



Said & another v Attorney General & 3 others; Haki Africa & 2 others (Interested Parties) (Petition E063 of 2021) [2022] KEHC 313 (KLR) (22 April 2022) (Judgment)

Neutral citation: [2022] KEHC 313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E063 OF 2021
JM MATIVO, J
APRIL 22, 2022**

BETWEEN

ABDULRAHMAN SAID 1ST PETITIONER

MOHMED ABUBAKAR SAID 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

SAFARICOM LIMITED 4TH RESPONDENT

AND

HAKI AFRICA INTERESTED PARTY

INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED PARTY

KENYA NATIONAL COMMISSION FOR HUMAN RIGHTS INTERESTED PARTY

JUDGMENT

1. On 14th October 2021, 22-year-old Mohamed Abubakar Said, (the 2nd Petitioner), herein after referred to as the victim, a student at the Umma University described as a resourceful promising Kenyan and a budding poet who used to offer his free time to teach young children in various mosques and leading prayers at the Al Azhar & Ibrahim Mosques within Mombasa Town disappeared mysteriously. His disappearance was reported at the Central Police Station, Mombasa, vide OB No.16 of 15/10/2021. Subsequently, eye witness accounts disclosed later that the victim was forcefully arrested while on his



- way from Al Azhar Mosque at seven up area within Majengo area towards Ganjoni. It is alleged that he was assaulted by armed men in civilian clothes who forced him into a vehicle and speed off to an unknown destination.
2. On 15th October 2021 at around 2.13pm, Haki Africa (the 3rd Interested Party) issued a missing person alert intimating the registration number plates of the vehicles used in arresting the victim as KCM 694 N, KCM 697N and KCF 659 U among others. The Petitioners aver that owing Police inaction, the victim's family wrote to the National Police Service-Internal Affairs Unit & the Director of Criminal Investigations on 27th & 29th October 2021 protesting the inaction, but the Police have not taken any measures.
 3. The Petitioners contend that the police inaction suggests complicity on the said abduction/forced disappearance, hence, the need for redress from this court under Articles 1(2), 2, 10, 20, 21, 23, 24, 25(d), 28, 29, 48, 49(1), 50, 51 and 47 of *the Constitution*, particularly, the Right to Habeas Corpus, Right to Freedom not to be denied arbitrarily, Protection of the Bill of Rights and Right to protection by the state officers. As a consequence, the Petitioners pray for an order that the Inspector General of the National Police Service produces the body of the said Mohamed Abubakar Said before this court together with the original of any Warrant or Order of detention. They also pray for a declaration that the right to Habeas Corpus guaranteed under Article 25 (d) of *the Constitution* cannot be limited and an order of Habeas Corpus directed to the 1st, 2nd and 3rd Respondents to produce the victim. Also, they pray for compensation for violation of the 2nd Petitioner's fundamental rights plus costs of the Petition. Prayer (b) of the Petition is spent because the 4th Respondent supplied the information sought.
 4. The 1st and 3rd Respondents filed the undated Replying affidavit of IP Leonard Namutali on 16th November 2021. Their case as I glean it from the said affidavit is that on 15th October 2021 a report was made at the Central Police Station by a One Twariq accompanied by Abdalla Abubakar to the effect that the victim went missing on 15th October 2021 at around 1600 hours, an inquiry file was opened and a signal of missing person was dispatched requesting all Police Stations within the Republic to assist in tracing him. However, the said Twariq and Abdala Abubakar willfully failed to disclose the details of the motor vehicles and details of the exact location despite persistent requests, hence, the Petitioners are guilty of material non-disclosure.
 5. Also, they contend that a search at the National Transport Safety Authority revealed that the said vehicles were not registered at the NTSA data base, and that investigations are ongoing but no one has recorded a statement despite persistent calls for eye witnesses to furnish the police with useful information. Further, no report exists to warrant fresh investigations nor are the Respondents detaining the subject. Lastly, the Petitioners should be compelled to avail witnesses to assist in the ongoing investigations.
 6. The 2nd Respondent (the DPP) filed grounds of opposition dated 18th November 2021 stating no evidence was tendered to show how the DPP violated the law or to show that the subject was arrested nor has the Petitioner identified the officers who arrested the subject. Further, that the application discloses no cause of action and that the application is made in bad faith.
 7. The 4th Respondent vide the Replying Affidavit of a one Daniel Mwenja Ndaba dated 14th December 2021 filed in compliance with the court order issued on 23rd November 2021 supplied the victims phone call records.
 8. The 1st Interested Party was discharged from these proceedings on 23rd November 2021. On behalf of the 2nd Interested Party is the Replying affidavit of Victor Kamau dated 4th December 2021, its Deputy



Director, Redress and Legal Services pleading that section 30 of the *Kenya National Commission on Human Rights Act*¹ bars it from investigating any matter before a court or any other public body.

