



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

PETITION NO. 2 OF 2017

IN THE MATTER OF: ARTICLES 20, 21, 22, 23, 24, 25, 26, 28, 29, 39, 47, 48, 49 50 AND 51 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 20, 25, 28, 29, 39, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DANIEL BARU NYAMOHANGA.....1st PETITIONER

REBECCA BOKE MWITA.....2nd PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE HON. ATTORNEY GENERAL

THE INSPECTOR GENERAL OF POLICE

OFFICER COMMANDING STATION-KEHANCHA.....RESPONDENTS

JUDGMENT

The Background of the Petition:

1. Following the arrest of **Daniel Baru Nyamohanga**, the first Petitioner herein, and his subsequent incarceration at Kehancha Police Station, this Petition, which is in the nature of an order of *habeas corpus*, was filed through the Kenya National Commission on Human Rights (KNHCR).
2. Upon settling directions, the hearing of the Petition proceeded by way of *viva voce* evidence. **Rebecca Boke Mwita**, the second Petitioner herein who was the wife of the first Petitioner testified in support of the Petition together with the father of the first Petitioner one **Nyamohanga Chacha (PW1)**.
3. Opposing the Petition, the Officer Commanding of Kehancha Police Station **No. 218517 C.I. Kipsaina Serem** led seven of his fellow officers in contending that in as much the first Petitioner was arrested by the police, he was indeed released from police custody and as such the Petition ought to be disallowed.
4. The other officers who testified were **No. 222718 ACpl. Vincent Ochieng (RW1)** attached at Kehancha Administration Police Headquarters, **No. 253660 APC Geoffrey Kubai (RW2)** attached at Kehancha DC's Office, **No. 251340 APC Festus Kiprop Cheruiyot (RW3)** Kehancha Administration Police Lines, **No. 253544 APC David Musyoka (RW4)** attached to Kehancha Administration Police Lines, **No. 1989122847 Supt. AP Lekakeni Moses (RW5)** the District Administration Police Commander (DAPC) and in-charge of the administration Police Officers in Kuria West, **No. 54054 PC Noah Kibiwott (RW6)** Kehancha Police Station and **No. 67690 PC Kibet Kimutai (RW7)** attached at Kehancha Police Station.
5. Hearing was conducted and the evidence of all the witnesses recorded. At the end of the hearing this Court for reasons tendered in its ruling rendered on 31/07/2017, referred the matter to **The Independent Policing Oversight Authority** (hereinafter referred to as '**the**

IPOA) for further investigations. The Court made the following orders, that: -

a) The Independent Policing Oversight Authority shall urgently carry out investigations on the circumstances leading to the arrest of one Daniel Baru Nyamohanga and whether he was released from Kehancha Police Station as alleged or otherwise.

b) In view of the nature and urgency of this matter, the Petitioners shall liaise with the Deputy Registrar of this Court and effect service of this ruling, the resultant order, the pleadings and the proceedings upon the Independent Policing Oversight Authority within 15 days of this ruling.

c) The Independent Policing Oversight Authority shall deal with the matter accordingly and file its Report with this Court within a reasonable period but in any event not later than the 30th day of September 2017.

d) The Deputy Registrar of this Court shall fix this matter for directions and further orders immediately upon receipt of the Report from the Independent Policing Oversight Authority or on 03/10/2017 as the case may be.

6. The IPOA filed its report with this Court on 14/11/2017 which made the following findings and recommendations at Page 7 thereof: -

Findings:

1. That Daniel Baru Nyamohanga and co-accused were arrested by police in Kehancha town, but the exact date of their arrest has not been established. (between 12 and 13 January 2017).

2. That Daniel Baru Nyamohanga and co-accused were held in police custody at Kehancha Police Station until on 17th January 2017.

3. That on 17 January 2017 at around 0900hrs, five of the accused persons were arraigned in court, while Daniel Baru Nyamohanga remained at the Kehancha Police Station.

