



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CONSTITUTIONAL PETITION NO. 12 OF 2017

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

BETWEEN

BINTU ADAN OSMAN.....1ST PETITIONER

TIMIRA RAGE.....2ND PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS...3RD PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE CHIEF OF DEFENCE FORCES.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

Introduction

1. The petition herein is dated 24th August, 2017 and filed on 30th August 2017. The 1st Petitioner is the mother one Ahmed Mahmud Rage, the subject of this Petition, whom they allege disappeared as a result of the actions of the 2nd and 3rd Respondents. The 2nd Petitioner is the sister to the said subject Ahmed Mahmud Rage.

2. The 3rd Petitioner is a Constitutional body created under Article 59 of the Constitution to protect and promote Human Rights. The petition is filed against the Director of Public Prosecutions, Inspector General of Police, the Chief of Kenya Defence Forces and the Attorney General, established under Article 157, 245, 241 and 156 of the Constitution respectively.

3. The petition is supported by affidavit sworn by the 1st Petitioner on 12th August, 2017, and that of the 2nd Petitioner dated 12th April, 2018.

4. The petition is hinged on the following Articles of the Constitution, Article 2, 3, 10, 19, 20, 21, 22(1)(2)(b), 23, 25(d), 26(1), 27(1), 28, 29, 47(2), 48, 50, 59(1)(3), 165(3)(b), 238(2)(b), 239(2), 244(c) and (d), 259(1)(b) and Article 1 of the International Convention for the Protection of All Persons from Enforced Disappearance, Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, the Universal Declaration on Human Rights, the African Charter on Human and Peoples Rights and section 389 of the Criminal Procedure Code.

5. The Petitioners are seeking the following prayers:

a. A Declaration that the right to petition for an order of habeas corpus as guaranteed under Article 25(d) of the Constitution of Kenya cannot be limited.

b. THAT this Honourable Court do issue directions in the nature of Habeus Corpus requiring the 2nd and 3rd Respondents by either themselves or through their representatives to produce the body of Ahmed Mahmoud Rage to court immediately and within 24 hours of the order being made to be charged or informed of the reason for his detention continuing or to be released.

c. THAT this Honourable Court Orders the 1st, 2nd and 3rd Respondents herein to investigate and prosecute those officers responsible for the enforced disappearance of the said Ahmed Mahmoud Rage.

d. THAT this Honourable Court orders for the compensation and reparation for the violation of the fundamental rights of the Ahmed Mahmoud Rage as provide for and guarantee under the Constitution.

e. THAT the Respondents pay the costs of this petition.

f. THAT further and without prejudice to prayer (e) above the petitioners should not be condemned to pay costs in the event of unfavorable outcome.

g. For any other relief that this Honourable Court may deem just to grant.

6. The 1st Respondent was struck out of these proceedings. The 2nd Respondent filed grounds of Opposition dated 6th June, 2019 and filed by the Attorney General the 4th Respondent who entered appearance on their behalf.

7. The 3rd Respondent in response filed two affidavits in opposition to the instant petition. The first is sworn by Lieutenant Colonel Clement Kimaiga Nyakundi dated 2nd November, 2017 and the second is sworn by Major Dabassa Mudale Roba also sworn on even date.

Background

The Petitioners Case

8. The Petitioners petition herein is brought pursuant to Article 22(1) and Article 58 of the Constitution, where the 1st and 2nd Petitioners instituted the same on behalf of the subject herein Ahmed Mahamud Rage, whom they allege that his rights or fundamental freedom in the bill of rights has been denied, violated or is threatened. The Petitioners in advancing their petition relied in their respective supporting affidavits, the witness statements of Bintu Adan Osman dated 24th August, 2017 and Timira Rage Alale dated 12th April, 2018 and their viva voce evidence tendered in Court by the subject witnesses.

9. The facts summarizing the Petitioners case as advanced by the 1st Petitioner and the 2nd Petitioner who are the mother and the sister of the subject herein Ahmed Mahmud Rage, is that on 5th March, 2016 a Police Land Cruiser with plain clothed police visited their home and asked for the whereabouts of the subject herein, who was absent at the time, and when he came back the subject received a call to report to the police immediately.

