



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 171 OF 2018

IN THE MATTER OF: ARTICLES 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48, 50 AND 51 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 21, 24, 25, 26, 27, 28, 29, 39, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: AN APPLICATION FOR THE ORDERS OF HABEAS CORPUS

BETWEEN

MBARAK KHALID BAKARI.....PETITIONER

AND

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. INSPECTOR GENERAL

3. KENYA NATIONAL POLICE SERVICE.....RESPONDENTS

JUDGMENT

The Petition

1. The petition herein is dated 25/6/18. The Petitioner, Mbarak Khalid Bakari, is the father of **Husni Mbarak Khalid Bakari** (hereinafter called "Husni") who is alleged to have mysteriously disappeared on 25/5/18. The petition is filed against the Director of Public Prosecutions, Inspector General, and the Kenya National Police Service as established under Articles 157 and 243 of the Constitution of Kenya.

2. The petition is supported by affidavit sworn by the Petitioner on 20/6/18, and those of Khalid Mbarak Khalid, Harun Abdalla Khalid, Abubakar Mohamed Bakari Mwamvuli, Charo Ndeka Ngonyo, Faisal Faruki Athman and Hussein Khalid.

The alleged facts giving rise to petition

3. On 25/5/18 the Petitioner's son Husni Mbarak Khalid Bakari left the Petitioner's garage where he worked as a mechanic at around 1 p.m. and went to Azhar Mosque in Guraya for the noon prayers accompanied by his brother Khalid Mbarak Khalid. The Petitioner was informed by Khalid Mbarak Khalid that after the prayers Husni went to buy dog meat at Bin-Agil Restaurant situated at Majengo Musa. He was further informed by Khalid Mbarak Khalid that on his way back and on reaching the Sapphire Hotel Husni was confronted by two armed plain cloth police officers who emerged from a parked Toyota Fielder salon car registration number KCP 254W and who asked Husni to enter the vehicle. Husni refused to board the vehicle and asked for the identity of the two officers but they declined to identify themselves and grabbed him trying to force him to enter the vehicle but he resisted. Two other plain clothes officers emerged from the said vehicle and joined their colleagues in dragging Husni into the vehicle. Husni shouted for help which attracted a crowd. Amongst the crowd was his cousin Harun Abdalla Khalid, the Petitioner's employees Abubakar Mohamed Athman and Abdulkareem Aidarus Abdulkareem. Khalid Mbarak Khalid held his brother and tried to take him away from the alleged police officers. However, the officers overpowered them and

removed their guns and threatened to shoot him and so he let go of Husni who was eventually put into the vehicle and the officers drove off. The Petitioner therefore believes that the 2nd and or 3rd Respondents illegally and or wrongly arrested and or abducted Husni on 25/5/18. The arrest and or abduction took place near Sapphire Hotel along Mwembe Tayari Road in broad day light and was witnessed by a number of members of the public including the security personnel guarding Sapphire Hotel.

4. The Petitioner reported the illegal arrest and or abduction at Central Police Station, Mombasa Island, which report was recorded in the Occurrence Book as OB/56/25/5/2018. The Petitioner avers that despite the said report, the 2nd and 3rd Respondents have denied responsibility for Husni's abduction and have denied knowing his whereabouts. The Petitioner avers that the circumstances and the manner of the illegal arrest and or abduction show that it is the 2nd and or 3rd Respondents who were involved or people authorised by them and they or the people authorised by them are wrongly, illegally and or without just cause detaining Husni or his body. The reasons that make the Petitioner believe they were police officers are as follows:

- a. The illegal arrest and or abduction took place in broad day light.
- b. The officers were calm and confident and without fear.
- c. The Petitioner knows that this is not the first of such illegal arrests and or abduction as a number of similar incidents have been reported and all involved Muslims who were suspected to have links with terrorists' organisations.

The constitutional and statutory foundation of the petition

5. The Petitioner avers that the 2nd and 3rd Respondents' alleged detention of Husni Mbarak Khalid Bakari is in violation of Articles 21, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48 and 50.

6. The Petitioner further avers that the alleged detention of Husni Mbarak Khalid Bakari is a demonstration of the Respondents' failure and or inability to perform their functions under Section 24 and 35 of the National Police Service Act, Cap 84.