4. The five accused persons were set free after being committed to a bond to keep the peace.

5. That before Daniel was arrested he had been profiled as a wanted person by District Security Intelligence Committee.

6. That the OCS, Kehancha Police Station was the last person to be seen with Daniel Baru Nyamohanga at Kehancha Police Station.

Recommendations:

The OCS, Kehancha Police Station, Mr. Kipsaina Serem be ordered to produce Daniel Baru Nyamohanga dead or alive.

7. On receipt of the Report from the IPOA (hereinafter referred to as '**the Report**') this Court made an order that the same be personally served on the Officer Commanding of Kehancha Police Station **No. 218517 C.I. Kipsaina Serem** with leave to the said Officer to respond on the Report. On 16/04/2018 the OCS took the stand and responded to the Report. He did not agree with its findings and stated that it was practically impossible to comply with the recommendation to produce the first Petitioner since he knew not his whereabouts. The OCS was of the view that if this Court associates itself with the recommendation in the Report then he given time to look for the first Petitioner.

The Evidence:

8. According to the **second Petitioner**, the first Petitioner was arrested on a Thursday the 12/01/2017. That, the second Petitioner was called by the first Petitioner on the said day at around 06:00pm and informed that the first Petitioner was held at Kehancha Police Station. That, she visited the first Petitioner at the Police Station on the following day, the 13/01/2017, but she was not allowed to see him. She was however able to see him on 14/01/2017 at around 10:00am and they talked. That, she returned to the Police Station on Monday the 16/01/2017 at around 09:00 am where she saw the first Petitioner being escorted into a police vehicle to be arraigned in court. That, she went to Kehancha Law Courts, but the first Petitioner was not arraigned together with the others. She however saw him board the police vehicle at the Law Courts and rushed to the police station hoping to talk to him. That, whereas she saw him at the Police Station she was not allowed to talk to him and she returned home.

9. The second Petitioner returned to the Police Station the following day at around 09:00am she saw the other people who had been arrested together with the first Petitioner taken to court but not the first Petitioner. That, she rushed court hoping to see him, but in vain. That, the other people who had been arrested with the first Petitioner were later released by the court and upon asking one of them, one Gitingi whom she knew as a boda boda rider, the second Petitioner was informed that the first Petitioner had not been taken to court alongside the others. The second Petitioner went back to the Police Station and managed to talk to the first Petitioner at around 04:00pm. The first Petitioner told her that as they were preparing to be taken to court that morning he had asked for the return of his money (Kshs. 35,000/=) and he was separated from the others. She then left for her home.

10. The second Petitioner returned to the Police Station on the following morning, the 18/01/2017, and requested to see the first Petitioner. She was told at the Report Office that the first Petitioner had been released the day before and she did not agree. She sought to and met the OCS who told her that he had released the first Petitioner the day before at around 11:00am. That, she denied given that she had even talked to the first Petitioner the day before at around 04:00pm and he was still in custody.

11. The second Petitioner was firmly sure that the first Petitioner was not released as alleged.

12. **Nyamohanga Chacha (PW1)**, testified that he learnt of the arrest of his son, the first Petitioner, from the second Petitioner in the evening of a Thursday in January 2017. That, he went to the police Station to see his son on the following day, but the OCS chased him out of his office and told him that the police were not holding him. That, as he left the OCS's office he met the second Petitioner who was also waiting to see the first Petitioner. He left her behind as he returned home. That, he returned to the Police Station on the following Monday and saw the first Petitioner being taken to court. He went to court, but his son was not arraigned. He returned to the Police Station where he was informed that his son was in police custody, but he did not see him. He later returned home. That, since that time he had not seen the first Petitioner. He blamed the OCS for arresting his son and not taking him to court.

