



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CRIMINAL APPLICATION CASE NO. E266 OF 2020**

**LESITT, J**

**FOZIA AHMED BAYUSUF.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE OFFICER IN CHARGE OF DCI TRAINING SCHOOL, SOUTH C.....3<sup>RD</sup> RESPONDENT**

**BURUBURU CHILDRENS HOME.....INTERESTED PARTY**

**RULING**

1. The Applicant has by Chambers Summons dated 23<sup>rd</sup> October 2020 sought 7 orders as follows:

- 1. That the Application be certified as extremely urgent and services upon the Respondent be dispensed with and it be heard exparte in the first instance;**
- 2. That an order that directions in the nature of habeas corpus do issue directed to the 3<sup>rd</sup> Respondent to have the body of MMA be produced before the Honourable court at such time as the judge may direct.**
- 3. That an order that the Respondents and or their representatives do appear in person or by his duly authorized agent together with the original of any warrant or order of detention to show cause why the MMA should not be released forthwith.**
- 4. That the Officer Commanding the DCI, South C Police Unit produces MMA in court.**
- 5. That the Inspector General of Police and the Officer in-Charge of DCI, South C or any other Officer in charge of the Police in the area within jurisdiction where MMA, is being held, the officer in charge of any Police Station in the Republic of Kenya holding her or any of them be ordered and directed to release MMA, on bail or on such terms and conditions as the court deems fit to grant.**
- 6. That upon hearing and Determination of this Application, this court orders that MM, be released forthwith.**
- 7. That the cost of this application be provided for.**

2. The application is brought under **Articles 25(d) and 51(2) of the Constitution. Sections 123 and 389(1) of the Criminal Procedure Code and Rule 3 of the Criminal Procedure** (Directions in the nature of Habeas Corpus) and all enabling provisions of the Law.

3. The application is supported by grounds on the face of the Chamber Summons and the supporting affidavit sworn by Fozia Ahmed Bayusuf dated 23/10/2020.

4. The Respondents have opposed the application through the replying affidavit sworn by Susy Wangila dated 29<sup>th</sup> October 2020.

5. The Applicant filed a further affidavit sworn by Fozia Ahmed Bayusuf dated 2<sup>nd</sup> November 2020.
6. The application was argued by one Mr. Cohen who was holding brief for Mr. Ahmed Nassir, Counsel for the Applicant. In his submissions, Mr. Cohen submitted that the Applicant was seeking the release of one MMA. Counsel urged that the mother of the said M swore both affidavits in support of the application.
7. Mr. Cohen urged that the Respondents had introduced a birth certificate showing M was below 18 years. Counsel urged that the birth certificate was contested. He urged the court to consider the Marriage Certificate produced by M mother which shows that the subject of the application was 18 years of age.
8. Mr. Cohen submitted that M was lawfully married in a ceremony conducted by the Kadhi. Counsel urged that the report alleged in the replying affidavit to have been made by M father reporting a missing child should not be believed as the alleged father of the subject abandoned his family 17 years ago.
9. Mr. Cohen submitted that the Respondents in their replying affidavit were relying on **section 119** of the **Children Act**. Counsel urged that the section did not apply in the case as the subject was not found begging for food. He urged that the subject was removed from an Apartment where she was well taken care off by her husband. He urged that M left home 3 years ago due to lack of school fees and decided to get married. Counsel urged that there was no court order authorizing the persons who took her to keep holding her.
10. Mr. Mutuma, Learned Prosecution Counsel opposed the application. Mr. Mutuma submitted that on 28/8/2020 the DCI officers, Child Protection Unit received a complainant from one M AM that his 17-year-old daughter had disappeared; and that he had learnt that she had been married off to a 57-year-old politician, one Rishad Hamid Ahmed. Counsel urged that the police were able to trace her to an Apartment where she was living with the 57-year-old Rishad.
11. Mr. Mutuma urged the court to see the annexed Birth Certificate of the subject, **annexure I** to replying affidavit showing subject was 16 years old. Counsel urged that investigations had revealed that the mother of the subject married off her daughter after receiving 500,000/= and a sofa set and relies on **annexure 2**.
12. He urged that the subject was taken by Child Protection Unit to Medicins Sans Frontiers where the subject was examined. The report is annexure 3 and shows that the subject was pregnant, which was proof of sexual assault. Counsel urged that police were in the process of charging Rishad Hamid Ahmed with sexual offence contrary to **section 8** of the **Sexual Offences Act**. He urged that Police would also charge FAB who is the mother of the child with Child Neglect. Counsel urged court to dismiss the application.