7. The Petitioner avers that when Husni was arrested he was in perfect physical health. The Petitioner is now apprehensive that the police may either torture him or kill him. He also suspects that if they will not kill him they may have transferred him to a foreign country for interrogation and or detention. The Petitioner avers that he is advised by his advocates on record, which advice he honestly believes to be true, that the police are in violation of his son's rights as an arrested person who is entitled:

- (a) To communicate with an advocate and his family,
- (b) To be brought before a court within twenty- four (24) hours of his arrest,
- (c) To be charged in court if the police suspect that he has committed an offence,
- (d) To be informed of the reason for the detention continuing if he is not charged in court.
- (e) To be released if not charged and no continued detention is applied for.
- (f) The Petitioner and his family are baffled by the situation which has caused a lot of mental torture, anxiety and hardships to the family.

Prayers

8. Based on the foregoing allegations the Petitioner prays that:

- (i) This Honourable Court do issue directions in the nature of habeas corpus or for an order of habeas corpus requiring the 1st, 2nd and or 3rd Respondents either by themselves or through their representatives to produce the body of Husni Mbarak Khalid Bakari to court immediately.
- (ii) In the event the 1st, 2nd and 3rd Respondents refuse, fail and or neglect to abide by the habeas corpus order an inquiry be conducted as to the whereabouts of Husni Mbarak Khalid Bakari and based on the finding appropriate orders be made.
- (iii) Any other relief that this honourable court may deem just to grant.

The Response

1st and 2nd Respondents

9. The 1st and 2nd Respondents oppose the petition vide grounds of opposition filed on 29/6/18. The 1st and 2nd Respondents' case is that they have no custody and vehemently deny arrest and the alleged detention of Husni Mbarak Khalid, and therefore cannot be subjected to an inquiry on account of any refusal, failure or neglect to abide by the order of *habeas corpus* within the proceedings. The Respondents aver that the burden of proving custody of an alleged missing person always lies upon the Petitioner in a *habeas corpus* application, and that the

entire petition fails to meet the in custody requirement minimum threshold for grant of the orders sought. The Respondents aver that Section 107(1) and (2) of the Evidence Act places the burden to prove the existence of facts to whoever desires a court to grant them orders; and that the Petitioner's affidavits lack competent and convincing evidence that the alleged missing person is in the custody of the 1st and 2nd Respondents.

10. The Respondents further aver that they have begun an investigation into offences against liberty disclosed under Chapter XXV of the Penal Code with a view to apprehend and bring any would be offender to justice and to return the victim to his family or pursue the investigation that would lead to the opening of an inquest into missing person believed to be dead. The Respondents aver that with no factual custody of the victim established, it would be in vain for the court to grant the orders sought against a constitutionally mandated authority reposed in the office of the 2nd Respondent currently properly seized of investigations into the matter. The 1st Respondent states that Section 118A of the Evidence Act states that "*where it is proved that a person has not been heard of for seven years by those who would be expected to have heard from him if he were alive, there shall be a rebuttable presumption that he is dead*"; and since this has not happened there is as yet no constitutional rights of the victim or his family that have been violated by the Respondents or their officers. Further,, the 1st Respondent states that the mandate of the Director of Public Prosecution in relation to the 2nd Respondent is spelt out under Article 157 (4) of the Constitution of Kenya 2010 as enabled and elaborated at Section 5 of the Office of the Director of Public Prosecutions Act No. 2 of 2013, and it does not include investigations, arrest and detention; that whereas the DPP has powers under Article 157 (4) to direct investigations which directions are issued in writing pursuant to Article 245 (4) and (5) of the Constitution 2010, the DPP does not get involved in any operational decisions; that the DPP pursuant to his constitutional mandate under Article 157(4) has issued directions in writing to the 2nd Respondent to cause speedy and thorough investigations to be conducted into the alleged disappearance and awaits a report for his necessary action in accordance with the law; that no orders in the nature of Habeas Corpus can issue against the DPP and for this reason the DPP is a stranger in these proceedings and that the petition is not in compliance with the Chief Justice Rules under Section 389(2) Criminal Procedure Code – Criminal Procedure (Directions in the Nature of Habeas Corpus Rules, 1948 (Cap 27 (1948) sub. Leg. (L,N 474/1963) and therefore is incompetent.

