, J.A.

IN THE MATTER OF A REFERENCE FROM HIGH COURT OF UGANDA

AND

IN THE MATTER OF SHEIK ABDUL KARIM SENTAMU AND ANOTHER.

(Arising from High Court Ruling of 8/7/98 by Hon.Justice J.P.M. Tabaro, in Misc.Cause No. 495 of 1998)

RULING OF THE COURT:

This reference was made by Tabaro J. in Miscellaneous Cause No. 495 of 1998 under Art 137 (5) of the Constitution. The issue for determination is:

> **"Whether or not the charging of Sheikh Abdul Karim Sentamu and Mustapha Bahiga on 19th June, 1998 before magistrate's Court at Kasese after issue of a writ of habeas corpus by the High Court on 8th June was consistent with Art 23 (9) of the Constitution."**

The events leading to the reference arose out of a Habeas Corpus ad subjiciendum application filed on behalf of Sheik Abdu Karim Sulaiman, Hamim Serwanga Lwanga, Mustafa Bahiga and Salim Sempa against the Inspector General of Police to produce the named persons before court. The ground of application was that the applicants were arrested in various places by the police between 2/5/98 and 25/5/98 and detained in different places.

They had not been charged and produced before court contrary to the Constitution. The application was supported by affidavits of relatives of the applicants and persons who witnessed their arrests.

The court granted an order nisi on the 8/6/98 returnable on the 12/6/98. There was no return on the 12/6/98 as Mr. Cheborion who appeared for the Attorney General did not know where the applicants were kept. The writ was extended and returnable on 17/6/98. The applicants were not produced on the 17/6/98 and no return was available. The return was extended to 22/6/98. Later in the morning of the 17/6/98 the court was informed by the Magistrate Grade One at Kasese that 38 accused persons had been charged with the offences of Treason and Misprison of Treason and remanded in custody.

A return on the 22/6/98 indicated that the applicants, Sheik Abdu Karim Sentamu and Mustafa Bahija had been charged and remanded in custody; but they were not produced in court. Mr. Mbabazi complained about the absence of the charge sheet attached to the return. The matter was stood down until 3.00p.m.

In the afternoon of the 22/6/98 Mr. Cheborion filed an affidavit from the Director of C.I.D. The affidavit showed that the police arrested Serwanga Lwanga and Kiggundu Sempa and later charged them on the 8/6/98 before Kasese Magistrate's Court with the offence of Treason. The Charge Sheet was filed in court. The police, however, did not know the whereabouts of the applicants. The matter was adjourned to the 23/6/98.

The applicants were again not produced on the 23/6/98. The court noted that the return was incomplete since it did not indicate the name of the court where the applicants were charged and the prison where they were remanded. The court ordered the officer, ACP Garyahendera, who made the return to be summoned and come to court on the 26/6/98. ACP Garyahandere informed court that after the Inspector General of Police was served with the writ, he directed the C I D to find out the whereabouts of the applicants. He later learned from Kasese Police that the two applicants had been taken to court and charged. A copy of the

charge sheet was faxed to him and he informed the Director of C.I.D.
As The return apparently did not indicate the date the applicants were charged, the court ordered the Kasese Court's file to be brought on the 7/2/98. The Kasese court file indicated that the applicants appeared before the court on the 19/6/98.

Mr. Mbabazi submitted that since the applicants were charged after the order nisi was made, Article 23(9) of The Constitution had been violated and prayed for the instant reference.

The learned Judge felt that Art 137(5)(b) of the Constitution obliged him to make the reference once a party to the proceedings had made the request He accordingly made the reference.

When the matter came up for hearing, Mr. Cheborion raised one preliminary point of law. It was the contention of Counsel that the matter before the court is for enforcement of individual rights under the Constitution and not for interpretation of the Constitution. His reason was that a writ of habeas Corpus was issued on the 8/6/98 directed to the Inspector General of Police to produce the applicants before the High Court to justify their detention. Subsequently, a return was made on 22/6/98 which showed that the applicants were charged on the 19/6/98 with the offence of treason and remanded in custody. The applicants were not produced on that day. Mr. Mbabazi complained that the rights of the applicants had been violated because they were not produced in court. Art 23 (9) provides that a right to an order of habeas Corpus shall be inviolable and shall not be suspended. That being the case the High Court should have dealt with the matter under Art 50 of the Constitution as the matter is for redress and is not for interpretation of the Constitution. That redress could be obtained in any competent court. He relied on this Court's decisions in Constitutional Petition No. 6/97: Uganda Journalists Safety Committee and Another Vs. Attorney General; Constitutional Petition No. 11/97: Dr. James Rwanyarare and Another Vs. Attorney General, and Constitutional Appeal No. 1 of 1997 between Major General D. Tinyefuza and Attorney General (the Supreme) unreported.

Mr. Mbabazi opposed the preliminary objection and contended that the objection could not be raised in law. He argued that under the Civil Procedure Rules the point of law which can be raised as a preliminary point must be agreed upon. Therefore this Court's decisions in Constitutional Petitions No. 6/97 and 11/97 (Supra) were wrongly decided. He referred to Order 6 r 27 where a party can raise a point of law for determination by the court. But the point of law that can be raised under the rule must be clear from the plaint and not in any other document. He contended that as the point of objection here was lack of jurisdiction, it could not be raised under the rule. He also referred to Order 7 (11) under which plaint could be rejected in the instances indicated in the rule. He contended, however, that the application under the rule has to be by Summons in chambers.

According to Mr. Mbabazi the prayer in those rules he referred to is either for dismissal or striking out of plaint and not for referring the case back to the High Court for determination.

He argued, in the alternative, that the courts are hesitant to entertain preliminary objections in matters of great importance involving interpretation of the Constitution.

He finally contended that matters raised in the reference are matters of facts and not law.

In reply, Mr. Cheborion, submitted that it is trite law that points of law can be raised at any time. He invited the court to use its inherent powers under S. 101 of the Civil Procedure Act to make orders as may be necessary for the ends of Justice or to prevent an abuse of the process of the court. He also referred to Ord 13 r 2 where the court can deal with issues of law first in a suit where both issues of law and facts are raised.

We think it is better to deal first with the argument of Mr. Mbabazi that the preliminary objection could not in law be raised before considering the merit of the preliminary objection.

Under the provisions of rule 7 of The Interpretation of the Constitution (Procedure) Rules 1992 (Modification) Directions, 1996, the Civil Procedure Act and the Rules made under it apply to

proceedings brought to this court for the interpretation of the Constitution. The relevant Rules relating to preliminary objection can be found in Order 6 rules 27, 28 and 29 of The Civil Procedure Rules. The Rules provide:-

> **"27 Any party shall be entitled to raise by his pleading any point of law, and any point of law so raised shall be disposed of by the court at or after hearing:**
>
> **Provided that by the consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.**

28. If, in the opinion of the court, the decision of such point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counter-claim, or reply therein, the court may thereupon dismiss the suit or make such other order therein as may be just.

29. The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment entered accordingly, as may be just. All orders made in pursuance of this rule shall be appealable as of right."

The effect of the rules referred to above were considered by the Supreme Court in The Constitutional Appeal No. 1 of 1997 between Major General D. Tinyefuza and Attorney General (unreported) where at the commencement of the hearing of the petition by this Court, three preliminary objections were raised by the Attorney General.

Oder J S C had this to say on the effect of the rules:

"In my view, the effect of the rules under orders referred to appears to be this: the defendant in a suit or the respondent in a petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action."

Mulenga J S C observed:

"The usefulness of decisively disposing of a suit on a legal point, where appropriate, without going through a lengthy trial, cannot be gain said. And where such a point is raised it is of course desirable that the court makes a decision on it before embarking on the trial even if the case is to continue. In my opinion, however, that remains in the courts discretion, as is evident from the provisions of the law governing the procedure."