9. The 3rd Interested Party (Haki Africa) filed the affidavit of Hussein Khalid, its Executive Director dated 19th November 2021. It's case as I distil it from the said affidavit is that on 15th October 2021 it received a complaint that the victim had been abducted by individuals who were armed and identified themselves as police officers and bundled into motor vehicle registration number KCM 697N. Further, a report was made to the Police and the incident was publicized in the media but no action has been taken by the Respondents. On 9th November 2021 the 3rd Respondent printed Posters stating that the victim was wanted and offered an award of Kshs. 10,000,000/= to anyone who presented him. The 3rd Interested Party also states that between January and October 2021, it recorded 42 cases of disappearance while in 2020 it recorded 18 cases and all were arrested on alleged anti-terror operations. Further, that from available evidence, this is not normal kidnapping.
10. In his further affidavit dated 22nd November 2021, the 1st Petitioner essentially reiterated the contents of his earlier affidavit and disputed the averments in the and 3rd Respondents' Replying affidavit.
11. All the parties made oral submissions. Counsel for the Petitioners submitted that the 3rd Respondent has failed to perform its constitutional and statutory duties by failing to undertake investigations. He submitted that the material before the court confirms extra-judicial arrest or forced disappearance. He argued that details of the vehicles involved were provided to the Police and at the site there are CCTV cameras which could have assisted in the investigations. He argued that the DPP has a constitutional duty under Article 157(4) to order investigations where the Police have been inactive. He argued that video and audio recordings were presented to the Police and urged the court to take note of the high rate of cases of forced disappearances. Additionally, he submitted that the Police were supplied with sufficient information to initiate investigations. He urged the court to find that the Respondents are in contempt of this court's order. Lastly, he submitted that the phone call data placed the subject within the abduction area.
12. The 3rd Interested Party supported the Petition and argued that the 1st, 2nd and 3rd Respondents have a duty to protect the citizens. It argued that the kidnappers identified themselves as Police officers.
13. The 1st and 3rd Respondents' counsel acknowledged that a report was made at the Police Station but argued that a signal was transmitted to all Police Stations notifying them of a missing person. He submitted that the subject is not in police custody and a search at the National Transport and Safety Authority revealed that the alleged vehicles were not registered and that investigations are still ongoing. Additionally, he argued that the Police have not refused to record statements. As for the alleged contempt, he submitted that the 1st and 2nd Respondents have demonstrated that the victim is not in their custody. Lastly, he cited *Abmed Nassir Ahmed Mohamed v Republic*² and *Samuel W & Another v Republic*³ in support of the proposition that an applicant must demonstrate the subject is in the Respondents' unlawful custody for a writ of *habeas corpus* to issue.
14. Counsel for the DPP submitted that no correspondence was copied to the ODPP nor was it reported to the DPP that the Police had refused to investigate the matter. She submitted that for a writ of *habeas corpus* to issue, it must be established that the Petitioner is in custody of the Respondent and that the illegality of the detention must be proved. She submitted that failure by the Police to investigate ought

¹ Act No. 14 of 2011.

² {2015} e KLR.

³ {2017} e KLR.



to have been brought to their attention. She argued that under Article 157(10) of *the Constitution*, the ODPP cannot receive direction from any person. She cited *Law Society of Kenya v Attorney General & others*⁴ and submitted that the burden of prove in an application for habeas corpus lies with the Petitioner and that the alleged witnesses have not filed witness statements or affidavits and there is no basis for the DPP to be held in contempt.

15. On behalf of Safaricom, it was submitted that they had already complied with prayer (2) of the Petition since they had already supplied the information sought so they ought to be released from these proceedings. Counsel for the Kenya National Human Rights Commission relied on their affidavit which essentially states that the law prohibits the Commission from investing matters pending in court.
16. First, I will address the question whether the Petitioners have demonstrated failure by the Police to investigate the subject's disappearance. It is useful to underscore that disposition of constitutional issues must be formidable in terms of some statutory and constitutional principles that transcend the case at hand. This is because court decisions cannot be ad hoc, but they must be justified and perceived as justifiable on more general grounds reflected in previous case law.⁵ In interpreting *the Constitution*, the court should attach such meaning and interpretation that meets the purpose of guaranteeing constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.
17. The functions of the National Police Service are enumerated in section 24 of the *National Police Service Act*⁶ (the Act). Its functions include (e) investigation of crimes; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
18. Section 35 of the Act provides the functions of the Directorate of Criminal Investigations which include—undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.
19. The above provisions leave no doubt that the police are legally obligated, once they witness or are informed of a crime, to investigate the offence. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These obligations arise from *the Constitution* and are affirmed by the Act. In terms of the above provisions, the Police are statutorily obligated to investigate crimes. Any other answer would give rise to indignation.
20. Simply put, investigation of the crime is a solemn duty imposed by law on the police. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the courts to record convictions but to bring out the real unembellished truth. Our courts have insisted on the observance of certain principles – a code of investigation ethics – to be observed by the investigating officers. Observance of these rules is essential to protect life and liberty of the people and create public confidence in the criminal investigatory process.

⁴ Pet No. 311 of 2016.

⁵ See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Harvard Law Review P. 1.

⁶ Act No. 11A of 2011.



21. Any principle for liability of the police in their dealings with individual members of the public should seek to strike a measured and careful balance between the interests of the effective administration of policing and the need to protect vulnerable individuals from serious harm. In my view, the time has come to recognize the legal duty of the police force to take action to protect a particular individual whose life or safety is, to the knowledge of the Police, threatened by someone whose actions the police are able to restrain.
22. As Lord Parker CJ said in *Rice v Connolly*,⁷ “it is the duty of a police constable “to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury.” The duty is one which any member of the public affected by a threat of breach of the peace, whether by violence to the person or violence to property, is entitled to call on the Police to perform. In short, it is a duty owed to the public at large for the prevention of violence and disorder.
23. In determining when the Police have a positive obligation to take preventative measures to protect an individual whose life is at risk from the criminal acts of another, it must be established to the court’s satisfaction that the Police knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.
24. The critical question of fact is whether the police, making a reasonable and informed judgment at the time, should have appreciated that there was a real and immediate risk to the life of the victim. The test is if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed. Fundamentally, a police’s position is different from that of ordinary citizens in that they cannot simply walk away from a criminal offence that has been reported to them or has been brought to their attention. As was held in *S v Williams and Others*:⁸

“ Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime ... a police officer is in a different position as it is his legal duty to bring criminals to book.”
25. The legislative intent in that the investigating officer records statements of persons acquainted with the facts of the case promptly to preserve the best evidence and to check any manipulation on the part of witnesses. It is presumed that spontaneity ensures the truth of details of incident and participants therein and delay generally occasions manipulations and colouring. Therefore, the Police are required to record statements of persons acquainted with the facts promptly and failure to do so is a serious matter. It is prudent for an investigator to give precedent to the examination of witnesses who are easily available at scene of crime in natural order of priority. Delay in recording statements may not by itself amount to be a serious infirmity but may assume such a character if there are concomitant circumstances to suggest the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case.
26. It is the duty of the Police to take into possession any documents or evidence of potential witnesses which has a bearing on the case. It is the duty of the Police to ensure that the law is observed not only in letter but in spirit during the investigations and to ensure that they observe the provisions of law

⁷ {1996} 2 QB 414, p 419.

⁸ 1998 (2) SACR 191 (SCA), citing *Booyesen, Justice, in S v Barnes and Another* 1990 (2) SACR 485 (N).



scrupulously and do not exceed their powers. It is the duty of the Police to investigate the case with utmost impartiality and fairness, both to the suspect as well as to the aggrieved person. If the police adopt an impartial attitude, it will further the cause of justice. If police adopt partial attitude and in conducting investigation or failing to undertake investigations, malice and bad faith will apparently be reflected.

27. There is no dispute that a report was made to the police about the alleged disappearance. Several contradictions and inconsistencies are evident in the version presented by the Police in this case. A reading of the Replied affidavit of IP Namutali shows that at paragraph 5 he avers on oath that Twariq and Abdalla Abubakar knowingly failed to disclose details of the motor vehicles and details of the exact location despite persistent request. However, in a clear contradiction, at paragraph 7, barely one paragraph away, IP Namutali avers on oath that he undertook a search at the National Transport and Safety Authority and found that the vehicles were not registered. He implies that he learnt about the vehicles after he was served with court papers, yet the report was made at the Police Station on 15th October 2021 and there is nothing to show he made any efforts to find out the details of the vehicles used.
28. IP Namutali also claims that no one recorded a Statement. This account is incredible considering that a report had already been made at the station and recorded in the OB. One wonders why the Police made no efforts to record statements from the two persons who reported. A more glaring inconsistency is to be found at paragraphs 8 and 9 of IP Namutali's affidavit. Whereas at paragraph 8 he avers that the investigations are ongoing, at paragraph 9 as if speaking from both sides on his mouth he avers that no complaint exists to warrant fresh investigations. The 1st and 3rd Respondent cannot purport to say there are ongoing investigations on one hand, then, state on oath that there is no report to warrant fresh investigations.
29. The court's duty is to determine whether there were contradictions and if so, whether they are so material that the court ought to reject the evidence. The test is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will only ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.
30. The question is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the 1st and 3rd Respondents case. As was said in *David Ojeabuo vs Federal Republic of Nigeria*⁹ "contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."
31. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.¹⁰ It is not every trifling inconsistency in the evidence of a witness that is fatal to its case. Its only when such inconsistencies or contradictions are

⁹ {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

¹⁰ See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251.



substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.¹¹

32. The trial court is required to weigh all the evidence and consider the merits and demerits, having done so, it decides whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence. The principle in civil cases is that the burden of proof is established on a balance of probability. To me, the cited inconsistencies are not trivial, but they are substantial and material in that they go deep into the heart of the dispute. They point to untruthfulness on the part of the Police.
33. The other important point to note is that weeks after the report was made, on 09th November 2021, the DCI circulated a notice portraying photographs of a person they described as Muhammad Abubakar alia Minishawary describing him “wanted, armed and dangerous” and placing a bounty of Kshs. 10,000,000/= . The Petitioners construe the said notice as a coverup.
34. A report was made to the Police. They claim that the vehicles implicated are not registered in the NTSA data base. One would have expected further investigations to establish the source of the “fake” number plates and who was using them. It was alleged the abductors were armed and described themselves as Police Officers. This revelation is the more reason why the Police ought to have come out and clear the name of the Police Force by undertaking extensive and thorough investigations. The fact that the Police have been implicated is the more reason why investigations ought to have been undertaken. But even more important, the fact that a life and liberty of a citizen is at stake should have been the more reason why the police ought to have left no stone untouched and unearth the truth.
35. Flowing from the foregoing discussion, it is my finding that the tests discussed in paragraph 23 and 24 above have been met in this case. If the police force had not negligently downgraded the urgency of the report, on the facts as they are known at present, it is probable that the victim would have been traced. The police have been empowered to protect the public from harm. This is the essential and critical obligation of the police force. I have no difficulty concluding that the Petitioners have established grave dereliction of duty on the part of the Police. The general rule is that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional. I shall consider, and grant the appropriate remedy on the issue under consideration later.
36. Next, I will address the question whether the Petitioners have demonstrated the elements of enforced disappearance. Unfortunately, the parties gave this pertinent issue a wide berth. A useful starting point in addressing this distressing issue is to recall that enforced disappearance has been characterized as the deprivation of a person’s liberty by state authorities, followed by the absence of or refusal to give information on the fate and whereabouts of that person or the refusal to acknowledge that deprivation of freedom.¹²
37. Diverse international instruments as well as international jurisprudence and doctrines are uniform in defining enforced disappearance and its constituent elements. Enforced disappearance, considered both as a criminal offense as well as a serious violation of human rights, is a complex crime, which

¹¹ See *Theophilus vs State* {1996} 1 nwlr (Pt.423) 139.

¹² See, for example, Resolution No. 33/173, “Disappeared persons”, of the General Assembly of the United Nations, 20 December 1978 (Para.s 2 and 3 of the Considerations); Report of the IACHR on its Activities in Dominican Republic, OAS/Ser.L/V/II.13, doc. 14. 15 October 1965, Chapter IV, “Cases of disappeared persons”; Annual Report of the Inter-American Commission on Human Rights 1971, OAS/Ser.L/V/II.27, Doc. 11 rev., 6 March 1972, Part III “Petitions and Claims”, Petition No. 1701, Argentina; and United Nations Human Rights Committee, Views of 29 March 1982, Communication No. 30/1978, Eduardo Bleier v. Uruguay and Views of 21 July 1983, Communication No. 107/1981, Elena Quinteros and M.C. Almeida de Quinteros v. Uruguay



involves the cumulative presence of two behaviours: the deprivation of liberty by state agents or individuals acting with the authorization, support or acquiescence of the state; and the refusal to acknowledge the deprivation of liberty of or the concealment of the fate or whereabouts of the disappeared person.