11. The 1st Respondent further filed a Replying Affidavit sworn by Peris B. Ogega on 2/7/18 stating that she is a prosecution counsel exercising the powers of the DPP under Article 157(9) of the constitution and Section 29 of the Office of the Director of Public Prosecutions Act No. 2 of 2013 and conversant with this matter. The deponent avers that on 4/6/18 the Director of Public Prosecutions pursuant to Article 157(4) and Article 245(4) and (5) of the Constitution of Kenya, 2010, wrote to the Inspector General to undertake speedy and thorough investigations into the incident and to forward the inquiry file for perusal and directions. On the 28/6/18 the Office of the DPP in Mombasa received Inquiry File No. 1 of 2018 from DCI Mombasa vide a forwarding letter Ref. No. CID/SEC/4/4/B/VOL.XXV.107 and upon perusal found that there were gaps in the investigations which needed to be addressed and that on the 28/6/18, the office forwarded the inquiry file directing the DCIO Mombasa to address the gaps noted and resubmit the same. However, as of the date herein, the file has not yet been returned to the DPP's office for perusal and further directions of the DPP.

The 3rd Respondent

12. The 3rd Respondent also opposed the petition vide grounds of opposition filed on 29/6/18. The 3rd Respondent's case is that the application is frivolous, vexatious a non-starter and an abuse of court process; that the Petitioner/Applicants have not demonstrated before this court that Husni Mbarak Khalid Bakari is in custody of the Respondents and or was arrested by the Respondents as alleged; that the Petition does not set out the acts or omissions complained of with reasonable precision to enable the Respondents respond to the petition; that the Petitioner/Applicant in coming to court is imposing upon the court the function of an investigator, prosecutor, Judge and executioner as investigations are ongoing; that the Petitioner has no legitimate claim against the Respondents; that the orders sought by the Petitioner/Applicant are unattainable.

The Hearing

13. The petition was heard *viva voce* and proceeded from 26/11/18 and was concluded on 20/2/19. The Petitioner called nine (9) witnesses while the Respondents called one (1) witness.

14. The totality of Petitioner's case from the evidence of his witnesses is that Husni Mbarak Khalid (Husni), the son of the Petitioner, on 25/5/18, left his father's garage which is near Sapphire Hotel Mombasa where he was working and went to the nearby Azhar Mosque in Guraya for Friday noon prayers. He was accompanied by his brother Khalid Mbarak and his cousin Harun Abdalla Khalid. Husni was 18 years at that time. After the prayer he informed his brother and cousin that he was going to buy dog meet at Bin Agil Restaurant. This was a usual practice by Husni, it was not the first time. Harun and Khalid went back to the garage.

15. On his way back and on reaching near sapphire Hotel and while his cousin, brother and the other employees at the garage witnessed, Husni was confronted by two armed people who emerged from a parked Toyota Fielder Salon vehicle whose registration number was KCP 254W. The two men asked him to enter the vehicle but he refused and asked for their identity. They declined to identify themselves and grabbed him trying to force him into the vehicle. Husni resisted and shouted for help. Harun, Khalid and the other employees and relatives who were at the garage rushed to the scene. Other members of public also went to see what was happening. Two other men emerged from the vehicle and one had a pistol. When asked who they were, the one with a pistol responded that they were police officers. On hearing that these were police officers, Khalid and Harun who had joined Husni to help him not to be dragged into the vehicle relaxed and allowed the police to arrest Husni hoping that they were going to see him at the police station. The abductors were not in police uniform.

16. The Petitioner reported these events to Central Police Station under OB/56/25/5/2018. They also reported to Haki Africa, a Human rights organisation, for help. At Haki Africa they reported to the Executive Director Hussein Khalid who accompanied the Petitioner and his family to the Police Headquarters in Mombasa on 28/5/18 to inquire from the Regional Police Commander, who informed them that the police had traced Husni's mobile phone to Mayungu which is past Malindi Town. The police recorded the statement of the Petitioner, Harun Abdalla Khalid and Khalid Mbarak Khalid on 29/5/18.

