



Law Society of Kenya & 3 others v Attorney General & 2 others; Independent Policing Oversight Authority (Interested Party) (Constitutional Petition E467 of 2021) [2023] KEHC 26888 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E467 OF 2021**

AC MRIMA, J

DECEMBER 15, 2023

BETWEEN

**LAW SOCIETY OF KENYA 1ST PETITIONER
WILSON HASSAN NANDWA 2ND PETITIONER
ELGIVA BWIRE 3RD PETITIONER
SAFARICOM LIMITED 4TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT**

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED PARTY

JUDGMENT

Background:

1. The dispute, subject of this judgment, emanates from the mysterious disappearance of Wilson Hassan Nandwa and Elgiva Bwire the 2nd and 3rd Petitioners herein respectively.
2. A synopsis of what transpired will suffice.



3. Elgiva Bwire was released from Kamiti Maximum Prison on 28th October 2021. He was handed over to his mother by the Anti-Terrorism Police Unit (hereinafter referred to as ‘the ATPU’) in the presence of his Advocate, Wilson Hassan Nandwa.
4. Later that day, at about 4:30pm, the Advocate, Wilson Hassan Nandwa, reported to the Central Police Station the abduction of his client, Elgiva Bwire.
5. On his way home from the office, the Advocate also went missing.
6. In the evening, at about 11:00pm, nine armed men, who identified themselves as Police Officers stormed the residence of the Advocate and inquired the whereabouts of the 3rd Petitioner.
7. The foregoing events resulted in the instant dispute.

The Petition:

8. Through an undated Petition filed together with an application by way of a Chamber Summons dated 2nd November 2021, both supported by the Affidavit of Mercy K. Wambua deposed on a similar date, the Law Society of Kenya, 1st Petitioner herein, sought to claim and vindicate the 2nd and 3rd Petitioners constitutional rights and entitlements.
9. The 1st Petitioner pleaded that from the recount of events of 28th October 2021, police officers were aware of the whereabouts of the 2nd and 3rd Petitioners and the continued detention of the said Petitioners was in breach of their constitutional rights.
10. It was the 1st Petitioner’s case that under Article 25(d) of *the Constitution* the right to habeas corpus shall not be limited.
11. It asserted further that by virtue of Article 29 of *the Constitution*, every person has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause.
12. The 1st Petitioner pleaded that the 2nd and 3rd Petitioners are equal before the law under Article 27 of *the Constitution* and to that end, under Article 49(1)(c) and (f) of *the Constitution*, an arrested person has the right to communicate with the Advocate and other persons whose assistance is necessary and be brought before a Court of law not later than twenty-four hours after being arrested.
13. The 1st Petitioner further posited that by virtue of Article 51(1) of *the Constitution*, a person who is held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights.
14. In reference to Article 1 of the International Convention for The Protection of All Persons from Enforced Disappearance, the 1st Petitioner pleaded that no one shall be subjected to enforced disappearance and no justification may be invoked by the State for enforced disappearance.
15. The 1st Petitioner further pleaded that under Article 2 of International Convention for The Protection of All Persons from Enforced Disappearance, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by groups of persons acting with the authorization of the State.
16. The 1st Petitioner averred that under Article 3 of the International Convention for the protection of All Persons from enforced disappearance, the State has the obligation to take appropriate measures to investigate any acts of enforced disappearance and bring those responsible to justice.



17. On the foregoing factual and legal basis, the Petitioners sought the following reliefs in the application: -
 1. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue a writ of habeas corpus for the production of 2nd and 3rd Petitioners before a Court of Law within 24 hours of the issuance of this Order.
 2. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue a writ of habeas corpus for the production of the 2nd and 3rd Petitioners before a Court of Law within 24 hours of the issuance of the Order.
 3. Spent.
 4. Spent
 5. The Costs of this Application be awarded to the Petitioners to be paid by the 1st-3rd Respondents irrespective of the outcome of the Petition.
18. In the main, the Petitioners sought the following reliefs;
 - a. An order for Habeas Corpus directed to the Respondents to produce the persons and or bodies of the 2nd and 3rd Petitioners.
 - b. An Order of Compensation and reparation for the violation of the fundamental rights of the 2nd and 3rd Petitioner as provided for under *the Constitution*.
 - c. Spent
 - d. A declaration that the right to habeas corpus are guaranteed under Article 25(d) and cannot be limited.
 - e. Costs of the Petition.

The Submissions:

19. The Petitioners filed written submission dated 7th March 2022. They reiterated the contents of their Petition and prayed for the reliefs therein.