**Section 389 (1)** of the **Criminal Procedure Code** provides:

**“389. (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.”**

13. It would appear the Applicant has mixed up the procedures for approaching the Court. While an order for habeas corpus was previously sought by procedure for **Directions in the Nature of Habeas Corpus** under the **Criminal Procedure Code** cap. 75, the procedure under the [new] **Constitution** is for a petition under **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, for the enforcement of the Right to **habeas corpus** under **Article 51 (2)** of the **Constitution** which provides as follows:

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

14. In the case of **Grace Struat Ibringira & others v Uganda** [1966] EA 445, the Court of Appeal for Eastern Africa had the following to say regarding this writ at page 454:-

**“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 restrained 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 most humble citizen ... may test the action of the executive government no matter how high the position of the person who ordered the detention.” (emphasis)

15. A similar view was taken by the Supreme Court of the Philippines in the case of *MA Estrdita D. Mortinex v Director General and Others* GR No.153795, cited in *Masoud Salim & Another v Director of Public Prosecution & 3 others* [2014] eKLR 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.”**

16. While the writ of Habeas Corpus is a quick means of approaching the court to secure the release of a detained person where one is able to demonstrate that such detention or confinement is unlawful, I am unable to make any further progress in this matter without the benefit of a Petition filed by the Applicant. Such a Petition will set out in a formal and constructive manner, the facts of the case, the question for determination, the relief being sought, among others which are now missing due to the procedure adopted by the Applicant.

17. On the hearing of a petition, **Rule 20 of The Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013** provides as follows:

**“20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—**

**(a) affidavits;**

**(b) written submissions; or**

**(c) oral evidence.**

**(2) The Court may limit the time for oral submissions by the parties.**

**(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.**

**(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.**

**(5) A person summoned as a witness by the court may be cross examined by the parties to the petition.”**

18. Upon considering the chamber summons application and the evidence presented by the parties upon supporting affidavit and replying affidavits and without detailed discussion thereof in order not to prejudice hearing of the main petition yet to be filed, I find that a case has been established to warrant the further examination of the matter by the court and that there are serious questions to be determined upon the full trial of the petition including the age of the subject, whether there are criminal charges being investigated against the Applicant and one Rishad Hamid Ahmed, and whether there is a valid marriage in law, between the subject and the said Rishad Hamid Ahmed.

16. In accordance with the substantial justice as required under **Article 159** of the **Constitution**, and for purposes of making progress in this matter, I consider that the matter should proceed to full hearing of the petition, once filed, whereupon the Court shall after hearing such witnesses as the parties may wish to put forward, in accordance with the discretion of the court to allow oral evidence or cross-examination under **Rule 20** of the **2013 Rules**, make a final decision as to the question before the court, as afore stated, to warrant an order for habeas corpus.

### **Orders**

17. The Applicant shall file a Petition in this matter as soon as is practicable, and shall serve the Respondents within seven days of filing, to enable the court make other and further orders as to the hearing of the Petition thereof, and the nature of the evidence to be presented before the court.

22. There shall be no order as to costs.

**DELIVERED THRU TEAMS THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2020**

**LESIT, J**

**JUDGE**

**In the presence of**

**Mr. Kinyua..... Court Assistant**

**Mr. Cohen.....For the Applicant**

**Mr. Mutuma.....For the State**

**LESIT, J**

**JUDGE**

November, 30<sup>th</sup> 2020