17. On the other hand the Respondents relied on the Replying Affidavits of Senior Superintendent of Police Jacob Kaberia Kanake who is

the District Criminal Investigating Officer based at Urban Police Offices Mombasa. The affidavits were sworn on 26/6/18 and 2/7/18 respectively. Mr. Kanake was the only witness who testified on behalf of the Respondents. He testified that he is the lead investigator in Police Inquiry No 1 of 2018. The inquiry is about the circumstances, under which Husni was allegedly kidnapped on 25/5/18. The witness claims to be fully conversant with all matters, facts and circumstances relating to Husni's kidnapping. He confirmed the report of Husni's abduction having been made and that the police commenced investigations by recording the statement of the Petitioner, that of Imtiaz Ahmed and Harun Abdalla Khalid. They investigated the registered owner of the vehicle KCP 254 W which is a company known as Nobel Trading Company Limited represented by Imtiaz. Imtiaz had sold the vehicle to Ambrose Cheroben Bitet through hire purchase on 19/2/18. The vehicle had a tracking device which placed it at Kaptama Bungoma County on 25/5/18. They confirmed with the National Transport and Safety Authority (NTSA) the details of the vehicle. The witness further confirmed having received a letter on 28/5/18 from the Director of Public Prosecution directing the police to investigate Husni's disappearance and to submit the Police inquiry file for his perusal and directions. The witness testified that police do not conduct operations using private vehicles and in fact they do not have in their fleet such a vehicle. He did not order such an operation and he is not aware of any operational commands involving Husni on that day. He claims that no witness recorded in their statements that the four men who abducted Husni were police officers. The witness pointed out that in fact even the O.B extract shows the Petitioner did not report that the abductors were police officers. Mr. Kanake suggested the possibility of criminals impersonating the police. He has contacted all special units of the police but none was aware of the incident.

Submissions

18. The petition was canvassed through written submissions. Mr. Aboubakar, learned counsel for the Petitioner, submitted quoting Justice Edward M. Mureithi in **HCP NO. 7 consolidated with No. 8 of 2014 Masoud Salim Hemed vs. DPP & 2 OTHERS** where the Judge observed as follows: -

“The general burden in habeas Corpus application must pursuant to section 107 of the Evidence Act remain with the Petitioner as stated in the case of MA. Estralita D. Martinez –Vs- Director General & Others, Supra, the Petitioner must establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the Respondents”

19. Counsel submitted that the Petitioner herein has indeed established competent and convincing evidence that Husni Mbarak Khalid is under the custody of the Respondents. Counsel submitted that the standard of discharging the burden of proof is on a balance of probabilities as these are not criminal proceedings. Mr. Aboubakar submitted that a number of eye witnesses testified in court under oath that the men who arrested and or abducted Husni introduced themselves as police officers. The witnesses were cross-examined and their testimony was not shaken. Mr. Aboubakar referred the court to Section 62 of the Evidence Act which states thus: -

“All facts, except the contents of documents, may be proved by oral evidence.”

Section 63 of the same Act explains section 62 as that: -

“(1) Oral evidence must in all cases be direct evidence.

(2) For the purpose of subsection (1) of this section, “direct evidence “means: -

a) With reference to a fact which could be seen, the evidence of a witness who says he saw it.

b)

c)

d) with reference to an opinion or to the grounds on which that opinion is held the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:”

20. Counsel submitted that the Petitioner was able to bring eye witnesses who saw and also heard the men who arrested and or abducted Husni identify themselves as police officers. Counsel submitted that the Petitioner discharged his burden of proof as Justice Mureithi explained in the above case when he said: -

“Where detention of an applicant is established, the burden of proving the legality of detention rests with the state, see Archibold Criminal pleading Evidence and Practice 2012 at Pg 1767 paragraph 16-55. To place the burden on an applicant to prove illegality of the detention is to require the applicant to prove a negative.”

Mr. Aboubakar then submitted that the burden of proof shifted to the Respondents and this is stressed by Justice Mureithi in the **Hemedi Case** as follows:

“This matter did not call for the respondents to prove legality of detention as the continued detention of the subject was denied and explained by the subject's alleged escape. However, in these circumstances, the respondents have a special burden of proof on the point of alleged escape, in accordance with the provisions of section 109 of the Evidence Act which provides as follows:-

‘109, The burden of proof as to any particular lies on the person who wished the court to believe in its existence, unless it is

provided by any law that the proof of that fact shall lie on any particular person.’

Where therefore the respondent claims not to have custody of the subject of habeas Corpus application, as a result of the subject’s escape from custody, the respondent must prove the escape.”

21. Mr. Aboubakar referred the court to the evidence of the Respondents through the D.C.I.O which denied that the police had arrested Husni and suggested that the arrest could be acts of thugs, criminals or even of terrorist organizations such as Al-Shabab. Counsel submitted that the Respondents were under a special burden to prove this fact which they failed to do. Counsel referred the court to **Section 60 (I) (M) of the Evidence Act** which provides for instances where a court of law shall take judicial notice of certain facts. It provides: -

“60 (1) The courts shall take judicial notice of the following facts:-

(m) the ordinary course of nature;

(n)

(o) all matters of general or local notoriety;”

22. In this regard Mr. Aboubakar submitted that the Court should take judicial notice that some departments of the police operate without uniform. Counsel stated that in fact the D.C.I.O under cross-examination admitted as much and agreed that those under the Directorate of Criminal Investigation (DCI), as a matter of fact, operate without uniform. So the fact that the men who arrested Husni were in civilian clothes do not discount that they could nevertheless be police officers. Counsel further submitted that it is a matter of general notoriety that abduction by criminals is always followed by a demand for ransom, failure to which the abductee is killed and dumped for the public to see. In the case of Husni no such ransom has been asked or requested for thereby eliminating the theory put forward by the police of a possibility of abduction by criminals or the Al-Shabaab. Counsel further submitted that it appears that abduction by the Al-Shabaab targets high profile individuals such as the foreign doctors and tourists who was abducted in Lamu. Counsel submitted that Husni is an unknown local boy of less value to Al-Shabaab and under **Section 60 (1) (o) of the Evidence Act** this fact discounts the possibility that he was abducted by Al-Shabaab. Counsel urged the court to take judicial notice of the fact that the police have been involved in forced disappearances as well as extra judicial killings. He cited an article by Hussein Khalid, the Executive Director of Haki Africa, a Human Rights Organization entitled **“what do we tell the families?” Killings and Disappearances in the Coastal Region of Kenya, 2012-2016** in which a number of cases of forced disappearance were noted. One such a case is that of Hemed Salim whose facts are well captured in Justice Mureithi’s findings in the **Hemedi Case**. To date Hemedi has not been found and an inquiry is underway. The judge had this conclusion: -

“(h) In these circumstances it must be concluded that the suspect was a missing person believed dead within the meaning of section 386 (d) of the CPC.”

23. The report lists 28 cases of disappearances and states the circumstances of such disappearances, For instance, the case of **Jeremiah Onyango Okumu and 3 others**. The report states: -

“Human Rights watch interviewed witnesses in Mombasa who saw the four men being kidnapped at around 5.30 pm by several armed men in civilian clothes near the Likoni Ferry. Several of the witnesses said they recognised the armed men as ATPU Officers. Dudah Black and Dudah Brown had told family and associates several weeks before they had disappeared that the ATPU was threatening them. The Likoni Ferry Police Post officers did not respond, even though the men were abducted nearby and appeared unconcerned when relative reported their disappearance. A duty officer at Likoni Ferry Police Post advised the family to look for their bodies in the mortuary as police had shot them.”

24. Mr. Aboubakar submitted that despite the report having been availed to the government, it has not investigated the content to disapprove the same. Husni was arrested or abducted at 2.30 p.m. in broad day light at Sapphire Hotel which is near Kenya Railway Police Station. The police did not interview the guards of the Hotel who were among the eye witnesses. They did not scrutinise the CCTV Video recording at the Hotel which could have captured the incident. They were lax and unconcerned. Counsel submitted that this is in contrast with how the police reacted when an Italian tourist was abducted in Malindi where the police deployed helicopters and other resources to try and rescue her.

25. Mr. Aboubakar submitted that the police says their investigation show that the vehicle KCP 254W was sold to **Ambrose Cheroben Bitet** who had custody of the same at the time of the abduction but they never recorded his statement. Further the police had traced Husni’s mobile to Mayungu past Malindi a few hours after the arrest or abduction but the call data they brought to court did not include the call data of some days prior to the arrest and or abduction. Counsel questioned why the police omitted the said data? Equally, the police did not produce the duty rosters of the officers within the islands area so as to ascertain who were on duty, and what the duties entailed, and the areas they were assigned. Normally the police have a record of the officers’ operations. This information would have helped to show that the police were not involved.

26. Further, the officer who recorded Harun Abdalla’s statement was not called to testify to explain why he recorded that, **“the one who was on the driver’s side cocked a Ceska Pistol,”** when Harun did not know names of guns. How did the officer reach the conclusion that the pistol was a Ceska Pistol? Counsel submitted that all these facts amount to the Respondents deliberately keeping vital information from the court which information they had in their possession and or were able to easily access and avail to court. Counsel urged the court to apply the principle of adverse inference as was held in the case of **Republic vs. Cliff Macharia Njeri, HCCRC NO 67 of 2012** that:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”

Applying the above principle Justice Lesiit observed: -

“In this case the prosecution did not call the Tuk Tuk driver who had been hired by PW1 and the deceased to drop them at Starehe area where the two were attacked.”

27. Mr. Aboubakar further submitted that in an application for *Habeas Corpus* the court should take in mind the states duty to guarantee the security of its citizens including Husni. **Article 29 of the Constitution of Kenya, 2010** guarantees Husni the right to his freedom and security which included the right not to be deprived of freedom arbitrarily or without just cause. Counsel submitted that this article considered alongside **Article 21** thereof which places the duty to observe, respect, protect, promote and fulfil Husni’s right to freedom and security to the state automatically shifts the burden of proof in applications in the nature of *Habeas Corpus* to the state. This in essence is in accord with the provisions of **Section 109 of the Evidence Act** which provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. Mr. Aboubakar further submitted that there is sufficient circumstantial evidence to allow the habeas corpus petition. Counsel referred the court to the Supreme Court of Kenya decision in **Republic vs. Ahmad Abdolfathi Mohammed and Sayed Mansour Mousari SCP NO 39 of 2018** where the court defined circumstantial evidence as follows: -

“Circumstantial evidence is indirect or oblique evidence...that is not given by eyewitness testimony.” It is an indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact. It is also said to be evidence of some collateral fact, from which the existence or nonexistence of some fact in question may be inferred as a probable consequences...in contrast to direct testimonial evidence, it is conceptualised in circumstances surrounding disputed questions of fact...”

29. Applying the *locus classicus* case on reliance of circumstantial evidence, the court in **Kipkering Arap Koskei & Another vs. R [1949] 16 EACA 135** said: -

“The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt...?”

30. On the part of the Respondents Mr. Makuto, learned counsel, submitted that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. The burden of proof lies on that person. Counsel submitted that pursuant to the above section, it is upon the Petitioner to establish any and convincing evidence that the missing kin, on whose behalf the petition is filed, is under the custody of the Respondents. Counsel referred the court to the case of **MA. Estrelita D. Martinez v. Director General & Ors. GR No.153795**. Further, counsel submitted that Article 51(2) of the constitution provides that (2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus. The court has power to issue directions in the nature of *habeas corpus* under Section 389 of the Criminal Procedure Code as follows:

“389. Power to issue directions of the nature of habeas corpus

(1) *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 according to law;*

(b) *that any person illegally or improperly detained in public or private custody within those limits be set at liberty;*

(c) *that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;*

(d) *that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;*

(e) *that any prisoner within those limits be removed from one custody to another for the purpose of trial; and*

(f) *that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.*

31. Mr. Makuto submitted that the true scope of *habeas corpus* was brought out by Hon. Justice Mureithi in the case of **Masoud Salim Hemed & another v Director of Public Prosecution & 3 others [2014] eKLR** when he stated; ‘‘ In the 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.

‘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.

32. Mr. Makuto submitted that if pursuant to (Ngaya-an v. Balweg, 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J.)', the Respondents are neither detaining nor retraining 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 2005per 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.”

33. Mr. Makuto submitted that the evidence in the petition shows that Husni was abducted by unknown persons, and the Respondents are not aware of his whereabouts. It is alleged that he was taken by unknown persons allegedly in a Motor vehicle Toyota fielder registration number KCP 254W.

34. Counsel submitted that evidence on record clearly shows that Husni Mbarak is not in police custody. Respondents' witness Kanake testified that a signal was sent throughout the country and it was confirmed that Husni was not in police custody. Investigations also indicated that no complaint/arrest had been made within the country relating to Husni Mbarak in any police station including special crime unit and further that the subject was not a person of interest in any on gong investigations thus the police had no reason to arrest him. Counsel submitted that the investigation file relating to the disappearance of Husni Mbarak is still open; no new information has been availed by members of the public concerning the same. Mr. Makuto submitted that the investigating officer made inquiries as to the ownership of motor vehicle registration number, KCP 254W which the Petitioner alleged was used in the kidnapping of their kin. Upon inquiry with the NTSA it was found that it was a Mazda Van which belonged to Nobel trading company limited which had been sold on hire purchase to one Ambrose Cheroben Bitei. Counsel submitted that this vehicle does not fit and is not similar to the description given of the alleged vehicle used in the kidnapping that is a Toyota fielder. Counsel submitted that in fact, the motor vehicle is a public service vehicle plying the Bungoma route and as at the time of the kidnapping, the vehicle was in Bungoma operating business.

35. The Respondents submitted that in the current case, no evidence of name, force number, rank, police unit of any police officer has been tendered to support the allegations by the Petitioner that the police were involved in the kidnapping. It follows therefore that the Petitioner has failed to discharge the burden of proof. Mr. Makuto submitted that of all the Petitioners' witnesses, it is only Khalid Mbarak Khalid the brother of Husni who was present at the time of the incident. He was clear that he did not remember the registration of the motor vehicle used, that none of the people involved in the alleged kidnapping wore police uniform or identified themselves by their force number which is a requirement under the force rules as stated by SSP Kanake. Mr. Khalid Mbarak Khalid only assumed they were police officers because they drew a gun. Counsel further submitted that Petitioner's witnesses gave conflicting evidence for the number of alleged abductors with some witnesses saying they were four while others saying they were five police officers.

36. Mr. Makuto dismissed the testimony of Mr. Hussein Khalid, the witness from Haki Africa, that police have been involved in the disappearance of Muslim youth at the coast. Mr. Makuto submitted that no credible evidence has been adduced to that effect. On the contrary, counsel urged the court to take judicial notice that a number of youths in the country are joining terrorist groups and or are being radicalized without the knowledge of their parents or relatives, only later to be found to have joined these militia groups to the detriment of their families and the society at large. In this matter, counsel submitted that credit should be given to the police for acting promptly by commencing investigations on the matter.

37. Mr. Makuto submitted that the Respondents have no custody of Husni. Neither did they arrest him.

The Determination

38. I have carefully considered the petition and rival arguments. The issues I raise for determination are as follows:

- (i) whether the writ of habeas corpus can issue.
- (ii) How do we determine the whereabouts of Husni.

39. Mr. Aboubakar submitted that Husni was arrested or abducted at 2.30 p.m. in broad day light at Sapphire Hotel which is near Kenya Railway Police Station. Although the Respondents have denied liability, Mr. Aboubakar submitted that the police did not interview the guards of the Hotel who were among the eye witnesses. They did not scrutinize the CCTV Video recording at the Hotel which could have captured the incident. They were lax and unconcerned. Counsel submitted that this is in contrast with how the police reacted when an Italian tourist was abducted in Malindi where the police deployed helicopters and other resources to try and rescue her.

40. Mr. Aboubakar submitted that the police says their investigation show that the vehicle KCP 254W was sold to **Ambrose Cheroben Bitet** who had custody of the same at the time of the abduction but they never recorded his statement. Further the police had traced Husni's mobile to Mayungu past Malindi a few hours after the arrest or abduction but the call data they brought to court did not include the call data of some days prior to the arrest and or abduction. Counsel questioned why the police omitted the said data? Equally, the police did not produce the duty rosters of the officers within the islands area so as to ascertain who were on duty, and what the duties entailed, and the

areas they were they assigned. Normally the police have a record of the officers' operations. This information would have helped to show that the police were not involved.

41. Further, the officer who recorded Harun Abdalla's statement was not called to testify to explain why he recorded that, **"the one who was on the driver's side cocked a Ceska Pistol,"** when Harun did not know names of guns. How did the officer reach the conclusion that the pistol was a Ceska Pistol? Counsel submitted that all these facts amount to the Respondents deliberately keeping vital information from the court which information they had in their possession and or were able to easily access and avail to court.

42. The issues or questions raised by Mr. Aboubakar are very valid. This court should want to know the steps that were taken by police to arrest the said abductors, if they were not policemen.

43. In an application for *Habeas Corpus* the court should take in mind the State's duty to guarantee the security of its citizens including Husni. **Article 29 of the Constitution of Kenya, 2010** guarantees Husni the right to his freedom and security which included the right not to be deprived of freedom arbitrarily or without just cause. This article considered alongside **Article 21** thereof which places the duty to observe, respect, protect, promote and fulfil Husni's right to freedom and security to the person automatically shifts the burden of proof in applications in the nature of *Habeas Corpus* to the State. This burden must then be aggressively rebutted by the Respondents.

44. It is not in doubt, that the writ of habeas corpus can only issue in situations where the victim is in unlawful custody or restraint. In this particular case, the Respondents deny having the said Husni under their custody. And although the Respondents have not been able to challenge headon some of the testimonies by the Petitioner's witnesses that Husni was abducted, it is hard for this court to conclude that the alleged abductors of Husni were indeed police officers. I agree with the Petitioner that there appears that not much has been done by the law enforcement units of this country to try to locate the whereabouts of Husni. However, this court has no evidence to assume that the said abductors were police officers. The question then arises – who were they, and where is Husni?

45. This leads me to the second issue. The evidence brought before the court has not established who the abductors of Husni are, or where Husni is as at now. The Respondents in their submissions appear to be telling the Petitioner to wait for seven years to pass so that Husni can be presumed dead. However, is this court to wait for seven years to pass with its hands tied and pens down? It is the duty of this court to establish the truth about the disappearance of Husni. In the same breath it is the duty of the State, in this case, the Respondents, to provide security for every Kenyan and for Husni.

46. Article 29 of the constitution states as follows:

"Every person has the right to freedom and security of the person, which includes the right not to be –

- (a) deprived of freedom arbitrarily or without just cause;**
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;**
- (c) subjected to any form of violence from either public or private sources;**
- (d) subjected to torture in any manner, whether physical or psychological;**
- (e) subjected to corporal punishment; or**
- (f) treated or punished in a cruel, inhuman or degrading manner."**

47. The freedom and security of person provided for under Article 29 is guaranteed by the state through its agencies herein being the Respondents. The state is solely responsible for Kenyans collective and individual security even when individuals must take first steps for their own security.

48. The description of the abductors that abducted Husni remains chilling to anybody who heard that story. If the abductors are not the police, then they are some rouges or gang of criminals which cannot be allowed to terrorise Kenyans wantonly. They acted in broad daylight in front of a busy hotel and a busy highway. They are a kind of gang that the law enforcement agencies must pursue and apprehend for appropriate punishment. They must be brought to book to either produce Husni or give an account of what they have done with Husni or his body. There must be a proper investigation of what happened to forestall any future such gangsterism from taking place. The state as the constitutional body which guarantees freedom and security of the persons should establish the circumstances under which Husni disappeared. If Husni disappeared at the hands of organized criminal gangs or groupings this should come out clearly to mitigate any such acts in future.

49. It is the finding of this court that the State is obligated to establish the circumstances under which Husni disappeared in line with the State's responsibility under Article 29 of the constitution of guaranteeing freedom and security of person. In that regard this Court, while dismissing the petition herein, makes the following observation:

- (i) The issues raised in this petition in terms of *habeas corpus* are fundamental issues in freedom and security of person. It is therefore imperative that the State security agencies herein (the DPP) does exercise his mandate under Article 157(4) of the constitution to reach to the bottom of this matter. In my view that is the only way justice will be served in this matter since the remedy of *habeas corpus* is clearly not available to the Petitioner.

Dated, Signed and Delivered at Mombasa this 23rd day of January, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Gachiri holding brief for Petitioner

Mr. Fedha for DPP

Ms. Kiti for Hon. Attorney General

Mr. Kaunda Court Assistant