



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 54 OF 2021

JOHN SYENGO MUSUU.....APPLICANT (SUBJECT)

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

R U L I N G

1. By an application dated 2nd of June 2021 brought pursuant to Articles 25 (d), 49 (1) (f) and 51 (2) of the Constitution of Kenya, Sections 123 and 389 (1) of the Criminal Procedure Code and Rules 2 and 3 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules, the Applicant sought:-

a. That the court do issue directions in the nature of habeas corpus directed to the 1st and 3rd Respondents to have the body of Jogn Syengo Musuu produced before the court within 24 hours or such earlier time as the court may direct.

b. That an Order do issue that the Respondents and/or their representatives do appear in person or by their duly authorized agents together with the origin of any warrant or order of detention to show cause why the said John Syengu Musuu should not be released forthwith.

c. That the 1st Respondent and the Officer in Charge-DCI Changamwe or any other office in charge of the police in the area within jurisdiction where John Syengu Musuu is being held be Ordered and directed to release John Syengu Musuu on bail or on such terms and conditions as the court deems fit to grant.

d. That upon hearing and determination of this application, this court orders that John Syengu Musuu be released forthwith.

e. That the court be pleased to make any further and other Orders as it deems fit and just.

f. That costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the affidavit of Mumo Musuu sworn on 2nd June, 2021 in which it is averred that the subject herein was detained for 14 days by an Order issued in Mombasa Chief Magistrate's Court Misc. Criminal Application No. E129 of 2020 pending completion of investigations on suspicion he was involved in a series of robbery with violence within Mombasa and its environs.

3. Upon release on 21st April, 2021, the subject met the deponent herein who was his sister together with their aunt-Kathimi Syengo and informed them that he had been released due to lack of evidence linking him to the crimes he had been accused of. He also informed the sister that his phone and Identity Card were left at Changamwe Police Station since they were still conducting investigations.

4. That while they were still talking, a police officer-the deponent had seen at the police station, known as Collins Mutua, came in the company of other plain-clothed police officers and told the subject that they were not done with him yet and immediately handcuffed him and bundled him into one of the two vehicles that were on standby-a Toyota probox.

5. That the vehicle sped off immediately but she was not able to read the number plates as she was in a state of confusion. They reported this matter to Central Police Station and were issued with an OB No. 70 of 22nd April, 2021.

6. The 2nd Respondent filed Grounds of Opposition dated 3rd of June, 2021 and PC Collins M. Mutua filed a Replying Affidavit sworn on 21st of June, 2021 and denied that he arrested, participated in the alleged arrest and/or witnessed any alleged arrest of the subject on 21st of April, 2021 as contended by Mumo Musuu.
7. It was his position that upon the conclusion of investigations and having reached a finding that there was no evidence to link the subject with the offence of robbery with violence, he had no reason to arrest him. PC Collins Mutua confirmed that a report of a missing person was made at Central Police Station-Mombasa and efforts were made to trace the subject in all police stations within the Coast region but he was not in any police custody in the Coast region.
8. He said that investigations into the whereabouts of the subject are still ongoing.
9. Upon application by the Applicant, dated 24th of June, 2021, an Order was issued requiring Prime Bank Limited and Chief Magistrate Mombasa to avail CCTV footage of 21st April, 2021.
10. By a Replying Affidavit sworn on 7th July, 2021-Ephantus Njiru, the Senior Manager and Head of Security at Prime Bank Limited head office said that the practice at Prime Bank Limited is that the bank retains CCTV footage tapes for a period of 21 days and if there is no issue raised within that period, the tape and the recorded information is overwritten and it therefore ceases to be available. In that regard, the CCTV footage of 21st April, 2021 is unavailable and the bank is unable to avail it as Ordered by the court on the 21st of April, 2021.
11. The application was canvassed by way of Written Submissions. Submissions by the Applicant-supported by the case of **Crolyn Kweyu Ongoma v. Republic [2016] eKLR** were that the Order of *habeas corpus* is the greatest guarantee of human freedom and its importance rests on it being the absolute safeguard against arbitrary and lawless state action on its citizens or aliens within its borders.
12. It was submitted that the purported release of the Applicant/Subject on 21st April, 2021 was a plot hatched by the Respondents through their employee-Constable PC Collins Mutua to hoodwink the court and the subject into believing that the Applicant/Subject had been set at liberty so that they could arrest and confine him illegally.
13. It was submitted that in an application for habeas corpus, all that the Applicant is bound to show is that the subject is under the illegal detention or the unlawful confinement of the Respondent. That the subject having been arrested by No. 96311 who works for the Respondent, the only logical conclusion to be drawn is that he is being unlawfully held by the Respondents.
14. The Applicant urged the court to find that the Applicant/Subject was arrested by the Respondents as being detained illegally and that is in the interest of justice that the Orders of *habeas corpus* be issued.
15. On the other hand, the 1st and 3rd Respondents' submissions was that; for a court to issue an Order of habeas corpus, there has to be proof that the subject of an application is in some form of custody within the jurisdiction of a court. They relied on the holding of Ojwang' J. in **Mariam Mohamed & Another v. Commissioner of Police & Another [2007] eKLR** and **Abdinasir Ahmed Mohammed v. Republic [2015] eKLR** and Ngenye Macharia J. who held that

'... a writ of habeas corpus shall be enforced when the Applicant demonstrates that the subject is in the unlawful custody of the Respondent.'
16. The Respondents endeavoured to bring out to the court the scope of the writ of habeas corpus as set out in the case of **Masoud Salim Hemed & Another v. DPP and 3 Others [2014] eKLR** and argued that the Respondents have made a return of the writ and stated that the Applicant is not in their custody and there is no evidence to the contrary. They therefore urged the court to dismiss the application for an Order for habeas corpus as the Applicant has not met the threshold for the grant of the Orders sought.
17. Having considered the application together with the Replying Affidavit, Grounds of Opposition, submissions and authorities relied upon, the issue for determination by this court is whether the Applicant has proved that the subject is being held in custody.
18. It is not in dispute that the subject of this application-John Syengo Musuu was arrested and detained for purposes of investigations on suspicion of being involved in a series of robberies with violence, pursuant to an Order issued in Mombasa Chief Magistrate's Court Misc. Criminal Application No. E129 of 2021.
19. It is also not in dispute that on 21st of April, 2021 the subject was released when the investigating officer did not find that the subject was not linked to the commission of the offences of robbery with violence.
20. What is in dispute is whether PC. Collins Mutua arrested the subject after he had been released by the court. The deponent of the Supporting Affidavit claimed to have known PC. Mutua at the Changamwe Police Station following arrest of the subject and that he and other police officers went to where they were with the subject and arrested the subject and bundled him into a waiting Toyota Probox car and sped off. They were therefore under the belief that it was the police who arrested the subject because PC. Mutua is alleged to have told the subject that he was not yet done with him.
21. The denial by PC. Mutua that he was involved in the arrest and detention of the subject puts the claims by the deponent of the Supporting Affidavit to the application in the balance. It has been confirmed by both the Applicant and the Respondents that the subject was not traced from various police stations-including Changamwe Police Station. In the circumstances and considering the scope of the writ of habeas corpus, the application cannot be allowed as it stands because the burden of proof was on the Applicant and the same was not discharged. Had the CCTV footage for 21st April, 2021 from Prime Bank and the court been availed, it would have gone a long to identify the suspects of

the said abduction of the subject.

22. However, the coincidence that the subject was arrested/abducted and/or kidnapped soon after being released is highly suspicious and a reasonable observer would be forgiven for drawing the conclusion that an unseen hand was behind the mysterious disappearance of the subject.

23. The application by the Applicant/Subject was brought pursuant to Articles 25 (d), 49 (1) (f) and 51 (2) of the Constitution of Kenya, Sections 123 and 389 (1) of the Criminal Procedure Code and Rules 2 and 3 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules the Constitution of Kenya, 2010 and the same cannot be taken lightly in consideration that the whereabouts of the subject are not known.

24. Given the sensitivity of this matter, this court is inclined to bring on board-on its own motion, the assistance, participation and contribution of the Kenya Human Rights Commission in conducting investigations into the whereabouts of the subject and file a report on the same to the Inspector General of Police for action.

DATED, SIGNED AND DELIVERED AT MOMBASA VIA ONLINE BY MS TEAMS, THIS 29TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the Presence of:

TURUKI- COURT ASSISTANT

CHALA ADVOCATE FOR THE APPLICANT

MR. MAKUTO- FOR THE 1ST AND 3RD RESPONDENTS

MR. MULAMULA-FOR THE 2ND RESPONDENT

HON. LADY JUSTICE A. ONG'INJO

JUDGE