The 1st and 3rd Respondents' case:

20. The Attorney General and the Inspector General of Police responded to the Petition through the Replying Affidavit of No.86167 PC Kintosi Kelian, a Police officer attached to the Directorate of Criminal Investigations, deposed to on 4th November 2021.
21. It was his case that on 28th October 2021, Jacinta Kudira Bwire, the mother to the 3rd Petitioner reported a missing person which was recorded in the Occurrence Book as OB No.98/28/10/2021.
22. He deposed that the Jacinta Bwire intimated that their motor vehicle registration No. KCL 726R make Nissan Wingroad was blocked by an unknown vehicle at Globe Cinema Round about and the 3rd Petitioner and her grand-son Stephen Allan Wangula kidnapped.
23. He deposed that immediately after recording statements of Jacinta Kudira Bwire and that of her driver, John Musumba Oliache, they commenced investigations.
24. He deposed that according to the statement of Jacinta Kudira Bwire, the 3rd Petitioner parted ways with his lawyer, the 2nd Petitioner herein, at the Anti-Terror Police Unit Headquarters.



25. He deposed that Stephen Allan Wangula was dropped off somewhere along Kangundo road.
26. He deposed further that on 29th October 2021 one Elmiqda Hassan Nandwa filed a report of a missing person, the 2nd Petitioner herein, vide OB No 18/29/10/2021.
27. It was his case that on 29th October 2021 the investigation team went to National Police Service Integrated Command Control and Communicating Centre to trial the movement of motor vehicle KSL 726R.
28. He deposed that they established that the said vehicle left the ATPU Headquarters with four occupants namely; John Musumba, Jacinta Kudira, Elgiva Bwire and Stephen Allan Wangila.
29. In reference to the statement of Douglas Masoka, he deposed that the car drove to 5th Ngong Avenue where they met the 2nd Petitioner. He deposed that at the 5th Ngong Avenue Suites, the 2nd Petitioner directed the car to the Parking lot of 5th Ngong Avenue Suites.
30. He deposed that one Douglas Masoka, a taxi driver, saw the 2nd Petitioner board a taxi motor vehicle registration No. KCW 620V make Suzuki Alto.
31. He deposed that immediately after parking the taxi he was in, the 2nd Petitioner alighted and went to where the vehicle KCL 726R was parked and immediately came back to the taxi motor vehicle KCW 620V with a slim dark man.
32. He deposed that according the statement, 2nd Petitioner entered the co-driver's seat and the other man in the back seat whereafter the car sped off to Ngong Road.
33. He deposed that the driver of motor vehicle registration No. KCW 620V, one Titus Mwenda Muia confirmed to have received a request from a client namely, Hassan via UBER online taxi service who wanted to be picked from Lancet next to 5th Ngong Avenue Suites but later changed the pick-up point to the 5th Ngong Avenue Suites.
34. He deposed that the driver, Titus Mwenda, then dropped the two passengers at Kingstone Apartments.
35. It was his case that on 8th November 2021, the 3rd Respondent learnt from the social media that the 2nd Petitioner who had been reported missing was found alive in Mwingi.
36. He deposed that on 9th November 2021, the 3rd Respondent requested the 2nd Petitioner to report to Central Police Station for purposes of shedding some light on the circumstances of his disappearance which to date has not honoured the summons.
37. He deposed that whenever a missing person is reported inquiry files are opened and the matters are pending investigation.
38. He deposed that they are neither detaining nor retaining the 2nd or 3rd Petitioners and as such the Petition and the application are bad in law and fit for dismissal since they are premised on conjecture and guesswork on reported disappearance.
39. It was his case that the Petitioners have wrongly invoked the powers of this Honourable Court to issue habeas corpus since such writ maybe sued as means of obtaining evidence on the whereabouts of a person or as a means of finding out who specifically caused or abducted the disappearance of a certain person.
40. He further deposed that the 2nd Petitioner has since been found and, therefore, the substratum of the Petition has been overtaken by events.



41. In urging Court to dismiss the Petition with costs, it was his case that that the Petitioner had not demonstrated violation of any constitutional provision.

The Submissions:

42. The 1st and 3rd Respondents urged their case further through written submissions dated 5th July 2022.
43. It was their case that the Respondents cannot be compelled to produce what is not in their custody. To that end, they referred to *Abdinasir Ahmed Mohammed -vs- Republic (2015) eKLR* where it was observed;

..... A writ of habeas corpus shall be enforced when the Applicant demonstrates that the subject is in the unlawful custody of the Respondent...
44. It was the 1st and 3rd Respondents' case that the Petitioners had not met the requisite threshold for grant of the writ of habeas corpus. They submitted that no evidence was presented before the Court.
45. They submitted further that when the report of missing person was made, the police took steps to investigate the crime, however, when the 1st Petitioner reappeared in Mwingi town, he did not cooperate with the Police.
46. In the circumstances, the 1st and 3rd Respondents submitted that investigations could not be carried out. It urged the Court to dismiss the Petition with costs.

The 2nd & 4th Respondents' cases:

47. The Director of Public Prosecutions, 2nd Respondent herein, did not take part in the instant Petition.
48. The 4th Respondent, Safaricom Limited, was discharged from these proceedings by consent of the parties and Order of this Court of 11th November 2021.

The Interested Party's case:

49. Independent Policing Oversight Authority (hereinafter 'IPOA') responded to the Petition and the application through written submissions dated 3rd March 2022.
50. In submitting on the issue whether IPOA has the mandate to investigate the alleged disappearance of the 2nd and 3rd Petitioners, it was its case that whereas Section 5 as read with Section 6 of the *Independent Policing Oversight Authority Act*, mandates the Authority to investigate any criminal conduct of a member of National Police Service, its investigative powers are limited by Section 26 which provides as follows;

The authority shall not investigate any matter which is the subject of proceedings before a Court of law or judicial tribunal.
51. IPOA submitted that the foregoing is couched in mandatory terms which means that the intention of Parliament was to bar the Interested Party from investigation cases which are subject to Court proceedings.
52. Deriving from the foregoing, the Interested Party submitted that, at the time the application and the Petition were filed, it had neither received any complaint on disappearance of the 2nd and 3rd Petitioners nor had it commenced investigations on its own motion.



53. It, therefore, was its case that whereas enforced disappearance is a grave issue, IPOA was automatically estopped from commencing investigations of the alleged disappearance of the 2nd and 3rd Petitioners.
54. It stated that it has no mandate to investigate the present matter until such time that the dispute before this Court is finalized or withdrawn.

Analysis:

55. The Court has keenly read and understood the substance of the instant Petition and the responses. It has also perused the parties' written submissions. As a result, the following issues are for determination:
 - a. The nature and scope of the right to habeas corpus;
 - b. Whether the 2nd and 3rd Petitioners were arrested by the police and if so, whether they were released;
 - c. Reliefs, if any
56. The issues will be considered in seriatim.

a. The nature and scope of the right to habeas corpus:

57. The right to an order of habeas corpus can be described as the greatest guarantee of human freedom ever devised by human beings. Its importance rests on it being the absolute safeguard against arbitrary and lawless State action on its citizens or aliens lawfully within its borders.
58. Thomas Jefferson was an American Founding Father who was the Principal author of the Declaration of Independence and later served as the Third President of the United State of America from 1801 to 1809. He died on 4th July 1826. His Excellency once said the following about habeas corpus:
.... The habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume...
59. Further, under Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, States are obligated to take appropriate measures to investigate any acts of enforced disappearance and bring those responsible to justice.
60. Closer home, the people of Kenya in 2010 gave themselves the right to an order of habeas corpus as one of the rights in the Bill of Rights that cannot be limited (Article 25 of *the Constitution*). This was a departure from the pre-2010 position where the right to habeas corpus was only provided for under a statute, (Section 389 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya) under directions in the nature of habeas corpus.
61. Having been firmly imbedded in *the Constitution*, Article 51(2) thereof provides that: -
 - A person who is detained or held in custody is entitled to petition for an order of habeas corpus.



62. My brother Hon. Muriithi, J. in *Masoud Salim Hemed & Another vs. Director of Public Prosecutions & 3 Others* (2014) eKLR rightly so discussed the scope of the right to habeas corpus in paragraphs 33, 34 and 35 of his judgment. The Learned Judge expressed himself thus: -

33. In Philippines case of *MA. Estrelita D. Martinez v. Director General and Ors.* GR No. 153795 of 17th August 2006 the Supreme Court of the Philippines set out the object of habeas corpus as follows: -

Habeas corpus generally applies to ‘all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto.

Said this Court in another case: -

The ultimate purpose of the writ of habeas corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority. – (*Ngaya-an v. Balweg*, 200SCRA 149, 154-5, August 5, 1991 per Jaris, J)’

If the Respondents are neither detaining nor retaining the applicant or the person on whose behalf the petition for habeas corpus has been filed, then it should be dismissed. This Court has ruled that this remedy has one objective – to inquire into the cause of detention of a person:

The purpose of the writ is to determine whether a person is being illegally deprived of his liberty. If the inquiry reveals the detention is illegal, the court orders the release of the person. If, however, the detention is proven lawful, then the habeas corpus proceedings terminate. The use of habeas corpus is thus very limited.- (*Alejano v. Cabuay* 468 SCRA 188, 200, August 25 2005 per Carpio, J.)’

Habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person. When the respondents making a return of the writ state that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary.”

34. Custody is crucial in habeas corpus case, and even where physical custody is lost by voluntary act of the respondents the right to habeas corpus will be affected. In *Mariam Mohamed and Anor. Commissioner of Police and Anor.* (2007) eKLR, Ojwang’ J. (as he then was) considered an application for habeas corpus in which the subject was admittedly taken out of jurisdiction of the Kenyan Courts and held: -

It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is no longer within their power to produce the subject before Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such that a Court of law is not to make an order in vain. Courts’ orders are focused, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, not in control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of habeas corpus. It follows that the applicants’ Chamber Summons of 18th October, 2007 is either overtaken by events, or would have to remain in abeyance, until the subject is physically in the custody of the respondents.”

35. However, as argued in the Article ‘The “Custody” Requirement for Habeas Corpus – *Allen v. United States, Martin v. Virginia*’, (1966) Vol. 26 *Maryland Law Review* 79, an order of habeas



corpus is available for persons in custody, even though it be legal – including parole and bail – as opposed to physical custody.

63. It, therefore, unveils itself that the right in the nature of an order of habeas corpus can only be enforced when it is proved that a victim is in the legal or otherwise custody of the State or State agencies. In the event the issue of custody is not firmly established then the matter falls under another realm; either on further police investigations or inquest proceedings.
64. Habeas corpus, hence, deals with the production of a person who is proved to be in the custody of the police or any State agency or is held under the instructions of the State or its agencies. It does not deal with matters of compensation or reparation for the violation of any fundamental rights resulting from the illegal incarceration. The latter lies in separate legal proceedings.
65. This hence brings the Court to the second issue.

b. Whether the 2nd and 3rd Petitioners were arrested by the Police and if so, whether they were released:

66. It is on record that by the time this matter was set for judgment, the 2nd Petitioner had been found. The 3rd Petitioner was yet.
67. Since it was alleged that the 2nd Petitioner was the Counsel for the 3rd Petitioner and that the 2nd Petitioner was arrested on account of his representation of the 3rd Petitioner, and the 2nd Petitioner eventually surfaced, then in order to resolve this matter further, it will be imperative for the 2nd Petitioner herein to file an Affidavit on his whereabouts during the time when it was alleged that he was arrested and detained by the Police.
68. The 2nd Petitioner's disposition will aid this Court in two ways. First, in weighing the position taken by the 3rd Respondent herein on the 2nd and 3rd Petitioners, and second, as a basis of assisting the Court in dealing with the aspect of reliefs if the Petition is eventually successful.
69. At this point, this Court shall discharge the Interested Party, IPOA, on the basis of Section 26 of the [*Independent Policing Oversight Authority Act*](#).
70. It is further on record that the 4th Respondent herein, Safaricom Limited, was wholly discharged by an order of this Court from the instant proceedings.
71. Therefore, the determination of this issue as well as the reliefs, if any, shall await further directions of this Court.
72. Consequently, the following orders do hereby issue:
 - a. A Declaration hereby issue that Article 51(2) of [*the Constitution*](#) as read with Article 25(d) of [*the Constitution*](#) grants a right to any person who is detained or held in custody by the State whether by himself, herself and/or his/her representatives to petition for an order of habeas corpus and that such right cannot be limited in any manner.
 - b. A Declaration hereby issue that Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance obligates State parties to investigate any acts of enforced disappearance of persons within its borders and bring those culpable to justice.
 - c. The 2nd Petitioner herein shall within 14 days of this order file and serve an Affidavit on his whereabouts during the period it was alleged that he had been arrested and detained by the Police.



- d. Once served, the 1st, 2nd and 3rd Respondents shall be at liberty to file and serve their respective responses thereto within 14 days of service.
- e. The matter shall, on a date to issue, be placed before the Presiding Judge of the Constitutional and Human Rights Division for further orders.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the Petitioners.

N/A for the 1st & 3rd Respondents.

N/A Learned Counsel for the 2nd Respondent.

Miss Mbugua for the Interested Party

Chemosop/Duke – Court Assistants.

