



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO 164 'A' OF 2017

MWANGOLO KIGUZO.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

Applicant's case.

This is an application for a *habeas corpus*. It is filed by the subject himself, Mwangolo Kiguzo. The application which is brought by way of Chambers Summons dated 5th June, 2017 under **Section 389 of the Criminal Procedure Code**, rules made thereunder and **Article 49 of the Constitution** sets out the background to the application. In a nutshell, it is alleged that the Applicant was arrested by the Anti-Terror Police Unit on 24th May, 2016 and was presented to court on the 25th May, 2017 when orders for his continued detention for 30 days were granted. The detention period was extended for another 40 days and on their expiry on 18th August, 2016 the Applicant was released after it had been certified that he had been counseled by the Anti-terror Police Unit to de-radicalize him. On 8th December, 2016 he was re-arrested for failing to attend the counseling on 3rd November, 2016. Apparently, his father had excused him from the investigating officer Mr. Ikade as he was engaged in taking care of his sick sibling. On 10th January, 2017, the Applicant was charged in Nairobi Children's Court in Children case No. 13 of 2017. On taking plea, he was granted a bond of Kshs. 1,000,000/= with one surety of a similar amount. Apparently, the surety was his father. Although the release of the Applicant on bail was challenged by the prosecution in the High Court, the High Court upheld the magistrate's order. After a successful approval of the bond, the Applicant was released from custody on 27th April, 2017.

Upon his release, he was admitted to Umma University to study a Diploma in Arabic and Islamic languages. He lived at Langáta. On 27th May, 2017, he was visited by his father. While his father was in the house, he walked out of the room and was never to return. He still was in his sleeping gown. His father reported his disappearance of the at Langata Police Station on 28th May, 2017 vide OB 30/28/05/2017. He also informed an Inspector Kibeti of his missing son. It is the Applicant's case that is believed that he must have been abducted by police officers because he was believed to be linked to terrorist activities.

In this application therefore, it is ordered that the Inspector General of Police and the Commandant of Anti-terror Police Unit or by their authorized agents be compelled to appear in court to show cause why the Applicant should not forthwith be released from their custody. In the meantime, it is also prayed that

the Applicant be ordered to be released on such bail terms and conditions as the court may seem just to grant.

The application is supported by the affidavit of Mgotu Kiguzo Moti, the Applicant's father sworn on 5th June, 2017. The gist of the affidavit reiterates the background to this application which I have already outlined above.

The Applicant was represented by Prof. Hassan who orally submitted that the court should take judicial notice that the law enforcement agents including the police have formed a habit of abducting people who then go missing especially those suspected to be linked to terrorist activities. He submitted that the incident having been reported to the police, the police had a duty to demonstrate what effort they have made in trying to find the Applicant. He stated that the scene from where the subject disappeared is covered by CCTV camera and it was therefore easy to unearth how the Applicant disappeared. In addition, it is contended that the police have not attempted to investigate the Applicant's telephone communications on the day he disappeared or days preceding his disappearance. His mobile phone is said to be still lying in his house just as he left it. Further, it is submitted that the police have not interviewed the persons it was disclosed the Applicant had communicated with prior to his disappearance, namely his father and a cousin. It is for these reasons it is believed that the police have knowledge of the whereabouts of the Applicant and are therefore obligated to produce him.

Respondent's case.

The application was opposed by way of an Affidavit in Reply sworn by Inspector Vitalis Kimutai Kibet of the Anti-Terrorism Police Unit (ATPU) sworn on 29th June, 2017. According to Inspector Vitalis, he concedes that the Applicant was indeed arrested on 25th May, 2016 after investigations revealed that he was involved in terrorist's activities. A search in his house led to the recovery of one life grenade, one electric fuse, electronic wires, two cameras, three screw drivers, batteries, three remote controls, three mobile phones, elastic rubbers and nails. This led to him be charged in the children's court. Unfortunately, after his release on bond, he continued to engage in terrorist's activities and did not continue to attend the counseling sessions as recommended. A warrant of arrest had already issued against him and the instant application is brought with a view to frustrate the forfeiture of the surety deposited by the Applicant's father. In that case, it is the case of the Respondent that an order of *Habeas Corpus* cannot issue as the Applicant is not in the police custody.

Learned State Counsel Mr. Odimu argued the application on behalf of the Respondent. He submitted that for an application of this nature to succeed, it must be demonstrated that the disappeared person is in custody of the police, lawfully or otherwise. In contrast, counsel submitted that at the time the Applicant disappeared, he was not in any way in custody of the police. He literally walked out of his house and never returned. At that time, he was under police supervision having been ordered to report twice a week at the Anti-terror Police Unit for monitoring and de-radicalization program. He failed this test which informed the police to charge him before the Children's Court.