38. The elements which characterize enforced disappearance are:- (a) deprivation of liberty against the will of the person concerned, (c) Involvement of governmental officials, at least indirectly by acquiescence; (c) Refusal to disclose the fate and whereabouts of the person concerned.”¹³ Enforced disappearance starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention.
39. Enforced disappearance of people is one of the most odious violations of human rights. The disappeared are stripped of all their rights and placed, defenceless, at the mercy of their victimizers, with no legal protection. Its practice causes profound suffering to the family members and friends of the disappeared: the never-ending wait for their return and the total uncertainty of what really happened to them and their location constantly torments their parents, partners and children. It is considered a crime under international law, and, therefore, state authorities have the duty to investigate, prosecute and punish the perpetrators and other participants.¹⁴ To sum it all, it is the worst of all violations as emphasised in the above excerpt: -

“The phenomenon of enforced disappearances [...] is the worst of all violations of human rights. It is certainly a challenge to the very concept of human rights, denial of the right for humans to have an existence, an identity. Enforced disappearance transforms humans into non-beings. It is the ultimate corruption, abuse of power that allows those responsible to transform law and order into something ridiculous and to commit heinous crimes.”¹⁵

40. From the middle of the 1960s, the Inter-American Commission on Human Rights started to issue warnings regarding this serious practice in a number of countries in the region. In 1976, the Commission stated that: -

“[t]here have already been many cases recorded of ‘missing persons’, that is, persons who according to witnesses and other evidence have been detained by military or police authorities but whose detention is denied and whose location is unknown. Added to the illegal deprivation of freedom in these instances is the anguish of relatives and friends who do not know whether the missing persons are dead or alive and who are unable to avail themselves of the remedies established under law or to lend them material and moral assistance. [...] The status of ‘missing’ seems to be a comfortable expedient to avoid application of the legal provisions established for the defense of personal freedom, physical security, dignity and human life itself. In practice this procedure nullifies the legal standards

¹³ “General Comments on the *Declaration on the Protection of All Persons from Enforced Disappearance of 15 January 1996*”, in Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN. 4/1996/38, para. 55.

¹⁴ Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - A Practitioners Guide © Copyright International Commission of Jurists, 2015.

¹⁵ Niall MacDermot, Secretary General of the International Commission of Jurists (1970-1990).



established in recent years in some countries to avoid illegal detentions and the use of physical and psychological duress against persons detained.”¹⁶

41. The Commission stated that “[t]his procedure is cruel and inhuman. As experience shows, a ‘disappearance’ not only constitutes an arbitrary deprivation of freedom but also represents serious danger to the personal integrity, safety and life of the victim. It is, moreover, a true form of torture for family and friends, owing to the uncertainty about their fate and the impossibility of providing them with legal, moral and material assistance.”¹⁷
42. The practice of disappearances, in addition to directly violating many provisions of the Bill of Rights constitutes a radical breach of *the Constitution* in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of our Constitution. Enforced or involuntary disappearances constitute the most comprehensive denial of human rights in our time, bringing boundless agony to the victims, ruinous consequences to the families, both socially and psychologically, and moral havoc to the societies in which they occur.
43. Enforced disappearance of persons is a multi-offensive crime as it affects physical liberty, due process, the right to personal integrity, recognition of legal personality and, the right to effective judicial protection. The validity of these rights is absolute. Their protection is regulated under the international human rights law and international humanitarian law. Under our Constitution, these rights are non-derogable. Enforced disappearance is an attack on various fundamental rights. In addition to violating freedom of movement, it hinders access to the legal remedies designed to protect the violated rights, breaching the right to appear before a court in order to decide, as soon as possible, on the legality of detention.
44. Enforced disappearance is a “multiple attack on fundamental rights of human beings in that it involves the denial of countless legal and social acts, from the simplest and most personal to that of recognizing the victim’s death.”¹⁸ How does the family know that their kin is alive or dead. The definition of enforced disappearance seeks the protection of a multiplicity of legal rights, such as the right to life, liberty and security of the person, the prohibition of cruel, inhuman or degrading acts, the right not to be subjected to arbitrary arrest, detention or exile, the right to a fair trial and due process, the right to recognition of legal personality before the law and the right to humane treatment in detention, among others.”¹⁹
45. The rights to life, liberty and personal security, are the very lifeblood and foundation of all human rights. For this reason, their validity must be respected unreservedly, without it being morally acceptable to stipulate exceptions or justify their conditioning or limitation. Their respect and guarantees for their free and full exercise are a responsibility that falls on the State.
46. From the material before me, it is clear that the victim was abducted by persons claiming to be Police Officers on 14th October 2021. It is my finding that the facts presented in this case demonstrate all the elements of enforced disappearance. As earlier concluded, the Police failed, refused and or neglected to investigate the alleged abduction. The attempt by the DCI to publish a notice describing the