The majority of the Justices of the Supreme Court cited with approval the speech of Romer L J in the case of Everett v Ribbands and Another [1952] 2 Q B 198 at 206:

"For myself, I think it is a pity that point was not set down as a preliminary point of law before hearing. The action was a substantial one: I understand it was estimated to last three days, and I can well believe it would. The point of law if decided, as has been against the Plaintiff, would have been decisive of the case. Although there may have been good reason for not applying, I would have thought this was the very class of case in which an application ought to have been made under Order 25 r 2 to have the point determined before the hearing.....and have the question decided at that early stage. I think that where you have

a point of law, which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of facilities afforded by the Rules of court to have it disposed of at the close of pleadings". (emphasis ours).

These are some of the respectable authorities which approve of the practice of raising a preliminary objection at the commencement of the hearing of a suit or a petition, including a reference.

Accordingly, the submission of Mr. Mbabazi that this Court erred in entertaining preliminary objections in Constitutional Petitions Nos. 6/97 and 11/97 has no legal foundation. That was the reason why he was unable to cite any authority in support of that bold submission.

The alternative submission that the court should be hesitant in entertaining preliminary objections in matters of great importance involving the interpretation of the Constitution, equally has no legal basis. The Constitutional Petition No. 6/97: Uganda Journalists Safety Committee and Another Vs. Attorney General, Constitutional Petition No. 11/97 Dr. James Rwanyarare & Another Vs. Attorney General and the Constitutional case No. 1 of 1996 – Major General David Tinyefuza (supra) concerned matters of great importance involving the interpretation of the Constitution. It has not been shown any where that material prejudice was caused to any party when this court entertained preliminary objections in those petitions. In fact the appeal in Constitutional case No. 1 of 1996 (Supra) turned on the point when should the court make a ruling when a preliminary objection is raised in the proceedings and not on the propriety of the objection.

We are therefore of the view that the preliminary objection was properly made.

We now turn to the merit of the preliminary objection: Does the reference involve interpretation of the Constitution or enforcement of individual rights under the Constitution?

The right to be tried according to law or to be released is really the Constitutional right that habeas corpus is supposed to secure. The writ is considered to provide an assurance that personal freedom will always be protected. The writ is used to question the legality of restraint. In the case of Barnardo V Ford (1892) A C 326 Lord Watson said: "The remedy of habeas corpus is, in my opinion, intended to facilitate the release of persons actually in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained".

A prisoner may apply for the writ the moment of arrest and in that sense, challenge the legality of his arrest. However, where there has been valid proceedings subsequent to the arrest, which are offered in justification of the detention, the prisoner will not usually be able to get redress. It was held in the case of The Queen v Weil (1982) 9QBD 70 that the illegality in the original arrest or proceeding is immaterial when the subsequent proceedings have been right. A similar observation was made by Sir Charles Newbold P in Grace Stuart Ibingira and others V Uganda (1966) E A 445 at page 452: "It is clear from a number of cases (See for example, Emperor V Savarkar (1911) Bom 142, Ex Parte Lannoy [1942] 2 KB 281 and R V Larsonneur [1933] 24 Cr. App. Rep 74) that a court has jurisdiction to deal with a person before it no matter how improper the procedure that brought that person before the court".

The reason for this is based on the rule that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court.

The rule that it is the present circumstances of the restraint which are relevant, has meant that the courts are always prepared to allow for a substituted warrant which corrects the defects in the first committal. This is well illustrated by the case of Re Alexander Terraz 39 L T 502: A warrant was issued on the 12th Nov. by the Chief Magistrate at Bow – Street to apprehend the applicant. He

was apprehended in London on 18th Nov., and remanded by the Magistrate to 25th Nov. and again on that latter day to the 29th Nov. for further inquiry. On the 26th Nov. an order Nisi was obtained for a habeas Corpus on the ground that the warrant did not set forth the nature of the offence he was charged with and so it was not good. On 29th Nov. a fresh warrant charging the offence more specifically and in detail, was issued and lodged with the gaoler. Huddiston B was of the opinion that both in practice and on authority, a second warrant might be lodged and substituted for the original warrant, and that on the argument of a rule like the present the whole question might be gone into, and the validity of the second warrant, whether issued before or after the rule nisi was as obtained or even at the very moment the prisoner was brought up, might be discussed and decided; the question being whether the prisoner is, at the moment the rule is being argued, entitled to be discharged.

It would seem therefore that so long as the material proffered tends to show present justification for the detention, it will be accepted by the court at any stage of the proceedings. This view is supported by the English Court of Appeal decision in R v Secretary of State for the Home Department, ex parte Iqbal [1979], All E R. 675. The facts, as disclosed in the head note, are that following enquiries by the immigration authorities the applicant was taken into custody as illegal immigrant under a detention order under the Immigration Act 1970. By mistake the order stated that the applicant was to be held "pending his further examination under the Act", instead of for the reason appropriate to detention under para 16 (2) namely 'pending the completion of arrangements for dealing with him under the Act'. At the time the order was issued the immigration authorities inquiries had finished and the examination of the applicant was complete. The applicant, who maintained that he was a lawful entrant, applied for a writ of habeas Corpus contending, inter alia, that the immigration officer had no right to detain him for reasons stated in the order.

The application for writ of Habeas Corpus was dismissed by a majority of the Justices of the Divisional Court in their reserved judgment. The applicant appealed to the Court of Appeal.

It happened, though the Divisional court seems not to have been told of this until after the reserved judgments were given, that on the very day the argument took place, and no doubt in order to prevent any further argument, a fresh detention order was made.

When the appeal was called at the Court of Appeal, Counsel for the Secretary of State sought leave to put in a fresh affidavit from the Deputy governor of the prison the applicant was detained, exhibiting that further order. He also sought leave to amend the return to the writ. The applicant to amend the return was withdrawn. The fresh affidavit exhibiting the new detention order was received.

The Court of Appeal held that even if the appeal succeeded and the Counsel for the applicant were able to satisfy the Justice of the Court of Appeal that the dissenting judgment of Boreham J were right and the majority judgments were wrong, a writ of habeas Corpus could not properly issue because there was then in force and had been in force since 24th April, a perfectly valid order detaining the applicant in prison.

Applying the above principles to the facts in this case, the following scenario emerges. The applicants were arrested and detained in various places. In order to secure quick trial or release, an application for writ of habeas corpus was filed and an order Nisi was granted on the 8/6/98 and directed to the Inspector General of Police to produce the applicants in Court to justify their detention. Initially the police did not know where the applicants were being detained. Eventually a return was made which showed that the applicants had been charged with treason before Kasese Magistrate's Court on 19/6/98.

What remained for the trial court to decide was whether the applicants were, at the moment the habeas corpus was being argued, entitled to be released.

That, to our minds was purely enforcement of fundamental rights under the Constitution. It did not call for interpretation of the Constitution to enforce a right to habeas corpus.

It seems to us that the trial Judge thought that if any party to the proceeding requests a reference to the Constitutional Court, then the Court was bound to accede to his request. In our view the duty to refer the question if a party so requests, is subject to a question as to the interpretation of the Constitution arising in the proceedings before the court. This is clear from the provisions of Art. 137 (5) which provides:

> **"(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a Field Martial, the court**
>
> **(a) may, if it is of the opinion that the question involves substantial question of law; and**
> **(b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional court for decision in accordance with Cause (1) of this article".**

However much a party may request, he cannot have referred a matter that does not involve interpretation of the Constitution. Nor can the party give the court jurisdiction which the court does not have by law: See: Attorney General V Milton Obote Foundation Ltd. and Another, Civil Appeal No. 7 of 1992.

In our view, the Constitution has not changed the practice and the law applicable to Habeas Corpus. Therefore, if the trial Judge had directed his mind to the principle that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ, he would not have swallowed hook and sinker the argument of Mr. Mbabazi that a Constitutional issue had arisen because the return showed that the prisoners were charged after the order Nisi.

In the result we agree with Mr. Cheborion that the matter is not properly before this court. It should be returned to the learned trial Judge to carry on.

Dated at Kampala this ....25th....day of....November....1998.

S.T. Manyindo
Deputy Chief Justice.

G.M. Okello
Justice of Appeal.

J.P. Berko
Justice of Appeal.

A. Twinomujuni
Justice of Appeal.

C.N.B. Kitumba
Justice of Appeal.