Counsel went on to submit that the surety who is the father of the complainant was under an obligation to ensure that the Applicant attended all court sessions. From the facts of the case, unfortunately, the Applicant lived far from his father in Kangemi while the former at Langata. This demonstrated that the Applicant's father was not ready and willing to cooperate with the court in ensuring that the Applicant did not abscond the hearings. To this extent, it is submitted that the Applicant must have deliberately fled so as to defeat the trial. Furthermore, summons was issued to the surety to show cause why the Applicant was not in court. To vindicate the submission, Mr. Ondimu asked the court to note that the Applicant left his house without his cellphone and without telling anyone where he had gone to. This was ultimately intended to ensure that the police did not trace him. The police cannot also be blamed where it is not demonstrated that they picked him up. In any event, they would have done so much earlier immediately he was released on bail. Counsel submitted that the Applicant had not demonstrated that statements had been recorded with the police to warrant commencement of the disappearance of the Applicant. Further, the report having been made, it was only prudent that the Applicant's family follows on that report so that investigations are conducted to their logical conclusion.

In rejoinder Prof. Hassan submitted that no summons had been issued to the surety who in any event has been attending all mentions in the trial. In addition, the bond terms did not set a condition that the Applicant lives with his father upon his release on bond.

Determination

It is now settled law that a writ of *habeas corpus* shall only issue where it is demonstrated that the disappeared subject is in the unlawful custody of the Respondent. The rationale to this is simple; the Respondent and in this case the police cannot be compelled to produce what is not in their custody. I refer to this court's holding in **Abdinasir Ahmed Mohammed vs Republic [2015] eKLR** thus:

“A writ of Habeas Corpus shall be enforced when the Applicant demonstrates that the subject is in the unlawful custody of the respondent. See Grace Stuart Ibingira and Others vs Uganda (1966) EA 445 as cited in Mombasa H.C. Petition No. 7 of 2014 Masoud Salim Hemed vs D.P.P and 2 others in which the then East African Court of Appeal sitting in Uganda delivered itself as follows:

“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 restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the state. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. The writ is directed to one or more persons who are alleged to the responsibility for the unlawful detention and it is a means whereby the most humble citizen of Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ.”

Further, in **Masoud Salim Hemed vs DPP & 2 others** consolidated with **Petition No. 8 of 2014 Okiya Omtatah Okiiti vs The Attorney General & others**, Hon. Muriithi.J sitting at Mombasa set out the scope of the writ of Habeas Corpus in the following words:

“33. 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 Philippines set out the object of habeas corpus as follows:

“Habeas corpus generally applies to ‘all cases of illegal confinement or detention 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. – (Nyaga-an v. Balweg, 200 SCRA 149, 154-5, August 5, 1991 per Jaris, J.)’

If the respondents are neither detaining nor restraining 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 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 proved lawful, then 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 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.”

It is gainsaid then that in the instant application, the Applicant required to demonstrate that the subject was in the police custody of police any other government agent. The background to this application confirmed by both the Applicant’s father and the Respondent is that the Applicant literally walked out of his house leaving behind his cellphone. He never informed his father who was in the house at the time where he had gone to. He neither thereafter attempted to communicate with anybody of his whereabouts. On the part of the state, it has sufficiently demonstrated that it is not holding the subject in custody. Indeed, Sas submitted by Mr. Ondimu the State needs the subject more than any other person. He is facing a charge of being linked to terrorism and has absconded the trial. Subsequently, a warrant of arrest has issued. Although the subject’s father gives an explanation that he too does not know where the subject is, when he stood surety for him, he undertook to ensure that he attended court. His allegations that the police must produce the subject because they have formed a trend of abducting persons linked to terrorist’s activities must be taken with a pinch of salt. Even if there may be such incidents, each case must be considered on its own merit and circumstances. The statement in reference to this case does not attest to the facts on ground. This is a case where no iota of evidence has been adduced linking the police or any State agency in the Applicant’s disappearance. There is also no evidence that the police enticed the Applicant out of his house prior to his disappearance.

Suffice it to state, the Applicant’s father has already made a report on disappearance of his son. There being no evidence of police links to that disappearance, it is only prudent that the Applicants father follows up on the report made at Langáta Police Station. Borrowing the words from **MA Estrelita D. Martinez v. Director General & Others as cited in Masoud Salim Hemed& Ano. V. DPP & 3 Others (2014) eKLR, ‘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...’** This case being a habeas corpus application cannot be linked or intertwined with the case reported at Langata Police Station. The investigation by the police pursuant to the report will endeavor to unearth how the subject disappeared. The nature of the investigations to be carried out is not within the scope of a habeas corpus writ. It has not been demonstrated in this application that the subject is in the Police custody and the police cannot therefore be linked to his disappearance. It is an application that is completely unmerited. It has no legs on which to stand and must fail. In the result, the same is dismissed with no orders on costs.

DATED and DELIVERED this 24th day of July, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the present of;

1. N/A Prof Hassan for the Applicant
2. Miss Aluda for the Respondent.