



Muslims for Human Rights v Attorney General & 2 others (Petition E168 of 2018) [2022] KEHC 12775 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E168 OF 2018
JM MATIVO, J
AUGUST 31, 2022**

BETWEEN

MUSLIMS FOR HUMAN RIGHTS PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

JUDGMENT

1. The Petitioner, Muslims for Human Rights is a human rights organization based at the coast region. It brings this Petition on behalf of the estate of Abubakar Abdulkadir as a matter of public interest, in defence and protection of the Constitution.
2. The 1st Respondent is the Hon Attorney General of the Republic of Kenya. Pursuant to Article 156(4) of the Constitution, the Attorney-General is — (a) is the principal legal adviser to the Government; (b) represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and (c) performs any other functions conferred on the office by an Act of Parliament or by the President.
3. The 2nd Respondent is the Inspector General of Police appointed pursuant to Article 245 (2)(a) of the Constitution. Pursuant to Article 245 (b) of the Constitution, he exercises independent command over the National Police Service, and performs any other functions prescribed by national legislation.
4. The 3rd Respondent is the Director of Public Prosecutions (the DPP), established under Article 157 of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.



5. The Petitioner's grievance is that on or about November 17, 2017, a Mr Abubakar Abdulkadir was heading to Masjid Sheikh Nassor to attend evening prayers. It states that 2 vehicles, a white Toyota Corolla registration number KBQ 157 U and another unidentified vehicle pulled up beside him and approximately 6 to 10 men alighted from the vehicles and forced him into the vehicle(s) and drove off with him. It contends that after his abduction, his phone was still ringing but in the afternoon of November 19, 2017 it stopped ringing.
6. The Petitioner contends that shortly after the abduction, his family members went to Malindi Police Station and as they approached the station, they saw the same vehicles involved implicated in the abduction drive into the station. However, they were barred from entering into the station. They state that the same day, a one Mr Faissal Nassor, went back to the same Police Station and the incident was recorded in the Occurrence Book number 86/17/11/2017 and he was given a follow up appointment date with the Divisional Investigation Office for November 20, 2017 at 8.00am.
7. Further, it states that a search at the Registrar of Motor Vehicles revealed that the said vehicles were not registered which information the family members communicated to the police. Also, it avers that the family members established that that the said Mr Abubakar Abdulkadir had previously been interrogated by police officers attached to the same Police Station, but the said officers have denied being involved in his disappearance. It contends that despite numerous visits to the said Station and correspondence to the 2nd and 3rd Respondents and the Independent Policing Oversight Authority, no conclusive investigations have been carried out and the person and body of the said Mr Abubakar Abdulkadir has not been availed to his family members. As a consequence of the above, the Petitioner prays for: -
 - a. A declaration that the right of *habeas corpus* is guaranteed under Article 25 (d) of the Constitution and therefore cannot be limited and an order compelling the 2nd Respondent to produce the person and or body of Abubakar Abdulkadir within 24 hours of the issuance of the order.
 - b. A declaration that Abubakar Abdulkadir's right to equality before the law and equal protection of the law as guaranteed under Article 27 (1) of the Constitution has been infringed as a result of the 2nd Respondent's actions.
 - c. A declaration that Abubakar Abdulkadir's right to inherent dignity and the right to his dignity to be respected and protected as guaranteed under Article 28 of the Constitution has been infringed as a result of the actions by the agents of the 2nd Respondent.
 - d. A declaration that Abubakar Abdulkadir's right to fair trial, rights of an arrested person have been violated.
 - e. Without prejudice to order (a) above, an order of mandamus compelling the Respondents to conduct investigations on the disappearance and whereabouts of Abubakar Abdulkadir and file a report on the same before this court within such time as may be directed by this court.
 - f. A declaration be issued that Abubakar Abdulkadir and his family are entitled to the payment of damages and compensation for violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution.
 - g. Costs of this Petition.
 - h. Interests on (h) and (i) above at the court's rate.
 - i. Any further relief or order that this honourable court may deem just and fit to grant.



8. The 1st and 2nd Respondents filed a Response to the Petition dated March 30, 2022. The salient points urged are:- (a) that the 1st Respondent has never had the physical custody of the subject, a crucial element for the writ of *habeas corpus* to issue; (b) that the facts as presented suggest a case of forceful taking and disappearance of the subject by unknown assailants as opposed to arrest and detention; (c) that the Petitioner has failed to establish a nexus between the Respondents and the alleged disappearance; (d) that the Petitioner's claim is not justiciable; (e) that the 2nd Respondent is constitutionally ordained under Article 245(4) of the [Constitution](#) to undertake investigations, and courts should restrain themselves from exercising discretionary functions conferred to other bodies; (f) that a case should not be resolved by deciding a constitutional question if it can be resolved in another fora, such as the Independent Policing Oversight Authority; (g) that courts should frown upon disputes that are hypothetical, pre-mature or academic which have not matured into justiciable controversies; and, (h) that the Petitioner has not adduced sufficient evidence to warrant any of the orders sought.
9. The 3rd Respondent filed a reply dated April 15, 2022 stating:- (a) that the Petition is misconceived and an abuse of court process; (b) that the Petitioner has failed to provide evidence to show that the said person was actually arrested or detained; (c) there is nothing to suggest that the 3rd Respondent violated the [Constitution](#); (d) that the Petition does not disclose a reasonable cause of action against the 3rd Respondent; (e) that the constitutional mandate of the DPP is to undertake prosecution.
10. The Petitioner's advocate submitted that the right to an order of *habeas corpus* is a non-derogable right under Article 25 of the [Constitution](#). He cited [Massoud Salim Hemed & another v Director of Public Prosecutions & 3 others](#) which underscored the scope of the writ of *habeas corpus* which is to inquire into the cause of detention of a person and to determine whether the person is being illegally deprived of his liberty, and if the inquiry reveals that a person is being illegally deprived of his liberty, the court orders his release.
11. He submitted that the burden of prove under section 107 of the [Evidence Act](#) lies on the Petitioner and cited [MA Estrelita D Martinez v Director General and others cited in Bintu Adan Osman & 2 others v Director of Public Prosecutions & 3 others](#) which held that where detention of an applicant is established, the burden of proving the legality of the detention rests with the state. He submitted that the facts pleaded suggest the 2nd Respondent's involvement in the arrest and disappearance of the subject.
12. The 1st and 2nd Respondents counsel acknowledging the right to *habeas corpus* under Article 25 of the [Constitution](#) cited [Grace Struat Ibringira & b others v Uganda](#) which held that 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. He argued that the Petitioner bears the burden of proof and that the Petitioner must prove that the subject was actually detained by the state after which the burden shifts to the State. He relied on [Masoud Salim Hemed v Director of Public Prosecutions and Law Society of Kenya & 2 others v Attorney General & 2 others](#). He submitted that there is no nexus between the 2nd Respondents and the missing person and dismissed the Petitioners account as speculative.
13. Additionally, counsel submitted that proof of custody of the subject is paramount in an application for *habeas corpus* as was held in [Masoud Salim Hemed v Director of Public Prosecutions and Bintu Adan Osman & 2 others v Director of Public Prosecutions & 3 others](#). He argued that the Respondent cannot be compelled to produce what is not in their custody. Further, counsel submitted that the Petitioner never sought an order of mandamus to compel the 2nd Respondent to conduct investigations.
14. The 1st and 2nd Respondent's counsel submitted that the instant Petition does not disclose a justiciable claim citing [Anthony Miano & others v Attorney General & others](#). He argued that the 2nd Respondent



- is constitutionally mandated under Article 245(4) of the Constitution to undertake investigations. He argued that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion and argued that the Policing Oversight Authority is mandated to undertake investigations. He also argued that the dispute had not matured.
15. Counsel cited *John Cheruiot Rono v Attorney General* in support of the proposition that the burden of proving violation of a constitutional right rests on the person alleging the violation and cited *Susan Mumbi v Kefala Grebedhin* which underscored the requirement that he who alleges must prove. Lastly, counsel faulted the omission to sign the affidavit in support of the Petition which he argued renders the Petition incompetent.
 16. The 3rd Respondent submitted that it does not have statutory mandate to contact investigations. Further, it argued that the Petitioner has not shown how the 3rd Respondent failed to perform its mandate under Article 157 (4) of the Constitution. It also argued that the obligation to discharge the burden of prove lies on the Petitioner as provided under section 107 of the Evidence Act and cited *Britestone PTE Ltd v Smith & Associates Far East Ltd* and cited failure to provide evidence of the alleged correspondence.
 17. Counsel for the 3rd Respondent also submitted that it has not been demonstrated that it violated or threatened to violate the subjects' rights. She relied on *Lwona Otieno v Airtel Kenya Limited* and *Anarita Karimi Njeru v Republic*. Additionally, she submitted that for a writ of *habeas corpus* to issue, it must be established that the suspect is in custody and relied on *Daniel Ngaya-an, Carmencita Ngaya-an, Clemente Wingnga and Felista Ngaya-an Tacaling* which held that the granting of the relief is not predicated on the disappearance of a person, but the Petitioner must establish by competent and convincing evidence that the missing person in whose behalf the Petition is filed is under the custody of the Respondents.
 18. I note that the cause of action arose at Malindi. Rule 8 (1) of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides: - 8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place. It is not clear why this Petition was not filed in the nearest High Court having jurisdiction. I came into these proceedings at a later stage, but from the records, it appears no one raised this pertinent issue. The above rule was ignored. Rules of procedure serve a salutary purpose.
 19. The term jurisdiction has been demarcated in three categories, namely; (a) subject matter jurisdiction, i.e whether the particular court in question has the jurisdiction to deal with the subject matter in question; (b) territorial jurisdiction, i.e whether the court can decide upon matters within the territory or area where the cause of action arose; and, (c) pecuniary jurisdiction i.e whether the court can hear a suit of the value of the suit in question. These three categories of jurisdiction are prerequisite to the assumption of a court's jurisdiction, a sine qua non. However, noting that the court never drew the party's attention to the omission to abide by the above rule, and noting the period the matter has been before this court, I am persuaded that the larger scales of justice tilt in favour of determining the matter on merit.
 20. I will first address the question whether the Petitioner has demonstrated failure by the Police to investigate the subject's disappearance. Granted, the functions of the National Police Service are enumerated in section 24 of the *National Police Service Act*. Its functions includes (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.



21. Section 35 of the NPSA 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.
22. A reading of the above provisions shows that the police are legally obligated, once they witness or are informed of a crime, to investigate the offence. These obligations arise from the *Constitution* and are affirmed by the NPSA. Investigation of the crime is a solemn duty imposed by law on the police. As Lord Parker CJ said in *Rice v Connolly*, “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. As I stated in *Abdulrahman Said & another v The Hon Attorney General & 3 Others and Independent Policing Oversight Authority and 2 Others (Interested Parties)* 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*: -
- “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.”
24. Additionally, in the above cited case, I stated as follows: -
- “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.”
25. There is no contest that a report was made to the police at Malindi Police Station about the alleged disappearance. The Police have not demonstrated that pursuant to the said report, they undertook any investigations and if they did, the outcome of the investigations have not been divulged to this court. The fact that the accusing fingers point at the police is the more reason why an impartial professional and transparent police should have promptly and expeditiously investigated the complaint and if they establish that their colleagues are culpable, do what the law demands, have them prosecuted.