¹⁶ Annual Report of the Inter-American Commission on Human Rights 1976, OAS/Ser.L/VII.40, doc. 5 corr.1, 10 March 1977(only available in Spanish, free translation).

¹⁷ Annual Report of the Inter-American Commission on Human Rights 1977, OAS/Ser.L/V/II.43, Doc. 21 corr. 1, 20 April 1978.

¹⁸ Judgment C-317/02 of 2 May 2002, Exp. D-3744, Lawsuit of unconstitutionality against Article 165 (partial) of Law 599 2000 “Whereby the Penal Code is enacted.”

¹⁹ Ibid.



victim as armed and dangerous, coming as it did, weeks after a report was made to the Police on the alleged abduction coupled with the failure by the Police to investigate the matter suggests that the said notice was issued in bad faith to cover the failure to investigate. The serious allegations of the forceful abduction of a citizen by persons claiming to be Police Officers must be investigated and appropriate action taken as the law permits.

47. I now turn to the plea to this court to issue the writ of habeas corpus. A writ of habeas corpus, Latin for 'you have the body,' is a plea filed by an imprisoned person or filed on his behalf asking the court to determine whether the imprisonment is lawful and justified. An applicant must prove beyond a reasonable doubt that he is being falsely imprisoned and that the imprisonment is in violation of his constitutional rights. For a judge to grant the writ of habeas corpus, the prisoner must prove a violation. In an interesting shift, if a judge does find sufficient evidence that a person is being unlawfully detained, the burden of proof is switched to the imprisoning person or state. To that end, the state must satisfy the burden of proof to justify the imprisonment.
48. The writ of habeas corpus ad sub-jucendum has been called by Sir William Holdsworth as “the most effectual protector of the liberty of the subject that any legal system has ever devised.” It is the chief method of securing a peremptory determination whether a person is lawfully detained in custody, and if not, provides for his immediate liberation. In its jurisdiction to issue writs of habeas corpus, this court has an obligation to protect a citizen’s right under *the Constitution* to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected.
49. As was held by the East African Court of Appeal in *Grace Struat Ibringira & others v Uganda*,²⁰ “the writ of habeas corpus is a writ of right granted ex debito justitiae, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained.... The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the humblest citizen ... may test the action of the executive government no matter how high the position of the person who ordered the detention.”
50. A similar view was taken by the Supreme Court of the Philippines in *MA Estrdita D. Mortinex v Director General and Others*²¹ cited in *Masoud Salim & Another v Director of Public Prosecution & 3 others*²² thus: “*habeas corpus* 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 ... 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.” In the instant case, save for the allegation that the abductors introduced themselves as Police officers, there is no evidence to suggest that the victim is held in custody, hence, the writ of habeas corpus may not be appropriate.
51. Lastly, the Petitioners pray for compensation and reparation for violation of fundamental rights of the 1st Petitioner on behalf of the family of the victim. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy

²⁰ {1966} E A 445.

²¹ GR No.153795.

²² {2014} e KLR.



in the form of compensation in monetary terms. However, despite the prayer for compensation and reparation, the submissions on the issue were thin if not non-existent.

Conclusion

52. Flowing from my analysis of the facts, the law and authorities discussed above and the conclusions made on the issues addressed, it is my finding that the following and the just and appropriate reliefs to issue in the circumstances of this case: -

- a. An order of Mandamus be and is hereby issued compelling the Inspector General of Police to immediately investigate the alleged abduction and disappearance of Mohamed Abubakar Said and forward the investigation docket to the Director of Public Prosecution within a period of 21 days from the date of this order.
- b. In deference to the Director of Public Prosecution's independence, authority and discretion under Articles 157 (10) and (11) of *the Constitution*, I refrain from issuing any orders which may amount to directing the ODPP what to do after receiving the investigation file.
- c. No orders as to costs.

Orders accordingly. Right of appeal

SIGNED, DATED AND DELIVERED AT MOMBASA 22ND DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE

