FIDELIS CHIRAMBA
and
TERRY MUSONA
and
FANUEL TEMBO
and
Mrs MUTEMAGAU
and
AGGRIPA
and
LLOYD TARUMBWA
and
PIETA KASEKE
and
LARRY GAKA
and
EMMANUEL CHINANZVAVANA
and
CONCILLIA CHINANZVAVANA
and
ENERST MUDIMU
and
COLLEN MUTEMAGAU

v

MINISTER OF HOME AFFAIRS N.O.
and
COMMISSIONER GENERAL OF POLICE
and
OFFICER COMMANDING CID HOMICIDE,
Chief Superintendent CRISPEN MAKEDENGE
and
DETECTIVE CONSTABLE MUUYA

HIGH COURT OF ZIMBABWE
HUNGWE J

HARARE, 11 NOVEMBER 2008

Urgent **Chamber** Application

Mr. C Kwaramba for the 1st to 12th Applicants

Mr. P Ndlovu for the 1st to 4th Respondent

Hungwe J

In this application the applicants seek an order a) declaring their arrest and continued detention unlawful; b) requiring the respondents and all those calling through them or acting on their behalf to permit the applicants access to medical treatment at medical centres of their choice; c) directing the respondents or anyone calling through them or acting on their behalf to produce the applicants before a High Court Judge in Chambers within two hours of the order being made or alternatively take the applicants for a remand at the magistrates court at or before 12h00 on 11th November 2008 failing which the respondents and all those calling through them or on their behalf shall forthwith release all the applicants from custody and that thereafter no Magistrates Court should entertain the matter for remand purposes save for trial purposes, applicants having been duly summoned.

They also seek an order for costs on a higher scale.

The application was placed before me through the Chamber Book as an urgent application on 6 November 2008. After perusing the papers I directed that the applicant serves the application on the respondents as well as on the office of the Attorney-General. I considered that the matter merited speedy consideration and that the Rules of Court relating to notice be dispensed with in the interests of the rights of the applicants. The matter was to be set down for hearing the next day at 10h00.

The application is premised on an affidavit deposed to by applicants' counsel *Mr Andrew Mukoni.* He makes the following averments. The applicants are Fidelis Chiramba, Pieta Kaseke, Terry Musona, Fanuel Tembo, Mrs Mutemagau, Mr Manyemwe, Lloyd Tarumbwa and others. The 3rd and 4th respondents are police officers responsible for the arrest and detention of the applicants. The police officers operate under the direction and control of the 1st and 2nd respondents.

On 3rd November 2008 *Mr Makoni* was instructed to represent all the applicants, From the information he gathered the applicants were being dealt with by either CID Homicide

Section or CID Law and Order Section at Harare Central Police Station although they had been arrested in places around Banket and Chinhoyi.

Upon visiting CID Law and Order section, the Officer-in-Charge of that section professed ignorance of the matter. When he then visited homicide section, he learnt that 3rd respondent was handling the matter. Upon requesting audience with him, the latter was said to be too busy to see the applicants' counsel. He also gathered information concerning the detention of the applicants at various police stations around Harare.

A visit to these stations however indicated that the applicants had been released into the custody of the 4th respondent.

He concluded that the police were detaining the applicants illegally for the reason that the 48 hour period permitted at law had long expired. He also believed that the police were holding the applicants *in communicado.* He feared that the applicants were being subjected to torture, ill-treatment or other inhuman and degrading treatment as access to legal practitioners was being denied. He believed that police had no legal basis for detaining the applicants hence they had failed to take the applicants to court within 48 hours as required of them by law. He believed that the applicants were being subjected to such ill-treatment for the purposes of unlawfully extracting from them confessions without legal representation. He therefore prayed that the applicants be produced at court or be released.

At the hearing Mr. Ndlovu for the respondents, indicated that the police did not have the applicants in their custody and therefore were unable to release the applicants. He pointed out that the police deny arresting the applicants as no evidence of such an arrest had been produced by the applicants.

In view of the attitude of the respondents, the matter was postponed to 11 November 2008 to allow the applicants to file further affidavits to address the following questions:

a) where are the applicants detained?

b) what are their detention book numbers, if any?

c) under what circumstances were they detained?

d) on whose authority are they detained?

e) what are the applicants full and further particulars?

f) what other persons were arrested and detained under similarly circumstances as the present applicants?

g) what is the registration number or numbers of the vehicles which conveyed the applicants if any? and,

h) whether any criminal charges were preferred against any of the detainees.

The respondents, particularly 3rd and 4th respondents, for their part were directed to file affidavits answering the allegations raised in the founding as well as the supplementary affidavit.

On 10 November 2008. Mr Makoni filed his supplementary affidavit as directed by the Court. The respondents did not file any affidavit despite being directed to do so by the Court.

In his supplementary affidavit he makes the following averments at paragraphs 5 and 6.

"5. After the postponement of the matter, I drove to Mabelreign police station in the company of the defence team comprising of myself, Alec Muchadehama and Charles Kwaramba. We gathered the following facts. Pieta Kaseke the 7th applicant was detained at the police station under Detention Book Number I55/0S on the 2nd November 2008. She was booked in by Detective Assistant Inspector Chibaya for Chief Superintendent Makedenge of CID Homicide. She resides at 167 Munashe Street, Kuwadzana Township, Banket. She was released by Detective Sergeant Muuya of CID Homicide on behalf of Chief Superintendent Makedenge. We then visited Avondale police station and discovered that Pieta Kaseke had been detained at the station prior to her detention at Mabelreign police station, She was detained under DB 1122/08. She was detained by Detective Assistant Inspector Phiri for Makedenge on 1st November 2008 and booked out on 2nd November 2008, Her whereabouts are still unknown, We believe she is still in the hands of the police with her minor child,

6. At Avondale police Station we also gathered that the 1st applicant was also at some stage detained there, He was detained at the station on the 3rd of November 2008 under detention number DB 1126/08 and released by Detective Chief Inspector Paradza and

Detective Inspector Chibata for C/S Makedenge on the 4th November 2008. His whereabouts are still unknown. We have reason to believe he is still in police custody. Prior to this detention he was detained at Rhodesville police station. His detention number at Rhodesville was DB 1886/08. He was in these cells on the 31st October 2008 from 09h00 to 15h00 when he was booked out by D/C Muuya of CID Homicide allegedly for CID Law and Order, 1st applicant was again detained at Highlands police station and Borrowdale police station before he was taken to Avondale police station. We failed to get the detention numbers at these two police stations as the police were less co-operative, 1st applicant resides at number 825 Kuwadzana Township, Banket. His ID number is [number]."

He recites that he ascertained that 3rd applicant was once detained at. Rhodesville and gives his particulars. 3rd applicant was detained under DB 1892/08 at Rhodesville and released by Detective Sergeant Mavunga of CID Homicide on 4th November 2008.

In respect of the rest of the applicants, *Mr Makoni* says he was unable to obtain any information regarding where they were detained after when they were attested or where hey currently were detained. This Was in spite of his visiting various police stations Around the city like Avondale, Borrowdale, Braeside, Highlands, Mabelreign, Matapi, Mbare, Marlborough and Rhodesville. Despite diligent inquiry he was unable to ascertain Full particulars of certain of the detainees e.g. 5th applicant's. He was however able to confirm that the applicants were being accused of contravening section 24 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] i.e. training insurgents, bandits, saboteurs and terrorists. He averred that after his discussion on 4th November 2008 with Detective Chief Inspector Paradza, he was under no illusion that all the detainees were held by the police and that Chief Superintendent Makedenge was handling the case. Paradza referred all questions to Makedenge who refused to entertain counsel.

A further supplementary affidavit was obtained from 1st applicant's son one Ponsiano Chiramba. According to him police came into their neighbourhood on 30th October 2008 and arrested Larry Gaka, 8th applicant. No-one had the presence of mind to record the police vehicle registration number. This occurred at night. The following day, 31st October 2008 around 03h00, police struck again and arrested his father together with 2nd and 3rd applicants. His father is the losing senatorial candidate for Zvimba in the March

2008 harmonised elections. He believes the arrests were politically motivated as all those arrested are MDC activists. Police took away his father's fully licensed 303 rifle. His father, the 1st applicant, is a 71 year old retired police officer.

Ponsiano brought food for this father at Rhodesville and later Highlands police stations but when he attempted to do the same at Borrowdale he was met with resistance. Police refused to disclose his father's whereabouts saying only that they were under instructions not to divulge such information,

9th, 10th and 11th applicants were arrested whilst driving from MDC Headquarters in Harare. They are resident in Banket, Their motor vehicle and themselves have not been seen since their arrest, Ponsiano was surprised to hear that the police deny any knowledge of the whereabouts of the applicants.

Faced with this evidence *Mr Ndlovu,* for the respondents, reconsidered his position and advised the court at the resumed hearing on 11th November 2000 that he was no longer opposed to the granting of the final order sought by the applicants were seeking. The change in his altitude is not only legally correct but commendable. I say this for the following reasons.

The Republic of Zimbabwe is a signatory to the International Covenant on Civil and Political Rights, *1966.* (ICCPR) It acceded to this international treaty. As a State Party to this international human rights treaty, the Republic of Zimbabwe is bound by the international treaty obligations flowing from the treaty. It may well be necessary to recite the relevant provisions of the ICCPR here.

Article 9 of the International Covenant on Civil and Political Rights, 1966, provides thus:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law,

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4, Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if his detention is not lawful.

Generally speaking the treaty places two types of obligations on States. Firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations is both positive and negative in nature; on the one hand the State must refrain (whether by act or omission) from violating human rights: and on the other hand the State must ensure that, through the adoption of whatever means necessary, such rights can be actively enjoyed.

In fulfilment of the positive duty to ensure the protection, enjoyment and promotion of the rights set out in the ICCPR, the Republic of Zimbabwe has given prominence to these rights by devoting an important part of its Constitution to these rights (Chapter III The Declaration of Rights Sections 11 to 26),

Section 13 of the Constitution of the Republic of Zimbabwe guarantees the protection of the right to personal liberty. Section 13 (3) thereof provides that any person who is

arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons of his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him. Subsection (4) further provides that any person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without any prejudice to any further proceedings that may be brought against him, shall be released either unconditionally or upon reasonable conditions necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial

The meaning of the right, contained in section 13(4) of the Constitution, was considered by this Court in *S* v *Makwakwa*[1] The Court noted that section 32(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] says: " ....a person arrested without warrant shall as soon as possible be brought to a police station or charge office and, if not released by reason that no charge is to be brought against him, may be detained for a period not exceeding forty-eight hours, unless he is brought before a judge or a magistrate, or a warrant for his further detention is obtained in terms of section thirty-three."

The enactment of this provision further demonstrates the State party's commitment to the upholding and promotion of the above rights. The judicial interpretation rendered to it is consistent with the spirit of that treaty.

From the above it is clear that the police on or about 30th October 2008 took all the applicants into their custody. They were required by law to advise the applicants of the reasons for their arrest. The Police did not do so almost 14 days after they effected an arrest! They were legally obliged to afford the detained persons access to legal counsel as soon as possible. The police did not do so 14 days after arresting the applicants. In terms of the Constitution of Zimbabwe the police were obliged to release the applicants if they failed to charge them with a criminal offence or bring them before a court of law within

[1] 1997 (2) ZLR 298 (H)

48 hours of their arrest. Again the police did not do such a basic thing. When they were sued, the police denied any knowledge of the applicants when clearly they knew or ought to have known that the applicants were being held in their custody. When I asked *Mr Ndlovu* at the hearing why his clients had not indicated some willingness to act according to the law in view of his advice to them, his response was that both 3rd and 4th respondents had taken leave of absence from their duties. No-one was prepared to deal with the matter. Such conduct by the police ought to be deprecated. Being officers of this Court the respondents ought to have known better than to deny such a notorious fact as the detention of the applicants. This denial has placed their counsel in a position where he can hardly oppose the order sought. The respondents have denied the applicants the protection of the law**.** The respondents have permitted the applicants to be detained *incommunicado.* People are at risk of torture or other forms of ill-treatment if they are detained *incommunicado.* The risk increases the longer they are held as this allows for a longer period for injuries to be inflicted and visible marks of these injuries to fade. Further detainees have a right of access to legal advice without delay. They should be able to consult with a lawyer in private while in custody, to have a lawyer present during interrogations and to representing them when they appear in court. Lawyers should be able to advise and represent their clients in accordance with professional standards free from intimidation, hindrance, harassment and without improper interference from any quarter. This is trite. No authority is required for stating the obvious.

There is one more disturbing feature in this saga. The respondents have not denied it either orally through *Mr Ndlovu* or by their action. It is the detention of a two year old alongside its mother. It hardly needs me to point out that being a signatory to the Convention on the Rights of the Child; the Republic of Zimbabwe must be seen, through the acts of its public officials, to be protective of the rights of the child. One of the applicants was arrested and taken away together with her two year old baby. There is no suggestion that the baby was suspected of having committed, or being about to commit a criminal offence at the time. There appears to be no provision in our law as it currently stands as to how the police should deal with such a situation,

Section 135(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] says that when a person under the age of eighteen years of age is accused of any offence other than treason, murder or rape, any judge, magistrate or police officer who has power under that

part to admit the said person too bail may, instead of detaining him, a) release him without bail and warm him to appear before a court or magistrate at a time and on a date fixed by such a person, or; b) release him without bail to the care of the person in whose custody he is and warn that person to bring him or cause him to appear before a court or magistrate at a time and on a day then fixed, or, c) place him in a place of safety as defined in section 2 of the Children's Act [*Chapter 5:06*] pending his appearance before a court or magistrate or until he is dealt with according to law.

Section 58 of the Prisons Act [*Chapter 7:11*] provides that subject to such conditions as may be specified by the Commissioner, any unweaned infant child of a female prisoner may be received into prison together with its mother and may be supplied with clothing and necessaries at the public expense provided that when such child has been weaned, the officer in charge, on being satisfied that there are relatives or friends of the child able and willing to support it, shall cause such child to be handed over to such relatives or friends. If he is not so satisfied, shall hand over such child to the care of such welfare authority as may be approved by the Commissioner for the purpose.

Section 84(1) of the Children's Act [*Chapter 5:06*] provides that a child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention.

It is clear that all three statutes address the position of a child suspected of having committed a criminal offence. The Children's Act does not expressly address the plight of a baby taken by police who have arrested its mother but in my view the prohibition against detention of minors is implied in this section, Article 16 of the Convention on the Rights of the Child provides thus:

"Article 16- protection and privacy

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks."

In any event I hold that the protection afforded to children is over and above that set out in the Constitution and other statutes. There is need however for the appropriate Act to expressly state this prohibition in clearer terms as it appears a lacuna exists in our law as presently constituted.

The conduct of the respondents in this case does not in any way uphold this international obligation to protect and promote the said rights.

It is not sufficient to pass legislation which recognizes the protective rights set out under international covenants and the Constitution as well as other domestic laws when in practice the public face of the State acts in flagrant breach of such protection afforded by the law. There must be adequate recourse in cases of breaches being proved before the courts.

To subject a two year old to the rigours of detention simply on the grounds that its mother may have committed some criminal offence is totally unconscionable and immoral. This is made worse by the denial of basic rights to the mother in the present case. It cannot be over-emphasised that the police can only act within the law. No-one is above the law or below it. In the present case the 3rd and 4th respondents have callously demonstrated the affinity to act as if they were above the law.

Despite the fact that I directed that they file affidavits in answer to the allegations personally against them none were forthcoming. I assume they have nothing to say for themselves in view of their blatant breach of the clear provisions of the law. I will therefore make findings without having their side of the story since they have declined the opportunity to respond.

The applicants seek an order declaring their arrest and continued detention unlawful. They also seek an order requiring the respondents and all those acting through them or on their behalf to permit applicants access to medical treatment at medical centres of their choices. Further, the applicants seek an order directing the respondent or anyone calling

through them or on their behalf to produce applicants before a High Court Judge in Chambers within two (2) hours of the order being made or alternatively take the applicants for a remand hearing at the Magistrates Court at or before 12h00 on 11th November 2008 failing which the respondents and all those calling through them or acting on their behalf shall forthwith release all applicants from custody and that thereafter no Magistrates Court should entertain the matter for remand purposes save for trial purposes, applicants having been duly summoned.

Because at the end of the hearing there was no opposition to the order sought I am of the view that costs on a higher scale should be reserved for those cases where there is malicious opposition. Had the applicants sought an order for costs personally against the 3rd and 4th respondents, I may have favourably considered granting it in view of the attitude displayed by the two to the present the proceedings. In the event I will grant the following final order:

1. The treatment and continued detention of the applicants beyond the statutory 96 hour period be and is hereby declared unlawful.
2. That the respondents and all those calling through them or acting on their behalf be and are hereby ordered to take applicants for a remand hearing at the nearest Magistrates Court at or before 16h00 on 11 November 2008, failing which the applicants are entitled to their immediate release.
3. In the event of the State deciding to charge the applicants for any offence arising from the allegations presently under investigating, then the police may proceed by way of summons.
4. The respondents and all those calling through them or acting on their behalf shall forthwith allow the applicants access to their legal practitioners, relatives and to medical treatment at medical facilities of their choice.
5. This order shall stand notwithstanding the noting of any appeal.
6. This order shall be served by the applicants' legal practitioners or the Deputy Sheriff.

Mbidzo, Muchadehama & Makoni *applicant's legal practitioners*

Civil Division of the Attorney-General's Office *respondents' legal practitioners*