13. The Petition was strenuously opposed. The Officer Commanding of Kehancha Police Station **No. 218517 C.I. Kipsaina Serem** (hereinafter referred to as '**the OCS**') was sued as the fourth Respondent. He testified that in the evening of 13/01/2017 as he was at his residence he was called and informed that some suspects had been arrested by Administration Police Officers from the Deputy County Commissioner's Kuria West Office and that he was required at the station. That, he proceeded to the station and learnt that the suspects were planning to rob some M-PESA shops in Kehancha town. On arrival at the station he met 6 suspects including the First Petitioner. That, he interrogated them and personally booked all the 6 suspects into police custody. That, as he was booking the 6 suspects RW5 brought in three other suspects which were booked separately. That, he commenced investigations and released some suspects who were not implicated and on 16/01/2017 he took six suspects to court who included the first Petitioner. That, he had intended to apply that the six suspects be bonded to keep peace but since there was a power black out the whole day, he returned the suspects to police custody. That, he managed to prepare the Affidavit on 17/01/2017 and instead took five suspects to court. That, as he left the station to court he gave instructions that the first Petitioner be released. That, on perusal of the Occurrence Book he noted that the police officer who was at the Front Office had released the six suspects from the police station to court under OB No. 14 and since he did not want the first Petitioner to be charged he wrote and signed on the remarks column of that OB 14 that the first Petitioner be released and proceeded to court with the rest.

14. The OCS could not recall ever attending to the second Petitioner due to the volume of people he attends to on daily basis. To him, the first Petitioner was arrested on 13/01/2017. The OCS recalled that it was either on 13/01/2017 or 14/01/2017 when PW1 visited his office with someone who introduced himself as a Commissioner with a Human Rights organization and sought the whereabouts of the first Petitioner. That, he told them that he had released him, and they left. He also denied any knowledge of the money as the same was not recorded during the time the suspects were placed in custody. To him, he had collected all the suspects phones and handed them over to the DCIO for further investigations which phones were all recorded as received by the police and later recorded as released to the suspects. The OCS produced an OB abstract in confirmation that he had indeed released the first Petitioner.

15. During cross-examination by **Dr. Okuto** Counsel, who jointly appeared with **Miss Orao** for the Petitioners, the OCS reiterated that the six suspects were brought to the station on 13/01/2017 by some Administration Police Officers on suspicion of planning to rob some MPESA shops in Kehancha town. That, the operation had been undertaken under the command of RW5. That, he booked the suspects under OB No. 28 of 13/01/2017 as pending attempted robbery investigations and that he interrogated them on 14/01/2017 and released those he did not find culpable. He confirmed that the first Petitioner had raised the issue of his money, but when he pursued it he did not get any evidence to support the allegation. That, after the DCIO could not link the suspects with the alleged robbery he decided to arraign them before court to apply that they be bonded to keep peace since there was a huge public outcry over many murders and robberies that had occurred due to lack of security.

16. The OCS further testified that he kept RW5 aware of the progress of the investigations and even explained why he had decided to release some suspects including the first Petitioner. That, he made the decision to release the first Petitioner on 16/01/2017 but since it was late he could not release him until 17/01/2017. The OCS stated that when he went to the station in the morning of 17/01/2017 he noted that all the six suspects had been booked for court under OB No. 14 of that day and since he was intent on releasing the first Petitioner he made some remarks on the side of the OB No. 14 on the release at around 09:00am before he left for court. He explained that the right way to release a person held in police custody was by entering a substantive entry in the Occurrence Book, but he did not do so as he was getting late going to court. That, he left the first Petitioner at the Front Office desk with RW6 and RW7.

17. On the Cells Register of 17/01/2017, the OCS confirmed that there was an entry for the first Petitioner by RW6 that he was being taken to court. That, he personally added the word '*Released*' after the Cells Register had already been entered with the remarks '*To court*'. On OB No. 30 of 17/01/2017, the OCS confirmed that he was the one who made that entry at around 05:00pm to regularize the record which according to him did not properly reflect that the first Petitioner had been released.

18. On further cross-examination by **Miss Orao**, the OCS confirmed that the Cells Register and the Occurrence Book were required to be always accurate but clarified that there can be a late entry like OB No. 30 of 17/01/2017. That, he did not make the entry that the suspects were not presented to court on 16/01/2017. He also clarified that when he was going through the Occurrence Book later in the day he realized that RW6 had not formally released the first Petitioner and that is why he made the entry as No. 30.

