



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISC. CRIMINAL APPLICATION NO.4 OF 2016**

**CROLYN KWEYU ONGOMA .....APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This Court has been called upon to exercise its powers and issue a writ. in the nature of **Habeas Corpus**, declaring the continued detention of **William Tomson Ong'ale**, (the subject), at the Kibos GK Prison illegal and thereafter order that the **subject** be released from the said illegal detention. That is what the chamber summons dated 4<sup>th</sup> March, 2016 by **Carolyn Kweyu Ongoma**, (the applicant), brought under **section 389(1)(a)(b)** of the Criminal Procedure Code Cap 75 of the Laws of Kenya is about.

2. The relevant facts giving rise to this application as set forth in the affidavit in support of the application and grounds on the face of the summons, are that the subject herein, was charged before the Principal Magistrate's court at Mumias with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in **Criminal Case Number 667 of 2012**. The **subject** went through a trial before that court and at the conclusion of that trial on 11<sup>th</sup> July 2013, he was found guilty, convicted and sentenced to suffer death, the only known sentence for that offence. The **subject** was dissatisfied with that decision and duly lodged an appeal to this Court, as the law allows him, in **Criminal Appeal Number 132 of 2013**, which appeal is still pending. Attempts to obtain copies of proceedings and judgment from the lower court have not been successful, which, according to the applicant, has made the appeal **otiose**. It is on the above basis that the applicant now feels the continued detention of the **subject** at Kibos GK Prison in the absence of the record from the lower court, is illegal and calls for the subject's release.

3. When the application came up for hearing on 11<sup>th</sup> April 2016, Mr Kundu appeared for the applicant while Mr Oroni was for the respondent. Mr Kundu, learned counsel for the applicant, moved the application and more or less reiterated what is contained in the supporting affidavit to the summons. Learned counsel submitted that there is no evidence that a judgment of the lower court exists to support the fact that the **subject** was convicted and sentenced. Counsel asked the court to grant the application, declare the continued detention of the **subject** unlawful and order his immediate release.

4. After Mr Kundu was through with his submissions, Mr Oroni asked for more time to respond to the application and for that reason, the application was adjourned to 4<sup>th</sup> May 2016. On that day Mr Oroni opposed the application and referred to a letter dated 16<sup>th</sup> February 2016 by the Executive Officer at Mumias Law Courts, acknowledging receipt of the letters by the **subject** over that file. According to counsel, the letter showed that the issue of the proceedings and judgment was being addressed. He therefore submitted that the application was unmeritorious and should be dismissed.

5. I have considered the application affidavit in support and rival submissions by counsel. **Habeas Corpus** is a command usually employed by the High Court to command someone normally the person who has detained another, to bring or produce the detained person before the court for purposes of ensuring that the party's detention or imprisonment is not illegal or show cause why the detained party may not be released or set free. The writ of Habeas corpus is available to the court for purposes of checking the excess of the executive that may detain its subjects without lawful cause, and is a formidable tool employed by the High Court to protect human rights and guard against the abuse of state power. The writ of Habeas Corpus is thus a means by which courts ensure that due process is followed regardless of status.

6. Habeas Corpus is a constitutional right which has been entrenched in our Bill of Rights, and is one of the few rights that cannot be limited under **Article 25** of the Constitution. **Article 51(2)** of the Constitution guarantees one's right to move the court for a writ of habeas corpus. It provides as follows:-

**Article 52(2):-**

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

7. Prior to the Constitution, 2010, the right to habeas corpus was available under **Section 389(1)** of the Criminal Procedure Code which, where appropriate, provides:-

(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.”

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 thus used to test the legality or otherwise of that detention. 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 matters how high the position of the person who ordered the detention.” (emphasis)**

9. 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.** (emphasis added).

The writ of Habeas Corpus is a quick means of approaching the court and secure the release of the detained person where one is able to demonstrate that such detention or confinement is unlawful.

10. The applicant before this court has not alleged that the **subject** was unlawfully arrested and illegally detained. From her own application, and the material before court, the **subject** was arrested on suspicion of having committed a known criminal offence, arraigned before a court of law, underwent a criminal trial, found guilty, convicted, after which he was sentenced. Following this legal process, the **subject** lodged an appeal to this court which the applicant identifies as **Criminal Appeal Number 132 of 2013**, and has duly attached what is called “memorandum of Appeal” signed under the hand of the **subject**. That “**Memorandum of Appeal**” clearly states that the **subject** appeals from proceedings and judgment of **H. Nafula, Senior Principal Magistrate in Mumias Senior Principal Magistrate Criminal Case No.667 of 2012, Republic v William Tamson Ong’ale**, delivered on 11<sup>th</sup> July, 2012. Out of caution this Court called for the file relating to **Criminal Appeal No.132 of 2013** to satisfy itself on the veracity of the statements and confirmed that indeed that appeal is pending before the Court.

11. As seen from, the decisions referred to above, the purpose of the **writ of Habeas Corpus**, is to test the validity of the detention of a **subject** and whether there was due process. In other words, it is used to test the constitutionality of the confinement and determine whether the subject’s confinement violates his constitutional rights. It is not a writ to be granted as a matter of course, but on sound grounds, and may be refused if circumstances do not favour its grant.

12. Should this court grant the writ and make the orders sought? This court has carefully considered the application and the material placed before it by the **applicant** on behalf of the **subject**. The subject is not, in my respectful view, in any illegal, or unlawful detention or confinement. The subject is held in a public facility, namely Kibos GK Prison, having been committed to that facility through lawful committal warrants issued by a court of competent jurisdiction after a lawful trial. The criminal trial concluded on 11<sup>th</sup> July 2012 in **Criminal Case No.667 of 2012** when the subject was found guilty, convicted and sentenced. The subject duly exercised his right under the law and lodged an appeal to this court which is pending. He has sought proceedings and the court responsible says they are tracing the file which again in my view, is a reasonable response.

13. When applying for the writ of Habeas Corpus, the applicant is bound to show that the subject is under the illegal detention or unlawful confinement of the respondent. However in the application before me, the respondent named the Republic is not shown to be illegally holding or detaining the subject. The subject, as observed earlier and admitted by the applicant, is serving sentence upon conviction. A prison, as an institution, cannot admit a prisoner therein without a duly executed warrant under the hand of the committing court and the applicant has not alleged that the subject was not so committed. No one is being called upon to explain the subject’s detention because in my view, the **applicant** and the **subject** know that he is serving a lawful sentence.

The State or Republic is neither detaining nor confining the **subject**. It cannot be said that the subject is being deprived of his liberty. The legality and lawfulness of his being in prison is not in doubt. In any case, he is aware of why he is in prison that is why he has lodged an appeal to challenge his conviction and sentence. The route he has chosen is a legal process for determining whether his conviction was proper and the sentence lawful. He should pursue that course.

Having examined the circumstances under which the subject is being held, I am unable to find any default in that confinement. And as observed by the Court of Appeal in the case of **Ibinga v Uganda** (supra) the writ of habeas corpus is not granted as a matter of course and where the court determines that the confinement is lawful, the writ cannot issue. That being the conclusion I arrived at, that the subject is serving a lawful sentence imposed by a court of competent jurisdiction, I decline the invitation to grant the writ of habeas corpus. It is not merited.

Consequently the application dated 4<sup>th</sup> March, 2016 is hereby dismissed.

**Dated and delivered at Kakamega this 18<sup>th</sup> day of May, 2016.**

**E.C. MWITA**

**JUDGE**