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## SOCIOS PRINCIPALES

Femi Falana S.A.N, FCI Arb  
Funmi Falana B.Sc, B.Th, LL.B, LL.M,  
B.L, FCI Arb., Notario publico

## LAGOS

25, Adekunle Fajuyi Way,  
GRA, Ikeja, Lagos Nigeria.  
Tel: +234 80 3305 2979  
+234 80 2106 3232  
Correo electrónico:  
fflitgatlon@gmail.com

## ABUJA

22, Mediterranean Street,  
Imani Estate,  
Off Shehu Shagari Way,  
Maitama District,  
Abuja, Nigeria  
Tel: +2348033004903  
Correo electrónico:  
fflitigation@gmail.com

## EKITI

106, Ajilosun Street,  
Ado-Ekiti,  
Nigeria.  
Correo electrónico:  
fflitgation@gmail.com

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## DETENTION OF A WRONG PERSON NULLIFIES DETENTION

In its judgment of March 15, 2021 the Ecowas Court of Justice detailed the extensive violations of Cape Verdean law (along with international law) that occurred in the arrest and detention of Alex Saab. Consequently, the Court issued a binding unanimous decision in which it declared that Alex Saab's detention and subsequent imprisonment were illegal and that, therefore, he should be released immediately, and that the extradition process should be closed. The epochal judgment was read by the Rapporteur of the Court, Justice Januária Tavares Silva Moreira Costa, a former Minister of Justice of Cape Verde.

The Attorney-General of Cape Verde, Mr. Jose Landim has said that the judgment of the Ecowas Court should be ignored on the ground that it is not binding on the Cape Verdean authorities. However, having admitted that the arrest warrant in the June 29, 2020 Extradition Request is not in the name of Alex Saab but in the name of another person, Mr. Landim has prayed the Constitutional Court to regard the grave error as a "trivial mistake" which he now seeks to amend.

Another point mentioned by the Attorney General is that the Red Alert which he claims was the basis for making Alex Saab's initial arrest was not supported by an arrest warrant. It is on record that the United States did not provide a valid arrest warrant to either Interpol or Cape Verde and that there is no arrest warrant authorized by any court in Cape Verde that supported the detention of Alex Saab on June 12, 2020. Even though the Attorney-General has no answer to the incurable errors that have characterised the illegal arrest and detention of Alex Saab he has urged the Constitutional Court to overlook them.

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Chukwuma .H. Onwuemene LL.M, LL.B, BL  
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Olakitan Bolu-Agbaje LL.B, B.L  
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Oluwaseun Abraham Apelegan LL.B, B.L  
Temitayo Ifeoluwa Odeleye LL.B, B.L

*Justicia social para todos*

We are convinced that the Constitutional Court will have no difficulty in rejecting the submissions of the Attorney-General as they are not grounded in law. More so, that it is trite law that a court is under a legal obligation to nullify the arrest or detention of any criminal suspect or political detainee carried out outside the ambit of the enabling law. In *Singh v Delhi* 16 Sup. Ct. Journal 326 it was held : "This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they consider to be their duty, must strictly and scrupulously observe the forms of rules of the law."

The learned author in Maxwell's Interpretation of Statute, 12th Edition at Pages 251-256 examined the principle to be observed on 'Statutes Encroaching Rights and at Page 251 said:

***"Statutes which encroach on the rights of the subject whether as regards person or property, are subject to a strict construction in the same way as Penal Acts. It is a recognised rule that they should be interpreted if possible so as to respect such rights and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted."***

There are cases in jurisprudence of various countries (including of West Africa) when a clerical mistake or a spelling error of the defendant's name served as a basis for the court to drop charges or for police to release a person. For instance:

1. In *Adegbenro Noah v Attorney-General of the Nigerian Federation* (Suit No ID/33M/90). The detainee, Adegbenro Noah challenged his detention under the State Security (Detention of Persons) Decree No 2 of 1984 at the Lagos State High Court. In justifying the detention of the Applicant the military regime filed a detention order in the name of "Adegbenro Nuah". The Court quashed the detention order and ordered the immediate release of the Applicant on the ground that Adegbenro Noah was not the same person as Adegbenro Nuah.
2. In *Maxwell Okudoh v. Commissioner of Police, Lagos State Police Command* (Suit No:M/32/84) the Applicant was detained at Mushin Police Station in Lagos under Decree 2 of 1984. In his judgment delivered on 30/4/1984 the Judge held that "It is clear that under the above section 1(1) of Decree No. 2 of 1984 that the Chief of Staff Supreme Headquarters can only detain a person for four reasons. In this case, the Chief of Staff has detained for acts prejudicial to public order. Can he do so? I answer that question in the negative. In consequence of the above pronouncements, I hereby order that the applicant, Maxwell Okudoh shall be discharged and released forthwith by the Respondent or whosoever is holding him in custody and such persons shall for the avoidance of doubt include the Chief of Staff, Supreme Headquarters."

3. In *Moses Emerson v Inspector-General of Police* (Nigerian Law of Habeas Corpus Page 266) the 1st respondent's return to the writ indicates that the detainee in this case has been detained for acts prejudicial to "Public Order". This is not in my opinion the same thing as "public security". They are not synonymous." On the basis of the error on the face of the detention order the Court ordered the release of the Applicant from custody.
4. In *Commissioner of Police v Agbaje Nigeria Law of Habeas Corpus page 42*. It was stated by the judge that it is unlawful to detain a person in a police station when the detention order states that he be detained in a civil prison.
5. Hong Kong riot police descended upon a court on 4 November 2019 after the justice department was forced to drop charges against five defendants over a spelling error. The arrestees – aged between 19 and 24 – were charged with possessing explosive substances. However, on the consent to prosecute document, the name of a defendant Yau Kin-wai was wrongly written in English as "Yau Kai-fai." The term "custody" was also missing from the official charge of "possession or custody or under his control" of the explosives. Barrister Douglas Kwok, who represented the defendants, challenged the legitimacy of the document and urged for his clients' release. The five people's charges were dropped after Principal Magistrate Bina Chainrai said the hearing could not continue even if the document were to be amended.

In view of the foregoing, the detention of Alex Saab cannot be justified under the Cape Verdean law and international law. The Attorney-General has admitted that the warrant of arrest is not in the name of Alex Saab but in the name of another person. The Constitutional Court cannot afford to be used by the Attorney-General to justify the illegality of the arrest and detention of Alex Saab. Furthermore, the prayer for the amendment of the incurable defect of the warrant ought to be rejected as the detaining authorities have failed to comply with the provisions of the Constitution and Criminal Code of Cape Verde with respect to arrest and detention of Alex Saab. Having regards to the facts and circumstances of this case the Constitutional Court should not hesitate to reject the illegal prayer of the Attorney-General and order the immediate release of Alex Saab from illegal custody.

FEMI FALANA, SAN, FCI Arb.