19. **RW1** testified on how he received instructions from RW5 to proceed and arrest the suspects at the Kehancha town on 13/01/2017 which was a Friday and not on 12/01/2017. That, while in the company of other officers they arrested the six suspects who were planning to commit robberies after monitoring their suspicious movements at the town. That, they took them to Kehancha Police Station and on reaching at the station he handed over the suspects to the OCS who was waiting for them. That, he did not follow up the matter thereafter. He also clarified that he was the one who led the officers to arrest the suspects although he had been so instructed by RW5.

20. **RW2** reiterated the evidence of RW1 save that he did not see the OCS at the Police station when they took the suspects after arresting them. **RW3** and **RW4** as well reiterated the evidence of RW1 and concurred with RW2 that the OCS was not at the police station by the time they went with the suspects.

21. **RW5** testified that on 13/01/2017 the police under his command arrested nine suspects who were intending to commit offences in Kehancha town which town had been raided by a series of robberies and murders. That, after his officers arrested the suspects they handed them over to the regular police for further investigations.

22. On cross-examination by **Dr. Okuto** RW5 confirmed that he knew the first Petitioner as one of the people who used to terrorize people in

Kehancha town and that he was suspected of having committed several murders including that of an MPESA shop owner in the town, a teacher at Isebania and a *boda boda* rider among others further to committing many other robberies and that he had thereafter disappeared. That, the first Petitioner had severally been discussed at the District Intelligence Security Committee as a key suspect and accordingly profiled as a wanted person and the police were looking for him.

23. RW5 further stated that he had received information at around 03:00pm that the first Petitioner was planning to rob MPESA shops in town since it was a market day and the shops were so busy. That, RW5 went to town and saw the first Petitioner with another such suspect and tasked his officers to trail the first Petitioner who appeared to be coordinating his colleagues and were clearly targeting the shops. That, he then called the OCS and informed him that the police were likely to arrest the first Petitioner who will have to be booked at the police station. Before the group commandeered by the first Petitioner could carry out the attack, the police officers arrested all of them and took them to the police station. The first Petitioner was arrested because of the preparation to commit the robberies as well as the previous incidents.

24. It was RW5 who further stated that the District Intelligence Security Committee had profiled the people who terrorized people and the first Petitioner was one of them but clarified that the OCS did not sit in that Committee and that he had not discussed the first Petitioner with the OCS. He also stated that the District Intelligence Security Committee was comprised of Deputy County Commissioner as the Chair, the OCPD, the DCIO, the NSIS (as the Secretary) and himself. To him, the Committee had not met again to discuss the issue of the first Petitioner and he stated that he would be surprised to hear that the first Petitioner was released as that information had not been brought to his attention.

25. During cross-examination by **Miss Orao**, RW5 was surprised to learn that the first Petitioner was released from custody as he had attended Court to testify on the arrest of the first Petitioner. He again confirmed that the first Petitioner was suspected to have committed several killings and robberies and had disappeared until when the police found him on 13/01/2017 and managed to arrest him. While admitting that he was not an investigator he clarified that he assists the investigators in apprehending suspects. He also stated that the Committee had not met over a long period because of other intervening and urgent security matters.

26. **RW6** had served at Kehancha Police Station for the past three years. He stated that he had been off duty and resumed duty on 16/01/2017. That, he learnt that several people had been arrested over robbery allegations and since they were to be taken to court he prepared the Cell Register accordingly by making the relevant entries. That, the suspects were taken to court but were not charged and they were taken back to the police station to be taken to court on 17/01/2017.

27. RW6 again prepared the Cell Register on 17/01/2017 but before the suspects left for court the OCS told him that the first Petitioner was to be released, but since he had already indicated that he was going to court he released him but he did not make such an entry as the OCS had already indicated 'Released' on the column he had written 'To court' so he thought that was enough. He vehemently denied that the first Petitioner was at the station in the evening of 17/01/2017 as alleged by the second Petitioner.

28. On cross-examination by **Miss Orao**, RW6 stated that he reported to work at 08:00am on 17/01/2017 and entered all suspects who were to be taken to court before he was asked by the OCS to release the first Petitioner. He concurred with the OCS that late entries can be made in the Occurrence Book especially in times when the station is very busy like in the mornings when suspect are sorted to be taken to court. He also confirmed that the OB and Cell Register entries were reflective of what exactly transpired in a police station. To him, the first entry by the OCS was not necessary but the second one was. He also clarified that he had already made another OB entry before the OCS gave instruction for the first Petitioner to be released and that is why the entry had to be made later by the OCS who was the one only mandated to correct any entries in the Occurrence Book.

29. RW6 confirmed while cross-examined by **Dr. Okuto** that he did not know the first Petitioner before the arrest. He recalled a lady seeking to see the first Petitioner at the police station on 15/01/2017 as he had just reported from off-duty, but he was formally to start work on 16/01/2017. It was his testimony that the first Petitioner was physically released by RW7 from the police station although he was the one who went to release him from the cells. That, by the time of the release of the first Petitioner, RW6 was in the cells.

30. **RW7** confirmed that he was present at the Report Office when the OCS released the first Petitioner and that he personally saw him walk out of the police station and that he went away. He denied the allegations that the first Petitioner had not been released from police custody.

31. In cross-examination by **Miss Orao**, RW7 confirmed that the first Petitioner had been arrested on 13/01/2017 and not on 12/01/2017 since on that day there was no suspect who was arrested. He also confirmed that it was only the OCS who could release any suspect who had been arrested either by doing it himself/herself or by instructing any of the officers. He also confirmed that one could make late entries in the Occurrence Book. It was his testimony that as the five were taken to court, the first Petitioner was released, and he left the police station.

The Report by IPOA:

32. On perusal of the evidence at the close of the parties' cases, this Court directed IPOA to investigate the matter and files a report. That was undertaken, and the Report was filed. The investigator from IPOA attended Court. The OCS did not agree with the Report and opted to challenge it. He took the stand and wondered why the Report made an issue on when the first Petitioner had been arrested and yet several arresting officers testified that the arrest was on 13/01/2017. That, the Report gave very different and unsupported dates on when the first Petitioner was released from police custody and that it was generally riddled with inconsistencies. That, the Report also raised issues which were new and not supported by evidence including the allegations of the police seeking a bribe from the first Petitioner and that the second Petitioner took food to the first Petitioner which issues had not even been raised in Court.

33. The OCS faulted the Report which alleged that the entries in OB No. 14 of 17/01/2017 were meant to conceal the truth as they were entered procedurally. He further contended the witnesses who allegedly saw the first Petitioner with the OCS were not named and the contents thereof were misleading including the allegation that the first Petitioner was held in the female cells and yet there were female suspects who had been arrested that day. He further denied any knowledge that the first Petitioner was profiled as he was not a Member of

the Security Committee and further denied that he was the last person to be seen with the first Petitioner. He also took issue with the unnamed police vehicle and yet there were several such vehicles in the neighboring stations and the region. He wondered how he will comply with the recommendation and yet he was not aware of the whereabouts of the first Petitioner. The OCS contended that he had fully co-operated with the Counsels and the investigators and undertook to keep on looking for the first Petitioner.

34. On cross-examination by **Miss Orao**, the OCS confirmed that he did not charge the first Petitioner with any robbery. He stated that he could not explain why there were so many alterations on the police records but agreed that he was the one responsible with all what happened at the police station.

Parties' Submissions:

35. At the close of the hearing, KNHCR filed its written submissions which it wholly relied on in seeking the grant of the prayers in the Petition. The Petitioners contended that there was adequate evidence to show that indeed the first Petitioner was still in the custody of the police and to that end a general refutation is not sufficient. The decisions in **E. Morrison v. Jamaica** (Communication No. 635/1995 in UN doc. GAOR, A/53/40(Vol. II), pp 123-124, para. 21.2), **Media Rights Agenda (on behalf of Niran Malaolu) vs. Nigeria** (ACHPR, Communication No. 224/1998 as adopted during the 28th Session, 23 October – 6 November 2000 para. 43) and **Hemed & Another vs. Director of Public Prosecution & 3Others (2014) eKLR** were referred to. It was further submitted that the incarceration of the first Petitioner was unconstitutional as it infringed **Article 49** of the **Constitution** and the right to human dignity under **Article 28** of the **Constitution**. Counsels also relied on the South African case of **The State vs. Makwanyane and Mchunu (1995) 6 BCLR 665 (CC)** and the Kenyan case of **Law Society of Kenya & 3 Others vs. Attorney General & 3 Others (2016) eKLR**.

36. The Respondents relied on the evidence on record in opposing the Petition.

Analysis and Determinations:

37. 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 first Petitioner was arrested and released by the police;**
- (c) **Remedies.**

38. I will consider each issue separately.

(a) The nature and scope of the right to *habeas corpus*:

39. The right to an order of *habeas corpus* can be described as the greatest guarantee of human freedom ever devised by human beings. Its importance rests on it being the absolute safeguard against arbitrary and lawless state action on its citizens or aliens within its borders.

40. **Thomas Jefferson** was an American Founding Father who was the principal author of the Declaration of Independence and later served as the third President of the United State of America from 1801 to 1809. He died on 04/07/1826. His Excellency once said the following about *habeas corpus*:

'.... The habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume...'

41. Closer home, the people of Kenya in 2010 gave themselves the right to an order of *habeas corpus* as one of the rights in the Bill of Rights that cannot be limited (**Article 25** of the **Constitution**). This was a departure from the pre-2010 position where the right to *habeas corpus* was only provided for under a statute, (**Section 389** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya) under directions in the nature of *habeas corpus*. Having been firmly imbedded in the **Constitution, Article 51(2)** thereof provides that: -

'A person who is detained or held in custody is entitled to petition for an order of habeas corpus.'

42. My brother **Muriithi, J.** in the case of **Masoud Salim Hemed & Another vs. Director of Public Prosecutions & 3 Others (2014) eKLR** rightly so discussed the scope of the right to *habeas corpus* in paragraphs 33, 34 and 35 of his judgment. The Learned Judge expressed himself thus: -

'33. In 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."

43. It therefore unveils itself that the right in the nature of 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. 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.

44. *Habeas corpus* therefore 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.

45. This hence brings me to the second issue.

(b) Whether the first Petitioner was arrested and released by the police:

46. From the evidence on record there is no doubt that indeed the first Petitioner was arrested by some Administration police officers at Kehancha town and was taken into police custody at Kehancha Police Station. The only contention is whether the first Petitioner was released. There are two opposing positions. The Petitioners contend that indeed the first Petitioner was not released since his arrest and that the police ought to produce him before Court. The other side took the position that the first Petitioner was released from custody on 17/01/2017 under OB Nos. 14 and 30 of 17/01/2017.

47. I have carefully considered the two OB Nos which form part of the crux in this matter. The OCS, RW6 and RW7 all admitted that police records are always supposed to be a true reflection of the occurrences of all the events. That, even though there can be late entries in the police records due to reasonable grounds, the release of suspects from police custody must be carefully and clearly undertaken. There has to be a substantive entry in the Occurrence Book on any release. That was however not the case herein. OB No.14 was clearly interfered with. The entry initially indicated that the first Petitioner was to be taken to court alongside the other five suspects. That was entered by RW6. Later, the OCS and so unprocedurally made some remarks at the last column of that entry on the release of the first Petitioner.

48. Even if the OCS was in a hurry to attend court, which was not denied, the first Petitioner was instead not attending court neither were RW6 and RW7 who were the officers at the Report Office. Those officers could have procedurally processed the release of the first Petitioner after all the first Petitioner was lucky not to be charged and hence spending some few hours in custody as his official release was being processed would not have amounted to asking too much from him. RW6 and RW7 simply did not formally release the first Petitioner neither did the OCS.

49. What followed were deliberate steps taken to conceal the true occurrence of the events. The OCS proceeds to enter remarks on the remarks column on the release of the first Petitioner. But, the OCS knew that what he had done was wrong. That is why the OCS, to make good that wrong, entered OB No. 30 at around 05:00pm. If what the OCS had entered under OB No. 14 was right, then why did he have to make a fresh entry No. 30 later in the day? As that was not enough, the OCS proceeded to the Cells Register where RW6 had indicated that

the first Petitioner was taken to court and inserted the word 'Released'.

50. Holding it at that, there is the evidence of RW5 who a member of the District Intelligence Security Committee (hereinafter referred to as '**the Committee**'). RW5 categorically stated that the Committee had profiled the first Petitioner as one of the most wanted criminals and who was linked with several murders and robberies which had rocked Kehancha and Isebania towns. That, the first Petitioner had been on the run, and the police were looking for him until the day RW5 received information that the first Petitioner was in town and he was organizing some robberies. Just to be sure, RW5 took his time and went to the town and trailed the first Petitioner. He was satisfied that the first Petitioner was up to no good and in view of the history RW5 organized several police officers to arrest the first Petitioner and his accomplices. The operation was successfully. As the operation was on-going, RW5 called the OCS and informed him that he was likely to have the first Petitioner arrested that day and he was just putting him in notice. That was before the arrest which took place between 06:00pm and 06:30pm.

51. I therefore find that the OCS was untruthful when he stated that he only learnt of the arrest of the first Petitioner after they had been arrested and taken to the police station. Clearly, he was attempting to make up a story. The OCS must have been aware of what was all about the first Petitioner. RW5 could not have just called the OCS without giving him the necessary details. Likewise, for the police to be looking for the first Petitioner, the OCPD who was also a member of the Committee and the one whom the OCS was reporting to must have shared with the OCS the reason why the first Petitioner was a wanted person. The OCS was a every senior police officer who cannot just feign ignorance. The effort by RW5 to portray that since the OCS was not a member of the Committee knew nothing of the matter concerning the first Petitioner is a clear demonstration that there was a concerted scheme to shield the OCS and mislead this Court.

52. An equally important issue is the way RW6 and RW7 kept on shifting positions on who really, and so physically, released the first Petitioner and saw him walk out of the police station. There was back and forth on the otherwise straight forward matter.

53. By taking the entire body of evidence together and in view of the foregone analysis, this Court finds that the position taken by the OCS and the other police witnesses that the first Petitioner was released from police custody to be untrue. I hence find and hold that the first Petitioner was not released from the police custody at Kehancha Police Station as alleged. As the in-charge of the station, this Court deems the OCS to be still holding the first Petitioner.

(c) Remedies:

54. Having so found, and there being no legal justification as to why the police should continue holding the first Petitioner in contravention of the **Constitution**, the only available order that this Court can issue in the circumstances of this matter is for the production of the first Petitioner before this Court. To that end, and in finding for the Petitioners herein, the following orders do hereby issue that: -

(a) It is hereby declared that the right to petition for an order of *habeas corpus* is guaranteed under Article 25(d) of the Constitution and that right is not subject to any limitation;

(b) An order of *habeas corpus* is hereby directed to the OCS Kehancha Police Station to produce the person or the body of one Daniel Baru Nyamohanga before a Court of Law by the close of business on Monday the 04th day of June 2018;

(c) The prayer for compensation and reparation is hereby disallowed;

(d) This matter shall be fixed for Mention on 05th day of June 2018 for further orders.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 31st day of July 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Dr. Okuto and Miss Orao instructed by the Kenya National Commission on Human Rights for the Petitioners.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondents.

Miss Nyauke – Court Assistant