26. Had the police taken the complaint with the seriousness it deserves, possibly, the victim would have been traced either alive or dead and equally important bring the culprits to book. The police are empowered and constitutionally obligated to protect the public from harm. This is the essential and critical obligation of the police force. This case reveals a worrying neglect of duty and or wilful refusal to investigate complaints where members of the police force are implicated. Worse still, where the complaint is registered in the same station where officers are suspected. This is a sad case of an impermissible dereliction of duty on the part of the Police.
27. 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. The Petitioner is entitled to a relief to address the police failure to perform their duty. I will later fashion the appropriate remedy after addressing the next issue.
28. I will now address the question whether the Petitioner has established the tests for the court to grant the writ of *habeas corpus*. This court's jurisdiction to grant a writ of *habeas corpus* is secured in the Constitution. Article 51(2) of the Constitution provides that: -
- “ a person who is detained or held in custody is entitled to petition for an order of *Habeas Corpus*”
29. Section 328(1) of the Criminal Procedure Code provides that: -
- “ the High court may whenever it thinks fit direct – (a) That any person within the limits of Kenya be brought up before the court to be dealt with in an accordance with the law. (b) That any person illegally or improperly detained in a public or private custody within those limits be set at liberty.”
30. The writ of *habeas corpus* was described by John Marshall, C J, as "a great constitutional privilege." An eminent judge observed "there is no higher duty than to maintain it unimpaired." It was described as a magna carta of British liberty. The history of the writ is the history of the conflict between power and liberty. The writ provides a prompt and effective remedy against illegal restraints. It is inextricably intertwined with the fundamental right of personal liberty. "Habeas corpus" literally means "have his body." By this writ the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal.
31. This writ is an order calling the person who was arrested or jailed the alleged person for producing the aggrieved before the court, for knowing the grounds of his detention and if not found any legal ground for his detention, then let the aggrieved be free from arrest and let him enjoy his freedom. The main focus of *habeas corpus* writ is preserving the right of the appellant's freedom by a quick judicial review for pleaded wrongful detention. Case law is in agreement that the person must be in custody. The Petitioner says the subject was forcefully put into vehicles. Later relatives saw the same vehicles leaving Malindi Police Station. A sworn affidavit from these eye witness(es) could have added more weight to these allegations. Much as the Petition is properly filed as a public interest litigation, where a person who has personal knowledge of contested issues of fact which are material to the issues at hand, then it is prudent for such a witness to swear an affidavit and present the facts to the court. Such an affidavit carries more evidential value than the deponent to the supporting affidavit who cannot attest to matters he has no personal knowledge of. Ideally, the affidavit before me can pass test if the Petition was to stand of pure points of law. But the nature of this Petition requires the facts which gave rise to the Petition to be conclusively proved. This becomes relevant considering the fact that for the writ of



habeas corpus to issue, it must be established that the subject is in custody. The 1st and 2nd Respondents have persistently disputed the allegation that the subject is in custody.

32. As was held by the East African Court of Appeal in *Grace Struat Ibringira & others v Uganda*, “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.”
33. A similar view was held by the Supreme Court of the Philippines in *MA Estrdita D Mortinex v Director General and Others* cited in *Masoud Salim & Another v Director of Public Prosecution & 3 others* 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 drove to the police station, there is no evidence to suggest that the victim is held in custody, hence, the writ of *habeas corpus* cannot issue.
34. Lastly, the Petitioner prays for a declaration that the victim’s family is entitled to compensation/damages. As I stated in the earlier cited case, 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 in the form of compensation in monetary terms. However, I am not persuaded that in the circumstances of this case, a case has been established to merit such an award.
35. Lastly, from the material before me, I find that the Petitioners case against the Director of Public Prosecutions is totally unmerited and unsustainable. In fact, considering the clearly defined constitutional mandate of the office of the ODPP, its was totally unnecessary to enjoin the DPP to these proceedings at this stage.
36. In conclusion, 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 just and appropriate relief to issue in the circumstances of this case is as follows: -
 - 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 Abubakar Abdulkadir and forward the investigation docket to the Director of Public Prosecution within a period of 30 days from the date of this order.
 - b. No orders as to costs.

Orders accordingly. Right of appeal

SIGNED AND DATED AT MOMBASA 28TH DAY OF AUGUST 2022

JOHN M MATIVO

JUDGE



SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF AUGUST 2022

STEPHEN GITHINJI

JUDGE