10. They alleged that upon the subject reporting to Hulugho Police station, he was detained and later transported to Hulugho Military Camp. They alleged that on 7th March, 2020 the subject herein called the 2nd Petitioner that he had been released and was at a Hotel in Garissa, she picked him and took him to her house where she stayed with him for four days and the subject narrated to her what had transpired. The subject allegedly told her that he was tortured, handcuffed and blindfolded by the agents of the 2nd and 3rd Respondents, who later dropped them at a garissa lodge and gave them Ksh. 2000/= and showed them a lodge to sleep .

11. The Petitioners allege that on 1st November, 2016 the subject herein left his home and never came back, and on 4th November, 2017 a group of Military and Police Officers came to their home with a photo of the subject herein, and asked for his whereabouts, wherein they informed them that they had not seen him for over 3 days. It is their evidence that on the same day the subject herein was reportedly spotted by Children who were herding goats in the bush, who informed them of his presence, they went to the scene, met the subject, who was in handcuffs and sickly and he narrated to them what had transpired.

12. They allege that the subject herein told them that he was approached by someone posing as a teacher on 1st November, 2017 who asked him to take him to the direction of Hulugho Military camp, where on the way he drew a gun at him and another person emerged, and together they assaulted him, robbed him Ksh. 10,000/= and took him to the Hulugho Military Camp where he was tortured.

13. He allegedly told them that at night he was moved to Garissa Military camp where he was torture and on the following day he was returned to Hulugho Military camp, where on the night of 4th November, 2016 he managed to crawl out of the camp when his captors were asleep.

14. The 1st Petitioner averred that the on finding the subject herein she called people to the scene where the subject was found, this included the area Assistant chief for Shora-sub location one Abdifatah Gani, whom she alleges that notified the Inspector of Administration Police by the name Abdille, who informed other security agencies. And that after an hour a group of military and police officers came in with 5 vehicles, 2 of which were armored personnel carriers.

15. The 1st Petitioners avers that the officers forcibly put the subject in one of the trucks alleging that they were taking him to hospital , she accompanied them to Hulugho Military Camp , where they assured her that her son was safe and would be taken to hospital. She left and

went back home and that was the last time she saw her son, as his whereabouts to date remains unknown, thus the filling of the instant petition.

16. Vide their filed written submissions; the petitioners identified four issues for determination. The first issue they addressed is the locus to bring the instant petition. In this regard they submitted that the instant petition has been filed pursuant to Article 22 and Article 258 of the Constitution, which empowers every person, whether corporate or non-incorporated to move the court to protect fundamental rights in the bill of rights. They relied in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013]eklr**.

17. The second issue addressed by the petitioners is as to whether they have the conditions for grant of an order of habeas corpus, and whether this court ought to issue the same. They submitted that habeas corpus as a writ is provided for under Article 51(2) of the Constitution and section 389(1) of the Criminal Procedure Code, and that it is one of the fundamental rights that cannot be limited as provided for under Article 25(d) of the Constitution. It is their submission that the burden of proof in such petition lies with the petitioners and in this case they submitted that they have established the arrest and detention of the subject herein by the Respondents and therefore the burden shifts to the respondents to explain the circumstances of the detention and the whereabouts of the detainee herein

18. They submitted that the petitioners have demonstrated that on 7th November, 2016, the subject herein was taken into custody by the agents of the 2nd and 3rd Respondents at Hulugho Military camp, in Garissa County to receive medical treatment arising out of injuries sustained from torture inflicted by the agents of the 3rd Respondent, wherein subsequently the subject herein has never been seen to date and his whereabouts remains unknown, which evidence they submit was clear from the 1st and 2nd Petitioners testimonies which stood unshaken even in cross examination.

19. Additionally, they submitted that failure to arraign the subject herein in court violates his rights protected under Article 49(1)(a,c,f) and 51(1) of the Constitution, and also infringes the following general rules in International Law which became part of Kenyan law pursuant to Article 2(5) and (6) of the Constitution. These are Article 1 and 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, the International Covenant on Civil and Political Rights.

20. In this regard the petitioners relied in the following authorities The Philippines case of **MA. Estrelita D. Martinez v. Director General AN Ors No. 153795 OF 17TH August, 2006, Massoud Salim & Another vs DPP & 3Others(2014)eklr, Timurtas v Turkey(23531/94) [2000]ECHR(13th June, 2000), Velasquez-Rodriguez v. Honduras IACrtHR(Ser.C) No. 4(1988), Judgment of July, 1988, Irene Bleir Lewenhoff & Rosa Valino de Bleir v. Uruguay, U.N. HUM.rts.comm.No. 30/1978, 13.3, UN DOC CCPR/C/OP/1/ 1985 and Myrna Marc-Chang v Guetamala 12th November, 2003.**

21. The third issue addressed by the Petitioners is whether the court may grant other reliefs to the petitioners, they submitted in the affirmative that pursuant to the violation of the subject herein Constitutional rights this court is empowered under Article 23 of the Constitution to fashion a remedy whenever human rights violations have been disclosed.

22. The final issue addressed by the petitioners is the issues of costs, where they submitted that this court ought to grants costs to petitioners which would act as a deterrent to respondents against future such violations as the court is the protector of the Constitution and the fundamental values in it as was held in **Mackeigan v Hickman (1989) SCR 796**.

23. In addition, they submitted that this court ought to grant compensation to the petitioners for the violations suffered, and the fair compensation in the circumstances, they relied in the case of **Lucy Wanjiru Mukaru VS Attorney General (2018) eklr**, where the court granted compensation of Kshs. 15 Million. In sum they urged the court to find merit in the petition.

Respondent's case

2nd and 4th Respondents Response

24. Through their grounds of opposition herein, the 2nd and 4th Respondents opposed the instant petition. They allege that the petitioners failed to sufficiently demonstrate with concrete evidence that the said Ahmed Mahamud Rage was actually arrested or detained by any of the Respondents at any particular time.

25. They contend that the evidentiary burden has not been discharged as the petitioners failed to identify the officers who alleged arrested the subject herein nor the number plates of the motor vehicles allegedly used to effect the arrest and that there is no report produced of any such report being made to the police on the said illegal arrest .They deny conducting any arrest and neither are they aware of such a person by the name Ahmed Mahamud Rage alleging that the instant petition lacks merit.

26. Counsel for the State Mr. Ogosso submitted on behalf of the 2nd and 4th Respondent, where he submitted that the instant petition has not been pleaded to the required threshold set in the case of **Annarita Karimi Njeru and Mumo Matemu decision**, in that they have not particularized the violation nor demonstrated the same in their pleadings.

27. It was submission that the petitioners allegations have not been proved as there were no details or particulars of their claims, for instance they did not provide the names of persons involved, the Motor vehicles registration numbers and names of hotels and addresses as well as telephone numbers nor persons referred to providing affidavits in support of the allegation.

28. In sum it is Counsel submission that the petitioners failed to discharge the burden of proof as provided for under section 107, 109 and 110 of the Evidence Act. He relied in the following authorities; **Law Society of Kenya & 2 Others vs AG & 2 others (2018)eklr, Michael Rubia vs AG(2020)eklr and Kenya Human Rights Commission & Others vs AG & 6 OTHERS(2019)EKLR**.

The 3rd Respondent case

29. The 3rd Respondent in response to the petition filed the above two affidavits of Lieutenant Colonel Clement Kimaiga Nyakundi and Major Dabassa Mudale Roba in opposition to the instant petition. The gist of their response is that they deny knowledge of any arrest of the subject herein Ahmed Mahamud Rage by the 3rd Respondent, and that they have never had any custody of such a person and that their holding cells are not meant for civilians but only military officers, and that whenever the military personnel arrest a civilian, they usually and immediately hand him over to the civil police. They also denied the torture allegation stating that the same was baseless and amount to hearsay.

30. Vide their filed written submissions highlighted by State Counsel Mr. Kioko, they identified four issues for determination. The first issue is whether it has been established that Ahmed Rage was arrested and or detained by the 3rd Respondent. In this regard they submitted that the burden of proof in habeas corpus application is on the petitioners, and in this case the petitioners failed to prove beyond doubt or on balance of probabilities that the subject herein was detained by the 3rd Respondent.

31. They submitted that apart from the allegations that the subject was arrested by military officers to be taken to hospital, nothing was tendered to prove the same, for instance the identity of the said military officers, the vehicles registrations numbers and that despite alleging presence of many people during the arrest, only the mother who testified and was uncorroborated witness whose evidence cannot be relied on wholly as was held in **David Nyanjom Owak vs Attorney General(2018)Eklr.**

32. In addition, they submitted that there was no evidence of any report to the police i.e OB number, that there was nothing tendered to prove the existence of such a person by the name Ahmed Rage for instance a copy of the Identity card and that the instant petition was filed 9 months after the alleged disappearance hence a case of Inordinate and extravagant delay. They relied in the following authorities; **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro(2015)Eklr** and **Abdi Murshi Iman vs The Chief of Kenya Defence Forces and the Attorney General Garissa Constitutional Petition No. 10 of 2017.**

33. The second issue addressed by the 3rd Respondent is on whether the petitioners have demonstrated violation of rights and fundamental freedoms of the subject herein. In this regard they submitted that the petitioners have failed to prove the nature and manner in which the 3rd Respondent allegedly violated the provisions of the Constitution or any law.

34. In that the allegations of torture and other cruel, inhuman or degrading treatment or punishment remain unsubstantiated and that whatever is presented herein is hearsay within the meaning of section 63 of the Evidence Act. For instance no medical report was produced or an affidavit of the said subject. They relied in the cases of **Monica Wangu Wamwere vs Attorney General (2019) EKLr** and **Dominic Waweru vs Occidental Insurance Company Ltd (2015)eklr.**

35. The final issue addressed by the 3rd Respondent is whether the remedies for breach of fundamental rights and freedoms herein can be issued, and in this respect they submitted that the same ought not be issued as it is premature at this stage as the whereabouts of the subject remains unknown as the Respondents have denied having him in their custody and submitted that the options herein is to order for further investigation or inquest. They submit that the instant petition lacks merit. They rely in the case of **Masoud Salim Hemed & Another vs Director of Public Prosecution & 3 Others (2014)eklr.**

Issues, analysis and Determination

36. I have keenly read and understood the substance of this Petition. I have also perused the Report and the parties' evidence and their submissions. I have gathered the following issues for determination herein: -

- a. **The nature and scope of the right to *habeas corpus*;**
- b. **Whether the Petitioner herein Ahmed Mahaamud was taken into custody of the 2nd and 3rd respondents;**
- c. **Remedies.**

The nature and scope of the right to *habeas corpus*;

37. The right to an order of ***Habeas Corpus*** is one of the rights in the Bill of Rights which cannot be limited under Article 25 of our Constitution. It is listed among the other un-derogable rights such as the right to freedom from torture, and cruel, inhuman or degrading treatment, freedom for slavery or servitude and the right to a fair trial, thus highlighting its important status in our jurisdiction. It is entrenched in the Bill of Rights under Article 51 (2) in the following terms:

“(2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.”

38. In the case of **Masoud Salim Hemed & Another vs. Director of Public Prosecutions & 3 Others (2014) eKLR** the court rightly so discussed the scope of the right to *habeas corpus* as follows:-

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

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

Said this Court in another case:

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

If the respondents are neither detaining nor 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 2005 per Carpio, J.)’
Habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person. When the respondents making a return of the writ state that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary.”

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

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

35. However, as argued in the Article ‘The “Custody” Requirement for Habeas Corpus – *Allen v. United States, Martin v. Virginia*, (1966) Vol. 26 Maryland Law Review 79, an order of habeas corpus is available for persons in custody, even though it be legal – including parole and bail – as opposed to physical custody.”

39. It is therefore clear from the foregoing that an order of *habeas corpus* can only be enforced when it is proved that a victim is in the legal or otherwise custody of the State or State agencies, and that in the event the issue of custody is not firmly established then the matter falls under another realm; either on further police investigations or inquest proceedings.

40. It deals with deals with the production of a person who is proved to be in the custody of the police or any State agency and does not deal with matters of compensation or reparation for the violation of any fundamental rights resulting from the illegal incarceration, the latter lies in separate legal proceedings.

Whether the Petitioner herein Ahmed Mahaamud was taken into custody of the 2nd and 3rd respondents

41. It has been established that the general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. As stated in the case of *MA. Estrelita D. Martinez v. Director General & Ors*(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. Where detention of an applicant is established, the burden of proving the legality of detention rests with the State, see *Archbold Criminal Pleading Evidence and Practice 2012* at p. 1767 paragraph 16-5.

42. Coming to the instant case, the burden was on the petitioners to establish that the subject herein Ahmed Mahmud Rage was detained by the 2nd and 3rd Respondents or in the hands of any of the state agencies, and after establishing that fact, the burden then shifts to the Respondents to explain the whereabouts of the subject herein.

43. The 1st Petitioner told this court that the subject herein was taken into the custody of the 2nd and 3rd Respondents after he was found in the bush with Injuries purportedly secured out of torture and that the respondents promised to take him to hospital. The Respondents on the other have vehemently denied taking into custody anyone by the name Ahmed Mahmud Rage. They even deny existence of such a person as no identity card or copy thereof was produced confirming existence of such a person.

44. Additionally, they contend that the petitioners testimonies herein fail to identify with precision the alleged people who took the subject into their custody, as they failed to give the identity of the officers, motor vehicle registration numbers nor call other witnesses in view of their allegation that many people were present when the subject herein was taken into the custody of the 2nd and 3rd Respondent.

45. I have carefully considered the divergent position of the petitioners and the Respondents, and in my view it is my finding that the petitioners have failed to discharge the evidentiary burden required proving that it is the 2nd and 3rd Respondent who have the custody of Ahmed Mahmud Rage.

46. Of concern herein is the delay in bringing the instant petition for habeas corpus, as 9 Months had lapsed when they approached this court since the said disappearance of the subject herein. Further, it is surprising that not even a police report was made to the police regarding the alleged disappearance of Ahmed Mahmud rage. Furthermore and sadly, it is now over 3 years since the said disappearance and therefore the orders of habeas corpus in the circumstance would not be appropriate.

Remedies:

47. Having found that the petitioners have failed to establish that the subject herein Ahmed Mahmud Rage is in the custody of the 2nd and 3rd Respondents, and that the situation is made worse by the indolence of the petitioners in filing the instant petition, this court makes the conclusion that Ahmed Mahmud Rage case is that of disappearance of a person.

48. In this regard the court in **MA. Estrelita D. Martinez v. Director General and Ors(supr)** held that disappearances were the proper subject of criminal investigations and not habeas corpus, it stated :

“When forcible taking and disappearance – not arrest and detention – have been alleged, the proper remedy is not habeas corpus proceedings, but criminal investigations and proceedings.

Abduction or kidnapping is a crime punishable by law. Investigations with regard to crimes are first and foremost the duty of the Philippine National Police (PNP) and the National Bureau of Investigation (NBI), not the courts. There are instances when members of the PNP – the agency tasked with investigating crimes – are suspected of being responsible for the disappearance of a person, who is the subject of habeas corpus proceedings. This fact will not convert the courts into – or authorise them through habeas corpus proceedings to be – forefront investigators, prosecutors, judges and executioners all at the same time. Much as this court would want to resolve these disappearances speedily – as in the present case, when it is interested in determining who is responsible for the disappearance and detention of Michael (if, indeed, he is being detained) – it would not want to step beyond its reach and encroach on the duties of other duly established agencies. Instead of rendering justice to all, it may render injustice if it resorts to shortcuts through habeas corpus proceedings. In fine, this proceeding for habeas corpus cannot be used as a substitute for a thorough criminal investigation.”

39.conclusion

In view of the foregoing, this court directs that the State security agencies herein (the DPP) to exercise its mandate under Article 157(4) of the constitution to reach to the bottom of this matter by directing investigations into the whereabouts of Ahmed Mahmud Rage. 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. And thereafter an inquest if necessary be conducted by the Magistrate’s Court. Thus court makes the following orders;

i) **The petition has no merit thus it is dismissed with no orders as to costs.**

DATED, DELIVERED AND SIGNED AT GARISSA 28TH THIS DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE