



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.141 OF 2017**

**IN THE MATTER OF AN APPLICATION BY AHMED MAALIM**

**ABDULLAHI ON BEHALF OF AHMED HAJIR MAALIM ABDULLAHI**

**AND**

**IN THE MATTER OF ARTICLE 102(2)(B) 20,21,25(A) AND (D), 28,29, 49**

**AND 51 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CRIMINAL PROCEDURE (DIRECTIONS IN THE NATURE OF HABEAS CORPUS RULES)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR HABEAS CORPUS AD SUBJICIENDUM**

**BETWEEN**

**AHMED HAJIR MALIM ABDULLAHI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

On 11<sup>th</sup> July 2017, the Applicant, Ahmed Maalim Abdullahi, filed an application before this court seeking orders of *Habeas Corpus*. The application urges the court to order that Respondents, the Inspector General of Police, the Officer in Charge Anti-Terrorism Police Unit, the Directorate of Criminal Investigations and the Director of Public Prosecutions to produce Ahmed Hajir Maalim Abdulahi (the subject) who was alleged to have been abducted on 6<sup>th</sup> May 2017 by five plain clothed men who claimed to be police officers and bundled into a black Nissan Lafesta motor vehicle registration number KBH 082Y. Since his abduction, the subject has not been traced. At the time of his abduction, the subject was with his friend Adan Siyad Gone. He was abducted with the subject but was released on the same day by the abductors.

Upon learning of the subject's fate, his family searched for him at various police stations and hospitals. The search yielded no positive result. The family made a report to the police at Kahawa Sukari Police Post on the same day vide OB21/6/5/2017. A copy of the OB report was annexed to the affidavit in support of the application. The subject was not traced through his mobile phone. A search at the National Transportation and Safety Authority (NTSA) revealed that motor vehicle registration number KBH 682Y was not actually a Nissan Lafesta black in colour but was a Toyota Corolla NZE white in colour. The search indicated the registered owner of the motor vehicle to be one Mbura Wanja Lucy. It was apparent that the report to the police did not yield the expected outcome hence the decision of the family to file the present application before this court on 11<sup>th</sup> May 2017.

The Application was certified urgent and was listed for hearing before this court on 17<sup>th</sup> May 2017. Although the application was argued on

that day (after the State had indicated that it was opposing the application), this court was of the view that since the issue was the determination of the whereabouts of the subject, it was imperative that a more senior police officer investigates the matter. The court issued the following orders:

***“the CCIO (County Criminal Investigation Officer) to take over the investigations from Kahawa Sukari Police Station with a view to ascertaining the whereabouts of the Applicant Ahmed Hajir Maalim Abdullahi. A report to be filed in court on 25/5/2017. Mention on 26/5/2017 for further orders.”***

The Application was mentioned on that day and on several subsequent occasions as the court awaited delivery of the investigation report by the concerned police officer. A report was finally presented to court on 6<sup>th</sup> June 2017 by CIP Mathew Bett – The District Criminal Investigations Officer (DCIO) in charge of Ruiru, Kiambu County. In the report, he narrated how he followed several leads with a view to establishing whether the subject was in the hands of any government agency or investigative body. The report made the following verbatim conclusion:

***“D (1) (Adan Siyat Gone) is a reportee in this case and application in this matter reported VIDE OB21/6/5/2017 in that him and his friend were kidnapped by unknown men whom as they went to meet at Kahawa Sukari as their customer who wanted to buy shoes. The report does not have any evidence whatsoever that any government agent was aware of the kidnapping. D(1) A reportee rendered his statement and indicated that his friend Ahmed Abdullahi was not a wanted person by the police or any other government agents.***

***This is enough evidence to show that the missing person was not arrested by government agencies and is not being detained anywhere in police custody. The signals of a missing person have been sent to all police stations country wide and we have not received any report that the missing person has been identified anywhere.”***

The court was informed that the family of the subject had further leads that they wished the police to investigate. The court directed the police to investigate the leads and report to the court in the following week. On that date, PC Dismus Juma of the DCI Office at Ruiru told the court the following:

***“we have exhausted all leads in this case including checking whether there was CCTV camera at the scene of crime. There was no CCTV camera. We have exhausted investigation on the mobile data. We have nothing further to report.”***

The family of the subject through counsel, asked the court to investigate the possibility that the subject may be under military detention. The court obliged and ordered the Kenya Defence Forces to present a report to the court if they were holding the subject during the course of their duties.

Major Dennis Agaki Arisa attached to the Directorate of Military intelligence (DMI) at the Kenya Defence Forces Headquarters swore an affidavit categorically denying that the subject was in their custody. In paragraph 5 and 6 of the affidavit he deponed thus:

***“5. THAT the Kenya Defence Forces, formations and units have never at any time arrested the Applicant AHMED HAJIR MAALIM ABDULLAHI as alleged.***

***6. THAT the Directorate of Military intelligence has never arrested and is neither detaining the applicant at its military facility at Karen as alleged.”***

With that assertion by the Kenya Defence Forces, it became clear to the court that the subject was not under the formal custody of any of the security agencies unless there was the possibility that the security agencies were not being candid or forthright with the court. The court’s evaluation of the responses made by both the police and the Kenya Defence Forces ruled out such probability.

This court’s jurisdiction to grant a writ of *Habeas Corpus* is anchored in the **Constitution. Article 51(2)** of the **Constitution** guarantees one’s right to move to the court for a writ of *Habeas Corpus*. It provides thus:

***“a person who is detained or held in custody is entitled to petition for an order of Habeas Corpus”***

**Section 328(1)** of the **Criminal Procedure Code** reinforces the constitutional position. It provides that:

***“the High court may whenever it thinks fit direct –***

***(a) That any person within the limits of Kenya be brought up before the court to be dealt with in an accordance with the law.***

***(b) That any person illegally or improperly detained in a public or private custody within those limits be set at liberty.”***

The court in **Crolyn Kwenyu Onguma Vs Republic [2016] eKLR** held thus:

***“8. In the exercise of its jurisdiction to grant the writ of Habeas Corpus under the Constitution and the Criminal Procedure Code, the High Court has to ensure that any detention or confinement is lawful and due process has been followed as a guarantee to people’s liberty. The writ of Habeas Corpus is granted when an applicant shows to the satisfaction of the court that***

***the subject is in the unlawful custody or detention of the respondent, and the writ of Habeas Corpus is used to test the legality or otherwise of that detention.”***

In the present application, this court in exercise of its jurisdiction, in pursuant of the orders craved for by the Applicant, directed the police to conduct thorough investigations to establish the whereabouts of the subject when it became apparent that the subject was not under police custody. This court did not discern any resistance from the police when they were instructed to investigate all the leads, including the leads provided by the family of the subject. The report filed in court by the Police established that the subject had not been in the custody of the police nor were the police investigating him at the time. Even the expansion of the net to include the Kenya Defence Forces, who were not party to the application, yielded a negative response. They too confirmed that the subject was not in their custody.

In the circumstances of this application therefore, it was evident that despite all the court’s effort to assist the subject’s family to secure his release or establish his whereabouts, the effort did not yield the desired result. It was apparent that the subject may have been abducted by unknown people not connected to the security apparatus of the State.

In the premise therefore, the application for the writ of *Habeas Corpus* is marked as spent.

It is so ordered.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020.**

**L. KIMARU**

**JUDGE**